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185 Cal. 435

STEWART et al. v. LOGAN, Registrar, et al. (L. A. 6867.)

(Supreme Court of California. March 31, 1921.)

Records ⊜9(10½)—Decree confirming title must be entered on court records.

Under the Land Title Law, decree of the superior court determining and confirming title, provided for by sections 14–16, must be entered on the records of the court.

In Bank.

Application for writ of mandate by Mary Eliza Stewart and others against C. L. Logan, Registrar of Land Titles, etc., and John M. York, Judge, etc. Application for writ denied.

James W. Bell, of Los Angeles, for petitioners.

PER CURIAM. We are satisfied that under the provisions of the act known as the Land Title Law, Statutes 1915, p. 1932, the decree of the superior court determining and confirming title, provided for by sections 14, 15, and 16 of the act, must be entered upon the records of the court.

The application for a writ of mandate is denied.

All concur.

185 Cal. 354

Ex parte YOUNG. (Cr. 2361.)

(Supreme Court of California. March 25, 1921.)

Prisons ⊜15—Prisoner held given sufficient notice before forfeiture of credits.

Under Pen. Code, § 1588, providing that a forfeiture of a prisoner's credits shall be made only after notice to the offender, etc., where a prisoner was brought before the board of prison directors upon a written charge which was read and explained to him, and to which he pleaded guilty without asking for time to present a defense, he was given all the notice and opportunity to defend required.

In Bank.

Original application by Henry A. Young for a writ of habeas corpus, directed to the State Board of Prison Directors. Writ denied.

Henry A. Young, pro se.

PER CURIAM. The only claim made in the petition that merits any consideration whatever is that contained in the allegations substantially to the effect that the prisoner was deprived of his credits by the board of prison directors without any notice to him or opportunity to defend, as provided by section 1588 of the Penal Code. But as to this it appears that in the habeas corpus proceeding instituted by him in the District Court of Appeal of the First Appellate District, Division 1, to which he refers in his petition (Ex parte Young, Crim. 958, District Court of Appeal), wherein he sought release from imprisonment upon the same grounds as those relied on here, the return showed that he was brought before the prison directors upon a charge duly filed against him of escaping from the prison in violation of the law and the rules of the prison, that the charge was read and explained to him, and that he thereupon pleaded "guilty." He does not appear to have disputed the correctness of this return in the District Court of Appeal, his claim apparently being that this did not show the "notice" required by section 1588 of the Penal Code, which provides:

"Such forfeiture, however, shall be made only by the board of directors after due proof of the offense and notice to the offender; nor shall any forfeiture be imposed when a party has violated any rule or rules without violence or evil intent, of which the directors shall be the sole judges."

In the light of these facts it may fairly be assumed that his allegations of want of notice are intended solely to present the question of the legal sufficiency of the notice in fact given. We entertain no doubt whatever that one brought before the board of prison directors upon a written charge which is then and there read and explained to him, and to which he, without asking for time to present a defense, enters a plea of guilty, has had all the notice and opportunity to defend that by any reasonable construction can be held to be required by section 1588 of the Penal Code as a prerequisite to a forfeiture of credits by the board.

The application for a writ of habeas corpus is denied.

ANGELLOTTI, C. J., and LENNON, LAWLOR, SLOANE, WILBUR, OLNEY, and SHAW, JJ., concur.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

185 Cal. 402

GOLDEN STATE PORTLAND CEMENT CO. v. WARD MOTOR CAR CO. et al.

(L. A. 6360.)

(Supreme Court of California. March 28, 1921.)

1. Fraudulent conveyances ⊂=241(3)—Creditor without a lien not entitled to possession of property.

A creditor of the seller of an automobile, possession of which was not immediately delivered as required by Civ. Code, § 3440, has no greater rights against the buyer than he would have against the seller had the latter still retained ownership of the machine, so that, having no lien, he is not entitled to possession of the property.

2. Bailment ⊂=18(2)—Repair lien does not attach to other chattels than that repaired on which work was done under same agreement.

The lien given by Civ. Code, § 3051, to a person who repairs personal property, even if it may extend under some circumstances to all articles on which work is done for the same person under the same arrangement, does not give a lien on an automobile for repairs made on other cars belonging to the same apparent owner, which were entirely separate transactions from the repairs on the car on which the lien was claimed.

Department 1.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by the Golden State Portland Cement Company against the Ward Motor Car Company and others to recover possession of an automobile. Judgment for defendants, and plaintiff appeals. Reversed.

Frank C. Hill and Geo. S. Hupp, both of Los Angeles, for appellant.

John C. Miles, of Los Angeles, for respondents.

OLNEY, J. This is an appeal by the plaintiff from a judgment for the defendant in an action to recover possession of an automobile. There is some conflict as to immaterial facts, but none at all as to the material ones. These are: The plaintiff purchased the car from a third person, whom we will call the vendor, and paid for it. We will assume, although there is grave question about it, that the sale was not accompanied by the immediate delivery followed by an actual and continued change of possession which section 3440, Civil Code, requires in the case of a sale of personal property, if the sale is not to be conclusively presumed fraudulent as to creditors. The license number, however, was changed, a new license plate attached, and the new owner's certificate of registration put in the car. The car was then turned over to the defendant to make some repairs upon it. These were made at a cost of $128.24. Against this was a credit of $40.00 which the defendant had received for some old tires which were on the car, and which he had sold pursuant to instructions to do so. The defendant was also doing work on certain other cars belonging to the vendor, and the bill for this work was $240.20. When the repairs upon the plaintiff's car were complete, and he went to the defendant to secure it, the defendant insisted that he be paid, not only for the work on that car, but also for that on the others. The plaintiff thereupon tendered the defendant the cost of the repairs on his car, less the $40 received for the tires, and demanded possession, which was refused. The present action followed.

[1, 2] The justification which the defendant urges for his refusal to give possession, is that he was a creditor of the vendor, and the sale was void as to the vendor's creditors under section 3440, Civil Code, mentioned. But the section, while avoiding sales as to creditors not accompanied by an immediate and continued change of possession, does not give a creditor any greater rights against the vendee in the case of such a sale than he would have against his debtor, the vendor. This goes almost without saying. The defendant, therefore, in the present case could justify his refusal to give up possession of the car only in case he had a lien upon it, not only for the repairs made to it, but also for those made to the other cars. The court found that the vendor had instructed the defendant to hold the car as security for his indebtedness, that is, found in effect a pledge, but this finding is without support in the evidence, as is practically conceded. In the absence of a lien by agreement, a pledge in effect, the only lien which the defendant could have was one under section 3051, Civil Code, which provides that—

"A person who makes, alters, or repairs any article of personal property, at the request of the owner, or legal possessor of the property, has a lien on the same for his reasonable charges * * * for such work done and materials furnished, and may retain possession of the same until the charges are paid."

But the lien so given extends only to the article upon which the work is done or for which the materials are furnished, and does not extend to anything else. 6 Corpus Juris, 1134, § 82. The defendant had a lien in this case for work done on the plaintiff's car, but he did not have any for the work done on the other cars. It may possibly be that under some circumstances where work is done on several different articles for the same person under the same arrangement, the different articles will be considered as but one as between the parties, so that a single lien for all the work covering all the articles will arise. But such is not the case here. The work on the plaintiff's car was done as a

separate and distinct job, and in fact was separately charged against the plaintiff, and not against the vendor. The defendant then had a lien only for that work. Against the amount of this lien was the credit for $40 received by the defendant from the sale of the old tires on the car. The balance he was tendered by the plaintiff, who thereby discharged the lien (section 1504, Civ. Code; Loughborough v. McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435) and became entitled to possession.

Judgment reversed.

We concur: SHAW, J.; LAWLOR, J.

(185 Cal. 371)

SHUPE v. RODOLPH et al. (L. A. 6407.)

(Supreme Court of California. March 28, 1921. Rehearing Denied April 27, 1921.)

1. Municipal corporations ⟸705(2) — Driver on wrong side of street and turning further to that side held liable for collision.

Where two vehicles are directly approaching each other, and each driver, to avoid a collision, turns to the same side, so that a collision results, the driver who was on the wrong side of the road and turned further to the wrong side is primarily liable.

2. Municipal corporations ⟸705(10)—Failure to avoid collision does not prevent recovery unless due to lack of reasonable care.

Whether one injured in a collision between his automobile and another car was negligent did not depend on whether he could have turned further to the right and thus avoided the collision, but whether his failure to do so was necessarily due to lack of reasonable care.

3. Municipal corporations ⟸706(7)—Contributory negligence of driver of one of colliding automobiles held for the jury.

Where plaintiff turned his automobile to the right to avoid defendant's car, which was on the wrong side of the street, but defendant turned to the same side and a collision resulted, it was a question for the jury whether plaintiff in such emergency was negligent in not turning to the left or turning more quickly or further to the right.

4. Appeal and error ⟸1053(3)—Admission of evidence held cured by instructions.

In an action for injuries sustained in an automobile collision on the easterly way of a double street, the admission of testimony that a signboard directed south-bound traffic to take the westerly way, if erroneous, was cured by an instruction that the fact that defendants were on the wrong side lost its importance because plaintiff observed them in ample time to avoid them and was bound to regulate himself accordingly.

Department 1.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Francis M. Shupe against Mrs. F. G. Rodolph and husband. From a judgment for plaintiff, defendants appeal. Affirmed.

Rehearing denied: WILBUR, LENNON and SLOANE, JJ., dissenting.

Harry M. Irwin, of Los Angeles, for appellants.

Edward H. Gruel and F. G. Tyrrell, both of Los Angeles, for respondent.

OLNEY, J. The present action is one for damages for personal injuries suffered by the plaintiff as a result of a collision between a motorcycle upon which he was riding and the automobile of the defendants. The cause was tried before a jury, which returned a verdict for the plaintiff, upon which judgment was entered. The defendants appeal.

The chief contention of the defendants is that the verdict is not supported by the evidence, in that it shows that the plaintiff was himself guilty of contributory negligence. The accident took place on American avenue in the city of Long Beach. The street is apparently what may be described as a double street; that is, there are two distinct and parallel ways, separately curbed and separated by a space not used for travel. The street runs north and south, and the easterly of the two ways is called American Avenue East, and is but 26½ feet in width. At the time of the accident the defendants were proceeding south in this, the left-hand way as they were going, and the plaintiff was coming north on the same way. The testimony is in sharp conflict as to whether the defendants were on the right-hand side of the way or not, and as to just how the accident took place.

[1] Taking the view of the evidence most favorable to the plaintiff, as we must do, the defendants were proceeding a little to the left of the center line of the way, as they were going, and the plaintiff was several feet to the right as he was going. As the two vehicles approached close to each other, the defendants turned still further to their left, and the plaintiff turned to his right so that the two met. The accident, in other words, according to the evidence for the plaintiff, was the not infrequent one of two cars directly approaching each other, one of them on the wrong side of the road, and where the two drivers in endeavoring to avoid a collision both turn to the same side, so that a collision results. In such a case it is evident that responsibility for the accident rests primarily with the driver who was not on the right side of the road in the first place and who turned to the wrong side in the second place.

[2, 3] The contention that the plaintiff was guilty of contributory negligence is rested

upon the fact that the evidence showed that at the time of the collision there was an open space of at least 6 feet between the car of the defendants and the curb on its left, that the plaintiff was, according to his testimony, going slowly, and that he could have turned his machine still further to the right and passed the defendants in the open space mentioned. But the question in the case is not whether the plaintiff could have turned further to the right and have avoided the collision, but whether, assuming that he could, his failure to do so was necessarily due to lack of reasonable care to avoid the impending collision. The two things are not the same. It may be that the plaintiff, if he had turned more quickly to the right, might have avoided the collision. It may also be that he could have avoided it by turning to the left. The point is that, when the defendants' car started to turn to the left, the plaintiff was confronted with a situation of imminent danger requiring instant action, and there may have been no negligence on his part in taking the action he did, although if he had done something else he would have escaped. As was said in Karr v. Parks, 40 Cal. 188, 193:

"It would be absurd to hold that even an adult person, in time of imminent danger, is negligent, unless he takes every precaution that a careful calculation afterward will show he might have taken."

Whether under the circumstances here presented the plaintiff did what he reasonably could to avoid the collision is very apparently a question about which there might be a reasonable difference of opinion. Such being the case, the answer to the question was exclusively within the province of the jury, and we cannot disturb their conclusion.

[4] The defendants also complain that testimony was admitted that at the north end of the street there was a signboard directing all south-bound traffic to take the westerly way. The point of the objection is that, although the signboard was there and its direction was disregarded by the defendants, there was no ordinance or other sufficient regulation prescribing that south-bound traffic should take the westerly way, so that the direction of the signboard was without authority, so to speak. But, if the admission of this testimony was erroneous (which we do not decide), the error was cured by the instructions of the court to the jury, which were that the fact that the defendants were on the easterly way when they should have been on the westerly lost its importance by reason of the circumstance that the plaintiff observed them there in ample time to avoid them, and, because of this, "that he had to regulate himself the same as if that was a street by itself and each one coming down there." There is nothing else which requires comment.

Judgment affirmed.

We concur: SHAW, J.; LAWLOR, J.

185 Cal. 344

BOYD v. SOUTHERN PAC. R. CO.

(L. A. 6372.)

(Supreme Court of California. March 25, 1921.)

1. Dismissal and nonsuit ⊜45—Statute for dismissal for want of prosecution held mandatory.

Code Civ. Proc. § 583, providing for dismissal of a cause for failure to bring it to trial, is mandatory.

2. Dismissal and nonsuit ⊜60(2)—Cause set for trial at date beyond the limitation for dismissal is not "brought to trial."

A cause was not "brought to trial," within the requirement of Code Civ. Proc. § 583, providing for dismissal for failure to prosecute, where plaintiff's application to have the cause set for trial was within the time limited but the date fixed for trial was beyond such limitation; an action is not brought to trial until the trial is commenced.

3. Appeal and error ⊜927(2)—Acquiescence in plaintiff's failure to prosecute must be shown to appellate court.

Every intendment being in favor of a judgment, the defendant cannot be deemed to have acquiesced in plaintiff's failure to bring the case to trial, resulting in dismissal, where such acquiescence is not shown.

4. Dismissal and nonsuit ⊜50—Failure to object to delay in prosecution does not waive rights.

Mere failure to object to setting a cause for trial at a date beyond the limitation fixed by Code Civ. Proc. § 583, was not an acquiescence in plaintiff's failure to bring the cause to trial within the time required by the statute.

Department 1.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by J. Boyd against the Southern Pacific Railroad Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

M. O. Graves, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

OLNEY, J. This is an appeal by the plaintiff from a judgment for the defendant based upon an order dismissing the action in accord with the requirements of section 583, Code of Civil Procedure, because of failure to bring the action to trial within five years

after answer filed. The Code section mentioned reads:

"*Dismissal of Actions.* The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

[1] The mandatory character of these provisions of the statute is evident, and our decisions have held that such is in fact their character. Larkin v. Superior Court, 171 Cal. 719, 154 Pac. 841, Ann. Cas. 1917D, 670. In the present case, the action was once set for trial at a time something over a year after issue joined by answer, but the trial date was continued indefinitely by stipulation. Some years later and a few months before the expiration of the five-year period, the plaintiff moved that the cause be set again for trial, and this was done but for a date after the expiration of the period. Upon the expiration of the period and before the trial date, the defendant moved that the action be dismissed, and the order of dismissal was made.

[2] The contentions of the plaintiff are two. The first is that the cause was "brought to trial," within the meaning of the statute, when it was set for trial, although the date set as the actual trial date was later. Counsel's argument is that when the plaintiff applied to have the cause set he had done all that he could do, that the fixing of the date at which it would be tried was wholly in the power of the court and beyond the plaintiff's control, and that the expression "brought to trial" should be taken to mean only that which the plaintiff could control, and for which alone, therefore, he should be held responsible. But the meaning of the expression "brought to trial" seems to us too plain to be in doubt. The trial of an action and the setting of it for trial are quite distinct things, and an action is certainly not brought to trial until the trial is commenced. Whether a mere calling of it for trial on the day set for that purpose would be a bringing of it to trial, we need not determine. We need not determine either what would be the situation where a reasonable time before the running of the five years a plaintiff endeavors to have a cause brought to trial but the court refuses to set a date for trial before the time shall have run, although its attention is called to the necessity for so doing. It does not appear in the present case that the situation in this respect was called to the court's attention when the plaintiff's motion to set the cause was heard, and it may well have been that, if it had been, an earlier date would have been fixed. The responsibility for calling to the court's attention the necessity for an early date for trial was on the plaintiff, and since he did not do so he must be taken to have acquiesced in the date set.

[3, 4] The second contention of the plaintiff is that the defendant waived the right to require a dismissal of the action by acquiescing in the plaintiff's motion to set the cause. A complete answer is that it does not appear that the defendant did so acquiesce. For all that appears, the defendant may have contested the motion to set, or, on the other hand, may not only have acquiesced but have asked for an earlier date, which, upon the plaintiff's objection, was refused. Every intendment is in favor of the judgment, and any matter relied on to show error must affirmatively appear. Furthermore, the plaintiff's counsel seem to mean by acquiescence the mere failure of the defendant to object to setting the cause for trial. But such failure alone would neither constitute a consent or agreement to try the case at the time set or amount to a misleading of the plaintiff. Certainly, without one or the other of these elements there could not be a waiver either direct or by estoppel.

Judgment affirmed.

We concur: SHAW, J.; LAWLOR, J

185 Cal. 298

In re MURPHY. (Cr. 2359.)

(Supreme Court of California. March 14, 1921.)

Criminal law ⊂⊃1073—Trial judge or Justice of District Court of Appeal alone authorized to give certificate of probable cause.

Where one convicted of a felony appealed from the judgment to the District Court of Appeal, which was the only court having jurisdiction, the only officers authorized by the law to give a certificate of probable cause were the judge of the trial court or some justice of the District Court of Appeal.

In Bank.

Application by Edward Murphy for a certificate of probable cause. Application denied.

B. D. Spagnoli, for petitioner.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., of San Francisco, for respondent.

PER CURIAM. The applicant on conviction of a felony was adjudged to suffer imprisonment in the state prison. He has appealed from the judgment to the District Court of Appeal of the First appellate district, the only court having jurisdiction of the subject-matter of such an appeal. Under such circumstances the only officers authorized by our law to give a certificate of probable cause are the judge of the trial court or some justice of said District Court of Appeal. See In re Mayen (on habeas corpus) 193 Pac. 813.

The application is denied.

All concur.

185 Cal. 435

GREEN v. SKINNER. (L. A. 5853.)

(Supreme Court of California. March 31, 1921.)

1. Deeds ⊂=56(2)—Delivery a matter of intention.

The question of the delivery of a deed depends on the intent of the grantor.

2. Deeds ⊂=58(2), 61—Delivery to grantee's father final delivery; deposit for delivery on grantor's death valid delivery.

If a grandfather intended, when he handed to his son deed conveying a half-interest in certain land to his grandson, that the deed should operate as an immediately effective conveyance, then, omitting the circumstance that the grandson was unaware of the deed, there was a final delivery, and the effect of the deed was to vest immediately in the grandson a future interest in remainder subject to a life estate in the grantor; the grantor having instructed the custodian son to keep the deed until the grantor's death, and then deliver it to the grantee grandson.

3. Joint tenancy ⊂=4—Joint tenancy may be severed by conveyance by one tenant.

A joint tenancy may be severed and ended by a conveyance, by one of the tenants, of his share, and the conveyance will have such effect though it is merely a conveyance of a remainder after the death of the cotenant making the conveyance.

4. Joint tenancy ⊂=4—Severance must take place before the death of cotenant.

Severance or attempted severance of a joint tenancy by conveyance of his share by a certain tenant, even a remainder after his death, must take place before the death of such cotenant and before the other as a consequence has become the owner of the whole by virtue of his right of survivorship.

5. Deeds ⊂=64, 65—Deed could not take effect until acceptance; acceptance relates back.

Before a deed could finally take effect, there had to be an acceptance of it, or of the gift made by it, by the grantee; but such assent when given, as between grantor and grantee, will relate back to the time when the grantor first handed the deed over to a third person for delivery to the grantee.

6. Deeds ⊂=65—Assent to conveyance made by grantee after grantor's death will relate back.

Assent of the grantee to the deed or the gift made by it may be after the death of the grantor, the deed having been delivered to a custodian until such event, and yet be effective by relation, so that the deed will be taken as delivered in the lifetime of the grantor, the only limitation being that the assent of the grantee will operate retroactively by relation only in the absence of intervening rights of third persons.

7. Joint tenancy ⊂=13—Grantee of cotenant who did not assent to conveyance until grantor had died took nothing.

Where a grandfather, holder of property as joint tenant with another, signed and acknowledged deed purporting to convey to his grandson a half-interest in the property, and delivered such deed to his son, with instructions to keep it until his (the grandfather's) death, and then to deliver it to the grandson, the grandson could not and did not assent to such conveyance, or gift, until the grandfather's death, when survivorship rights of the other joint tenant attached, and under such deed the grandson can take nothing.

8. Joint tenancy ⊂=6—Survivor takes under devise or conveyance creating tenancy.

The joint tenant who survives does not take the moiety of the other from him or as his successor, but by right under the devise or conveyance by which the joint tenancy was created.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Mabel R. Green against Arthur Skinner. From judgment for plaintiff, defendant appeals. Affirmed.

Donald Barker and James M. O'Brien, both of Los Angeles, for appellant.

George E. Mills and Alfred H. McAdoo, both of Los Angeles, for respondent.

OLNEY, J. This is an action to quiet title to certain real property. The plaintiff is admittedly the owner of an undivided one-half interest. The controversy is over the remaining one-half. The plaintiff had judgment, and the defendant appeals.

The property was originally conveyed to and held by the plaintiff and the defendant's grandfather as joint tenants. While so held the defendant's grandfather signed and acknowledged a deed purporting to convey to the defendant a one-half interest in the property and handed it to his son, the defendant's father, with instructions to keep it until his (the grandfather's) death and then deliver it to the defendant. The father kept the deed in accordance with his instructions,

and upon the grandfather's death, a year and a half later, had it recorded and gave it to the defendant. The defendant in the meantime was wholly unaware of the making of the deed by his grandfather, not learning of it until the day of his grandfather's funeral. Upon the foregoing facts the plaintiff claims the whole property by the right of survivorship incident to the joint tenancy, and the defendant claims that the deed of the grandfather operated in his lifetime to sever the joint tenancy and change it into a tenancy in common so that no right of survivorship existed and the defendant is entitled to an undivided one-half interest as the successor of his grandfather.

[1, 2] Question is made as to whether there was any effective delivery of the deed by the grandfather at all. The trial court found that there was none, but this finding is attacked as not sustained by the evidence. The question, of course, is one as to the intent of the grantor. If he intended, when he handed the deed to his son, that it should operate as an immediately effective conveyance, then, omitting the circumstances that the grantee was unaware of the deed, there was a final delivery, and the effect of the deed was to vest immediately in the grantee a future interest in remainder subject to a life estate in the grantor. Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186. We need not, however, determine whether such intent appears from the evidence or not, and may for purposes of discussion take the view favorable to the defendant and assume that it does. The case presented for discussion, then, is one wherein a joint tenant executes a deed of his moiety, delivers the deed, intending the delivery as an immediately effective one, but delivers it to a person other than the grantee with instructions that it is not to be delivered to the latter until the grantor's death, and thereafter dies, subsequent to which event the deed is delivered to the grantee and he for the first time learns of it. The question presented is: Does a deed so delivered by one joint tenant terminate the joint tenancy and destroy the right of survivorship in the other joint tenant?

[3, 4] It is the law that a joint tenancy may be severed and ended by a conveyance by one of the tenants of his share. Freeman on Cotenancy and Partition, § 29. The conveyance will have this effect even though it be but a conveyance of a remainder after the death of the cotenant making the conveyance. Clerk v. Clerk, 2 Vern. 323; 23 Eng. Reprint, 809. On the other hand, the severance or attempted severance must take place before the death of such cotenant and before the other, as a consequence, has become the owner of the whole by virtue of his right of survivorship. The question in the case stated, therefore, reduces itself into one as to when the deed to the defendant from his grandfather took effect: Was it before or after the latter's death?

[5, 6] The answer to this depends entirely upon the effect properly to be given to the circumstance that the defendant was wholly unaware of the deed until after his grandfather's death. Before the deed could finally take effect, there had to be an acceptance of it, or of the gift made by it, by the grantee. Section 1059, Civ. Code; Hawkes v. Pike, 105 Mass. 560, 7 Am. Rep. 554; Kingsbury v. Burnside, 58 Ill. 310, 11 Am. Rep. 67. Even so, however, such assent when given will, as between the grantor and the grantee, relate back to the time when the grantor first handed the deed over to a third person to be delivered to the grantee. Such assent may be after the death of the grantor and yet it is effective by relation, so that the deed will be taken as delivered in the lifetime of the grantor. 1 Devlin on Deeds (3d Ed.) § 276. This is well established, but with it goes the modification, likewise settled as the law, that the assent of the grantee will operate retroactively by relation only when the rights of third persons have not intervened. This was directly decided by this court after the matter had been twice considered in Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726. There the owner of certain real estate signed and acknowledged a deed purporting to convey the property to his brother, had the deed recorded, and then delivered it to a third person to hold it for his brother. His brother was unaware of the deed at the time these things were done, and before he learned of it a money judgment had been secured against the grantor, which was a lien upon his property. It was held that as against this intervening judgment lien the subsequent assent of the grantee would not relate back so as to make the deed effective as of the date when the grantor had handed it over, and that at the date the judgment was secured the property must be taken to be still the property of the grantor and subject to the lien of the judgment. For similar decisions in other jurisdictions, see Welch v. Sackett, 12 Wis. 243; Commonwealth v. Jackson, 73 Ky. (10 Bush) 424; Bell v. Farmers' Bank, 74 Ky. (11 Bush) 34, 21 Am. Rep. 205; Goodsell v. Stinson, 7 Blackf. (Ind.) 437; Parmelee v. Simpson, 5 Wall. 81, 18 L. Ed. 542. The same rule exists in the closely analogous case where it is sought to give retroactive effect to the ratification by a principal of an act of his agent unauthorized in the first instance. Taylor v. Robinson, 14 Cal. 396.

[7, 8] We perceive no reason why this rule does not apply to the present case. The deed to the defendant could not be finally effective until he assented to it. He did not and could not assent to it until he knew of it, which

was after the grantor's death. In the meantime and because of that death, the plaintiff's right to the whole property had accrued to her as the surviving joint tenant. If it be the rule that a subsequent assent to a deed by the grantee will not operate retroactively and by relation to give effect to the deed as of the date when the grantor parted with it, when such operation would destroy rights which have accrued to third persons in the meantime, it would seem plain that the defendant's consent in this case cannot be given effect by relation to destroy the right which had accrued to the plaintiff in the meantime. If anything, the present case is somewhat stronger for the application of this rule than a case where the intervening right is that of a judgment or attachment lien. For most purposes the holder of an attachment or judgment lien is considered as to third persons as standing in the shoes of the debtor, so that any right which is good against him is good against the holder of the lien. But here the plaintiff does not for any purpose stand in the shoes of the defendant's grantor. Her right was wholly independent of him. It was, to be sure, a right which he had the power to destroy by a severance of the joint tenancy upon which they held the property; but, unless this power was exercised in his lifetime, the right became complete as an incident of their tenancy. It is the old rule, in other words, that the joint tenant who survives does not take the moiety of the other from him or as his successor, but by right under the devise or conveyance by which the joint tenancy was created in the first instance. Freeman on Cotenancy and Partition, § 28. It would seem that if the consent of the grantee cannot operate retroactively to destroy an intervening right of one claiming through his grantor and yet not a bona fide purchaser for value, as the holder of an attachment or judgment lien is not, it assuredly cannot operate retroactively to destroy an intervening right of one who does not claim through his grantor at all. This conclusion is decisive of the case.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.

185 Cal. 415

ROTH v. MOELLER et al. (L. A. 6509.)

(Supreme Court of California. March 29, 1921.)

1. Principal and agent ⊂⊃33—Principal has power to revoke authority at any time, but by contract may curtail right to do so.

Under Civ. Code, § 2356, providing that unless the power of an agent is coupled with an interest it is terminated by its revocation by the principal, a principal has power to revoke an agent's authority at any time before the agent has completed performance, but may curtail his right of revocation by contracting not to revoke the authority for a definite time.

2. Principal and agent ⊂⊃41—Principal may revoke authority notwithstanding contract, but is liable in damages.

Though a principal contracts not to revoke the agent's authority for a definite time, he has power to terminate the agency within the designated period, but if he does so is liable in damages for the violation of the agent's legal rights.

3. Brokers ⊂⊃44—Contract held not to provide that principal should not revoke authority.

A contract, containing an offer to exchange property with a third party, and providing that the offer should be null and void unless accepted within 10 days, but should be irrevocable during that period, and further providing that plaintiffs should be authorized to act as agents in negotiating the exchange, contained no agreement on the principal's part not to revoke the agent's authority, but merely an agreement not to withdraw the offer to the third party, and hence the agents' authority might be revoked at will.

4. Exchange of property ⊂⊃3(1)—Offer without consideration may be withdrawn, notwithstanding statement that it shall be irrevocable.

An offer to exchange property, providing that it should be irrevocable for 10 days, was revocable at any time before acceptance, where there was no consideration for the offer or for the agreement not to revoke.

5. Appeal and error ⊂⊃1046(5) — Questions asked plaintiff by court during case in chief, disclosing facts material to defense, held harmless.

Under Code Civ. Proc. § 2042, providing that the order of proof is in the court's sound discretion, questions put by the court to plaintiff while testifying in his own behalf on his case in chief, resulting in the disclosure of facts material to the defense, did not require reversal, where no harm appeared to have resulted, and it affirmatively appeared that plaintiff's counsel was given ample opportunity to examine plaintiff after he had answered such questions.

6. Witnesses ⊂⊃246(2)—Court may call and examine witnesses.

The court has power to call or examine witnesses in furtherance of justice against the will of either party.

7. Brokers ⊂⊃30—Held not liable to principal because third party accepted offer after withdrawal and sued for specific performance.

Where R., to whom brokers were authorized to make an offer to exchange properties had notice that the principal had withdrawn the offer, and one of the agents took him to view the property merely in the hope that he and the principal would come to an understand-

ing, and, in accepting the offer notwithstanding the withdrawal, R. relied on a statement in the offer that it would not be revoked, and not on anything done by the agents, they were not liable for the principal's expenses in defending R.'s suit for specific performance.

In Bank.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Vincent L. Roth against Maria Moeller, who filed a cross-complaint against plaintiff and another. From a judgment of nonsuit, and from judgment for defendant in his cross-complaint, plaintiff appeals. Judgment of nonsuit affirmed, and judgment in cross-complaint reversed.

A. W. Burt, of Upland, for appellant.

Swanwick & Donnelly, of Los Angeles, for respondent.

LENNON, J. This action was instituted for the recovery of compensation for services alleged to have been rendered under a contract in writing, whereby the defendant Mrs. Maria Moeller authorized the plaintiff, Roth, and cross-defendant, King, to submit to one Richardson a proposition for the exchange of an orange grove which belonged to defendant Moeller for real property owned by said Richardson. Roth and King were engaged in the real estate business, King residing and having his office in the city of Los Angeles, while Roth resided in a country district near the home and property of defendant. The contract, which was drawn by King and signed by the parties at defendant's home on October 16, 1916, after reciting in detail the proposed offer to be submitted to Richardson, continued:

"Unless this offer shall be accepted in writing within 10 days of the date hereof and such written acceptance delivered to me or to my agent hereinafter named, all within the time aforesaid, this offer shall thereupon immediately be and become revoked, null and void without notice. During said period this offer shall be irrevocable."

The agreement then set forth further details relating to incidents of the exchange, and finally provided for an agency in the following terms:

"Roy D. King, Vincent L. Roth is hereby authorized to act as my agent in negotiating an exchange; I agree that if he shall secure an acceptance of the proposition to exchange the above described property on the above terms, that I will, within 10 days, furnish a certificate of title or abstract from a reputable and reliable abstract company. * * * And it is further agreed with said Vincent L. Roth, Roy D. King that when they have secured an acceptance of the proposition to exchange the above described property on the above terms, I will then pay him the sum of seven hundred seventy-three and 64/100 (773 64/100) dollars as commission for such services, which is the entire commission to be paid by me."

King delivered this agreement to Richardson's agent in Los Angeles on the evening of October 16. The following morning defendant Moeller telephoned to plaintiff, Roth, and directed him to hold up the proposition. Roth conveyed defendant's message by telephone to King's father, in Los Angeles, who, in turn, informed cross-defendant King. On the same day, October 17, cross-defendant King told Richardson's agent that defendant Moeller had directed that nothing further be done under the agreement. This agent reported to Richardson, to whom he had already delivered the agreement, that defendant "seemed to be trying to get a better deal." Nothing occurred until October 20, when Roth took Richardson to see defendant's place; it being stated to her that Richardson desired to look the grove over. He did examine the property, and discussed the exchange with Mrs. Moeller, but no agreement had been reached when the men left that afternoon. On the following day Richardson indorsed his acceptance upon the offer of exchange, and recorded the same, and, on November 27, 1916, brought suit against defendant for the specific performance thereof.

The present action was instituted by Roth alone, to whom King has assigned all his interest, and the complaint sets forth two causes of action, the first of which alleges full performance of the contract in securing Richardson's acceptance of the offer of exchange within 10 days after the execution of the contract, and seeks the compensation provided by the contract; the second claiming $773.64 as the reasonable value of services performed under the contract. Defendant, in addition to an answer alleging revocation of the authority granted by the contract, filed a cross-complaint against plaintiff and King as cross-defendants, claiming that the expense incurred by her in defending Richardson's suit for specific performance was the result of the acts of the agents in violating instructions and carrying on the deal, notwithstanding her withdrawal of their authority. The trial court nonsuited the plaintiff, Roth. It was further adjudged that the cross-complainant was not entitled to any judgment against cross-defendant King, but an affirmative judgment was entered in favor of cross-complainant and against cross-defendant Roth in the sum of $500. Roth appeals from the judgment of nonsuit, and from the judgment upon the cross-complaint.

[1, 2] The effect of defendant's revocation of the agents' authority is the paramount point to be determined in passing upon the correctness of the judgment of nonsuit. Save in the case of an agency coupled with an interest, a principal has the power to revoke an agent's authority at any time before the agent has completed performance. Civ. Code, § 2356; Flanagan v. Brown, 70 Cal.

254, 11 Pac. 706; Parke v. Frank, 75 Cal. 364, 17 Pac. 427; Blumenthal v. Goodall, 89 Cal. 251, 26 Pac. 906; 1 Cal. Jur. p. 705. A principal may, however, curtail his right of revocation by contracting not to revoke the authority for a definite time. If the principal does so contract, he still retains the power to terminate the agency, and the termination cannot be prevented by the agent, but a revocation of authority within the designated period renders the principal liable for damages for the violation of a legal right of the agent, just as in the case of any other breach of contract. Parke v. Frank, supra; Blumenthal v. Goodall, supra; Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 Pac. 354; Sill v. Ceschi, 167 Cal. 698, 140 Pac. 949; Boehm v. Spreckels, 191 Pac. 5.

[3, 4] We are of the opinion that, in the instant case, defendant violated no rights of the agents in revoking their authority. The contract herein sued upon contains no agreement that the agency shall continue for a specific period. That part of the agreement which sets forth the terms of exchange contains a provision that the offer to Richardson shall become null and void if not accepted within 10 days, and the further statement that during that period the offer is to remain irrevocable. This offer to Richardson and the agreement not to revoke it were made without consideration, and the offer was therefore revocable at any time before acceptance, for it is elementary that an agreement not to revoke a bare offer is not binding. There is no provision that the authority of the agents shall remain irrevocable for any period. The 10 days allowed for acceptance was a part of the offer to Richardson, but the writing does not provide that the agents shall have 10 days in which to procure the acceptance; the concluding paragraphs of the writing, wherein the agents are authorized to procure an acceptance, contain no specification as to time. It is true that, the offer to Richardson being void at the expiration of 10 days, the authority of the agents, if not sooner revoked, would amount to nothing after that period; but this is a limitation upon, rather than a grant of, the time for their performance. Upon this theory the case is distinquishable from that class of cases where the principal has, by the terms of his contract, restricted his right of revocation (Blumenthal v. Goodall, supra), and comes within the decision in Brown v. Pforr, 38 Cal. 550. In that case the principal had agreed to pay plaintiffs a commission "if they would find, within one month from the date of the contract, a purchaser for a certain parcel of real estate." The court held that the limitation of time was a restriction limiting the time allowed for performance by the agent, and not a restriction upon the principal's right of revocation; in other words, that the limitation was one in favor of the principal rather than the agent. Similarly, in the present case, the 10-day period was a limitation upon the authority of the agent, and not upon the principal's right of revocation.

It may be that, where a principal permits an agent to expend money or time and effort under a contract, an agreement not to revoke for a reasonable time may be implied from the circumstances, and the principal held liable for the agent's commission in case he violates the implied agreement. Boehm v. Spreckels, supra; Blumenthal v. Goodall, 89 Cal. 251, 255, 26 Pac. 906. However, owing to the promptness with which the authority was revoked by defendant, no such question arises in this case. Furthermore, no proof was introduced tending to show that any time or money had been expended by the agents before the revocation.

It follows that, since the contract of agency did not contain an agreement on the part of the principal not to revoke the agents' authority, either party was at liberty to terminate the relationship at will. Since plaintiff proved no services prior to the revocation entitling him to reimbursement, defendant was not liable for compensation under the contract, or for the value of services rendered, and the judgment of nonsuit was proper.

[5, 6] Certain questions put by the court to plaintiff, while appearing as a witness in his own behalf, resulted in the disclosure, upon the plaintiff's case in chief, of facts material to the defense, namely, the facts concerning the revocation of the agents' authority by defendant. By this, plaintiff claims to have been prejudiced. The order, of proof is, in general, in the sound discretion of the court. Code Civ. Proc. § 2042. While departures from prescribed procedure should not be made or countenanced, save for some especial and good reason, still in the present case no harm appears to have resulted from the irregularity complained of, and it does affirmatively appear that counsel for plaintiff was given ample opportunity to, and in fact did, examine the witness after he had answered the questions of the court. Moreover, it is within the power of the court to call or examine witnesses in furtherance of justice against the will of either party. Marin, etc., Co. v. R. R. Comm., 171 Cal. 714, 154 Pac. 864, Ann. Cas. 1917C, 114.

[7] By her cross-complaint, defendant Moeller seeks damages for violations of instructions on the part of the agents in procuring Richardson's acceptance of the offer of exchange after the revocation. As between Richardson and Mrs. Moeller, there is no question but that Mrs. Moeller had the right to withdraw her offer at any time before acceptance by Richardson. Consequently if, through the neglect of the agents, Richardson's acceptance was given without notice of the withdrawal of the offer, the agents might

be held liable for the resulting damages. There is uncontradicted evidence that Richardson did not accept until the evening of October 20. On October 17 Richardson received notice through his own agent, with whom cross-defendant King had communicated, that Mrs. Moeller was reconsidering her offer. On October 20, before the acceptance, Roth, upon the request of Richardson, took the latter to view the property in question, with the hope that they would come to an understanding. At that time Richardson himself had an interview with Mrs. Moeller, in the presence of plaintiff Roth, wherein Mrs. Moeller stated that she would not trade on the terms previously offered, and the parties were unable to reach any agreement. It was after this conversation that Richardson notified Roth and King of his acceptance of the original offer. The record is barren of evidence showing, or tending to show, that Richardson's attempted acceptance after the revocation was secured by any acts of the agents Roth and King, or that it was the result of anything but Richardson's own reliance upon that term of the proposition which stated that the offer would not be revoked for 10 days as a term which he was entitled to insist upon, regardless of his knowledge of the revocation. Since there was no proof of any misconduct on the part of the agents resulting in damages to cross-complainant Moeller, the judgment in her favor upon the cross-complaint cannot be sustained.

The judgment of nonsuit is affirmed. The judgment in favor of respondent upon her cross-complaint is reversed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; SHAW, J.; LAWLOR, J.; OLNEY, J.

185 Cal. 422

MEAD v. CITY OF LOS ANGELES et al (RIDEOUT, Intervener). (L. A. 6330.)

(Supreme Court of California. March 31, 1921.)

1. Municipal corporations ⟸918(4)—Same ballot boxes, etc., properly used at municipal election and special election under bond act.

Under Pol. Code, §§ 1111–1127, General State Law on Elections, §§ 1203–1205, 1208, 1243, requiring separate ballot boxes only when a general election and an election for municipal officers are held at the same time one record for two elections and the use of the same ballot boxes are permissible, and the same ballot boxes, etc., were properly used at a general municipal election in the city of Los Angeles in combination with which was held a special election pursuant to Municipal Bond Act, § 12¾.

2. Evidence ⟸83(2)—It is presumed that election officials performed duty.

Under Code Civ. Proc. § 1963, subd. 15, there is a presumption that persons appointed to act as election officials at a general municipal election and a special election under the Municipal Bond Act held in conjunction therewith regularly performed their official duty in both elections.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by William Mead against the City of Los Angeles and others, wherein Mary Rideout intervened. From judgment adverse to plaintiff and intervener, they appeal. Judgment affirmed.

Overton, Lyman & Plumb and Wm. B. Himrod, all of Los Angeles (Edgar G. Pratt and Henry M. Willis, both of Los Angeles, of counsel), for appellant Mead.

Charles S. Burnell, City Atty., of Los Angeles, for appellant Rideout.

W. B. Mathews, Lewis E. Whitehead, Ray C. Eberhard, and Trent G. Anderson, all of Los Angeles, for respondents.

LENNON, J. Plaintiff, William Mead, brings this action as a taxpayer against the city of Los Angeles and its officials to obtain a judgment decreeing a certain bond issue of the city of Los Angeles unauthorized and void and to restrain the city and its officials from issuing said bonds or expending any part of the proceeds thereof. Mary Rideout, also a taxpayer, by permission of the lower court, filed a complaint in intervention, joining with the plaintiff in seeking the same relief. Defendant answered plaintiff's complaint and the complaint in intervention, and the case was tried; the court rendering its decision against the plaintiff and intervener. A judgment was entered decreeing that neither the plaintiff nor intervener take anything by this action. Both plaintiff and intervener have appealed.

The undisputed facts are these: An ordinance was adopted providing for the holding of a general municipal election in the city of Los Angeles on June 3, 1919. An ordinance was also adopted calling a special election to be held in the same city on the same day for the purpose of submitting to the voters the question of the authorization of a $13,500,000 bond issue for raising money to be used in the acquisition of a certain municipal improvement, to wit, works and a distributing system for supplying the city and its inhabitants with electricity for light, heat, and power. The general and special elections were not consolidated and two ballots were furnished to each voter, a general municipal ballot and a special ballot which

contained only the bond election proposition. The elections were held on the same day and the election precincts established, the polling places designated, and the election officials appointed were identical in the two elections. In each of the various polling places there were in use for the two elections only one ballot box, one register containing the affidavits of registered voters, one roster of voters, one poll list, one list of assisted voters and one list of challenged voters. In view of the fact that the general and special elections were not consolidated, the failure to provide separate ballot boxes and lists of various kinds to be exclusively used in the special election is claimed by appellants to have constituted a noncompliance with the election laws, which invalidated the special election.

The special election was held pursuant to the Municipal Bond Act (Gen. Laws, 1915, p. 1155, § 12¾), which provides:

"Any election submitting the proposition of incurring indebtedness and the issuance of bonds called pursuant to the provisions of this act, may be held separately, or may be consolidated with any other election authorized by law at which the qualified voters of such city, town, or municipal corporation are entitled to vote. * * *"

There is, therefore, no question as to the validity of the separation of the two elections, nor do appellants question the use of the same polling places and the appointment of the same individuals as election officials in the two elections. The sole contention is that, where two elections are held on the same day, the ballot boxes, rosters of voters, poll lists, lists of assisted voters, and list of challenged voters used in the two elections must be entirely separate and distinct.

In all particulars not recited in the ordinance calling the special election, the abovementioned Municipal Bond Act provides that the election shall be held as provided by law for holding municipal elections in the municipality, and the ordinance calling the special election here in controversy expressly adopted that law as the law governing the holding of that election. Section 202 of the Los Angeles Charter provides:

"All elections shall, except as in this charter otherwise provided, be conducted and held in accordance with the provisions of the laws of the state for the holding of general elections in effect at the time."

Since the city charter does not provide in detail the machinery for conducting elections, we must look to the state laws in effect at the time to determine the proceedings necessary to a valid election.

[1] A perusal of the sections of title 2 of part 3 of the Political Code pertaining to the general state law on elections discloses no such requirements as contended for by appellants. Among other things, these sections require the following at each election: A ballot box in each polling place (Pol. Code, § 1203); that each person desiring to vote shall write his name on a roster of voters, which signatures must be compared by the election officers with the signatures on the register of voters and the number of the ticket given the voter must be written on the register opposite the name of the voter (Pol. Code, § 1204); that, upon the ballot being returned by the voter after voting, the word "voted" shall be written on the register after the name of the person and number of the ballot (Pol. Code, § 1205). Section 1174 of the Political Code requires the boards and clerks of elections to keep poll lists, or lists of the number and names of the persons voting. Section 1208 provides for the keeping of a list of assisted voters, and section 1243 for a list of challenged voters. A complete record of each election in the particulars specified is essential, but nowhere is there any provision that, where two elections are called at the same time, and not consolidated, the records or equipment of one election must be separate and distinct from that of the other, except where a general election and an election of municipal officers are held at the same time. In such a case, section 1203 of the Political Code expressly provides that there shall be a separate ballot box for each election. Here, however, both elections were municipal.

In the present case, complete records of the vote and general proceedings of each election were kept and returned. At each precinct, for example, was a single roster of voters, kept and returned as a part of each election. Surely it cannot be said that such a roster, kept by the election officials for both elections, was kept in one election exclusively. It contained the signatures of those voting at the special election as well as of those voting at the general municipal election, and there is no law determining that such a roster can be a part of only one election and there is no evidence that it pertained more to one election than to the other. It is fully as accurate to say that the roster was returned in connection with the special election as to say that it was returned in connection with the general municipal election. The roster is complete as to each, and not as to any one more than as to the other. The same may be said of the register of voters the poll lists, and the lists of assisted and challenged voters. As the general state law now stands, with the single exception that separate ballot boxes must be used when a general election and an election for municipal officers are held at the same time, one record for two elections and the use of the

same ballot boxes are just as permissible as the appointment of the same persons to act in the capacity of election officials or the use of the same polling places in the two elections.

[2] Appellants contend that, by the use of one roster and register, there was danger of fraud for the reason that it was possible for the election officials to deliver only the general municipal ballot to many electors and thus withhold a considerable number of special election ballots. In that event, it is claimed, the election officers could have placed the number of a special election ballot after the names of the voters of the general municipal tickets and voted the ballots themselves, or deposited them as blank ballots. There was no showing of any fraudulent conduct on the part of the election officials. Certain persons were appointed to act as election officials at both the general and special elections and it is presumed that they regularly performed their official duty in both elections. Code Civ. Proc. § 1963, subd. 15. In the absence of a showing of actual fraud, the argument advanced by appellants amounts to nothing more than an argument for protective legislation, for, as previously stated, the law as it now stands does not require that a record of a given election be preserved wholly distinct and separate from that in any other election. If a complete record has been kept, that is a sufficient compliance with the law, and it is immaterial that that record may also be the record of another election held at the same place and time.

Since, so far as appears from the record in the instant case, the requirements of the law were observed in the holding of the special bond election, it must be held valid, and appellants are, therefore, not entitled to the relief prayed for.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; OLNEY, J.; SHAW, J.; WILBUR, J.; LAWLOR, J.

(185 Cal. 299)

LOS ANGELES COUNTY v. CLINE, Sheriff. (L. A. 6362, 6662.)

(Supreme Court of California. March 15, 1921. Rehearing Denied April 14, 1921.)

1. Mandamus ⟸73(1) — Proper remedy to compel sheriff to account.

Mandamus is the proper remedy for a county to compel its sheriff to perform his official duty to account for funds received by him in his official capacity in payment for services and supplies furnished by the county to the payer of the funds.

2. Prisons ⟸2—Right of federal government to commit prisoners to state prisons is matter of comity.

The right of the United States to commit prisoners to the jails or prisons of a state is purely a matter of comity extended by the states, and is subject to such demands for compensation as may be determined by contract with the proper authorities.

3. Prisons ⟸18(1)—Sheriff must account for money received from federal government for keeping prisoners.

Under Pen. Code, §§ 1601, 1611, Pol. Code §§ 4290, 4292–4294, Const. art. 11, § 16, and Rev. St. U. S. §§ 5539, 5547 (U. S. Comp. St. §§ 10523, 10548), all moneys coming into the hands of a sheriff from the United States for the support of federal prisoners must be paid over and accounted for by him to the county treasurer; the sheriff being allowed to put in his claim to the county for expenses incurred for support of such prisoners in the same manner and at the same rates as for prisoners committed by the state.

4. Prisons ⟸18(1) — County supervisors may contract for care of federal prisoners.

Under Pol. Code, §§ 4000–4003, 4041, it is the function of the board of supervisors as the constituted business agents of the county, and not of the sheriff, to contract with the federal authorities as to the compensation to be demanded for federal prisoners while confined in the county jail, and such compensation may include not only the expense of feeding the prisoners, but a just charge for all other supplies and services incident to maintaining and guarding them.

5. Prisons ⟸18(8) — Sheriff must keep account of expenses of caring for prisoners.

It is the duty of the sheriff to keep an accurate account of all expenses incurred by him in caring for prisoners in his charge.

6. Estoppel ⟸62(3)—County held barred by laches from requiring accounting by sheriff of money received for federal prisoners.

Where for many years the county authorities knowingly permitted the sheriff to deal with the money received from the federal government for care of its prisoners as a personal matter without accounting, the county was estopped as to past transactions by its laches from requiring the sheriff to pay the full amount received into the county treasury and then resort to his claim against the county for reimbursement, but, if necessary for his protection, the sheriff should be permitted to retain and apply as money advanced by him all amounts shown to have been legitimately expended by him in support of the federal prisoners prior to the commencement of the county's action against him to compel an accounting.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Two proceedings in mandamus by the County of Los Angeles against John C. Cline, sheriff of said county. From judgments dis-

missing the petition in the one case and denying peremptory writ in the other case, petitioner appeals. Judgment reversed.

A. J. Hill, Hugh Gordon, and Paul Vallee, all of Los Angeles, for appellant.

Gesner Williams, Milton M. Cohen, and George E. Cryer, all of Los Angeles, for respondent.

SLOANE, J. The record here includes two appeals presenting substantially the same issue in each. The proceedings are in mandamus to require the sheriff of the county of Los Angeles to account for and pay into the county treasury money received by him from the United States for the support of federal prisoners confined in the county jail.

[1] If the contention of the petitioner is correct that this money was received by the sheriff in his official capacity in payment for services and supplies to be furnished the federal government by the county of Los Angeles, mandamus is the proper remedy to compel a performance of the official duty to properly account for such funds. It is the contention of the respondent, however, that in receiving and maintaining federal prisoners in the county jail, the sheriff is acting for and as the agent of the United States, and is not accountable to the county for money received for the support of such prisoners.

We think an examination and comparison of the state and federal statutes relating to the matter makes it sufficiently clear that this contention cannot be upheld. The following sections of the Penal Code of California and of the United States Revised Statutes practically cover the law on the subject.

Section 1601 of the Penal Code makes it one of the official duties of the sheriff as a state officer to receive and keep federal prisoners committed to the jail, where provision is made by the United States for their support. Section 1611 of the Penal Code requires the sheriff to receive all prisoners committed by competent authority and directs him to provide them with food, clothing, and bedding, for which he shall be allowed a reasonable compensation to be determined by the board of supervisors, and to be paid out of the county treasury, "except as provided in the next section" (which exception has no application to the matter involved here).

Section 5539 of the federal statutes (U. S. Comp. St. § 10523) provides that all United States criminals imprisoned in state jails or prisons "shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state in which such jail * * * is situated, and while so confined * * * shall be exclusively under the control of the officers having charge of the same under the laws of such state." Under section 5547 of the federal statutes (U. S. Comp. St. § 10548) it is directed that the Attorney General "shall contract with the managers or proper authorities having control of such prisoners, for [their] imprisonment, subsistence, and proper employment."

The only reasonable deduction from these interrelated provisions of the state and federal laws is that federal prisoners are to be received under the same conditions and subject to the same jurisdiction and control as state prisoners, and are to be fed and provided for in the same manner by the sheriff, subject to contract between the Attorney General and the county authorities for compensation to the county for their maintenance.

[2] It is difficult to understand how the practice has been established and recognized of making this support of federal prisoners merely a matter of personal contract between the sheriff and federal authorities for the payment of a per diem rate for feeding the prisoners, while all the other outlay for jail room, guards, beds, and bedding, heat, light, cooking, laundry, and other service is furnished by the county without remuneration. The right of the United States to commit prisoners to the jails or prisons of a state is purely a matter of comity extended by the states and is subject to such demands for compensation as may be determined by contract with the proper authorities. Ex parte Shores (D. C.) 195 Fed. 627.

It is admitted in the record that during all the period covered by these mandamus proceedings there has been paid to the sheriff for the support of federal prisoners in the Los Angeles jail 35 cents per day for each prisoner, and that for the total period under the first proceeding, No. 6362, from January 4, 1915, to and including March 31, 1918, the amount so received was $11,230.96, and for the period covered by the second proceeding, No. 6662, from April 1, 1918, to August 19, 1919, the amount was $4,091.15.

It is conceded that no part of this money has been accounted for or paid over to the county of Los Angeles, but it is alleged to have been entirely expended by the sheriff in furnishing meals to the federal prisoners.

During a portion of the time involved in these transactions the sheriff of the county of Los Angeles has been entitled to a salary of $4,000 per annum, and for the remainder of the time to a salary of $6,000 per annum; and whether, under the Code or the charter of Los Angeles county, the law has been that the salary so allowed should be in "full compensation for all services of every kind and description" rendered by virtue of his office. Moreover, under the law already cited and the further provisions of section 4290 of the Political Code, it is evident that in boarding federal prisoners the sheriff is subject to the same rules and limitations as are prescribed for prisoners of the state of California. Section 4290 of the Political Code provides that the supervisors shall allow to the

sheriff his necessary expenses for boarding prisoners in the county jail, providing that the board of supervisors shall fix a reasonable price at which such prisoners shall be boarded, which price, since the amendment of 1917 (St. 1917, p. 1323), is not to be less than 12 cents for each meal for each person. It appears that the board of supervisors fixed the price of boarding prisoners in the county jail prior to the amendment at 8 cents, and since at 12 cents per meal.

It is also made the duty of all officers by constitutional provision and statutory enactment to immediately turn over to the treasurer or other legal depositary all moneys collected for the use of any county, city or town or other public or municipal corporation. Const. art. 11, § 16; Pol. Code, §§ 4292–4294.

[3, 4] We are of the opinion that all moneys coming into the hands of the sheriff for the support of federal prisoners is for the use of the county, and that it was and is the duty of the sheriff to account for and pay over to the county treasurer all money so received by him, and to put in his claim to the county for expenses incurred for support of federal prisoners in the same manner and at the same rates as for prisoners committed by the state of California, and that it is the function of the board of supervisors, as the constituted business agents of the county, to contract with the federal authorities as to the compensation to be demanded for caring for federal prisoners while confined in the county jail. It is entirely obvious that such compensation may not only include the expense of feeding the prisoners, but a just charge for all other supplies and services incident to maintaining and guarding them. Neither is it reasonable to suppose that the law on this subject is to be construed as making the sheriff the officer of the county to negotiate a contract of this kind involving compensation for so extensive a service by the county. Avery v. Pima County, 7 Ariz. 26, 60 Pac. 702; Pol. Code, §§ 4000–4003, 4041.

[5] It is also clearly the duty of the sheriff to keep an accurate account of all expenses so incurred by him in caring for prisoners in his charge. It is held in San Francisco v. Mulcrevy, 15 Cal. App. 11, 113 Pac. 339, and County of Alameda v. Cook, 32 Cal. App. 165, 162 Pac. 405, that the services performed by a county clerk under the federal naturalization laws are performed as an officer of the state, and that the fees allowed such clerk must be accounted for to the county. If such is the law in a matter so purely one of federal jurisdiction as that of naturalization of aliens, how much more clearly must it appear that the sheriff is acting as an officer of and in behalf of the county in extending the hospitality of the county jail to federal prisoners.

In Board of Freeholders v. Kaiser, 75 N. J. Law, 9, 69 Atl. 25, the New Jersey court was dealing with the precise question presented here, under a statute substantially like our own. The court there says:

"Section 33 of the act governing sheriffs * * * makes it the duty of the sheriff of every county to receive all persons committed to his custody by the authority of the United States. He takes them into his custody as sheriff; he remains responsible for them as sheriff, and all moneys paid to him on their account are paid to him as, and received by him as, sheriff. This being so, moneys paid to him by the federal government in excess of what was needed for the food and care of federal prisoners were paid to him as compensation for services rendered and duties performed with relation to them as sheriff, and the salary provided by the act of 1905 is in lieu of such compensation."

Our statutes go farther than this. Having provided a complete scheme for compensating the sheriff by county appropriations for the board and maintenance of all prisoners committed to the county jail, it becomes the duty of the sheriff to account to the treasurer for all moneys received from the government for its prisoners, and to present his claim to the county for his remuneration, just as in the case of prisoners committed by the state courts. It does not follow that, if the federal authorities see fit to stipulate and provide for a more liberal allowance than 12 cents per meal and two meals per day for each of its prisoners, the supervisors may not authorize such special expenditure. But as the laws stands 12 cents per meal and two meals a day is the allowance authorized by the supervisors for each prisoner. The allowance of 35 cents per day was the entire amount paid by the United States for the maintenance of its prisoners in the county jail. In the absence of express authority to do so, the sheriff surely is not at liberty to expend this entire allowance for meals supplied the prisoners. According to the respondent's own averments, he has expended the whole amount of 35 cents per day for their food alone, leaving all other items of cost to the county unprovided for. Even if he had the right to retain in his own hands the money necessary to feed the prisoners, he has made unauthorized use of 11 cents a day per prisoner.

The burden is upon the respondent to satisfactorily account for the money received by him from the federal authorities and to show that it has been disposed of according to law.

In case No. 6362, which was tried on its merits, there is a failure of the trial court to find what disposition was made of the sum received from the United States. The finding is "that some part, if not all, of the sum of $11,230.96 paid to the respondent by the United States for the support of prisoners committed under authority of the United

States and imprisoned in the county jail was expended and actually paid out by respondent for such purposes." This is not a finding at all as to the disposition of any specific part of this fund. Respondent is chargeable with all of it, and the burden is upon him to show that he expended it legitimately and to satisfactorily show in accordance with the rules governing the accounting of trustees (Bone v. Hayes, 154 Cal. 759, 99 Pac. 172) what amounts, up to the legal rate, have been expended in the feeding of federal prisoners. Any balance not so accounted for he should be required to pay to the county treasurer.

The conclusion of the trial court from the facts is that the petitioner is not entitled to have the writ of mandate issue, inasmuch as it would be inequitable to do so, and judgment was given denying the writ.

Under the views of the law herein expressed the judgment will have to be reversed.

We agree with the conclusion of the court, however, as to the inequity of such an application of the law under the circumstances shown in evidence as would deprive the respondent of compensation for feeding the federal prisoners within the amount per day which he was authorized to expend.

The system followed of permitting the sheriff of the county to deal with this fund as a personal matter and without keeping any accounts or making any returns to the county has gone on through successive incumbencies of the sheriff's office for many years. The county authorities have been aware of the condition, and have, in effect, consented to it, and are as much to blame for a misconception and misinterpretation of the law as is the sheriff.

[6] While this mutual misconception of the law cannot relieve the sheriff from liability to account for all the money so received which is justly due the county after crediting him with amounts legally expended, we are of the opinion that the county is estopped as to past transactions by its own laches from requiring respondent to pay the full amount received into the county treasury, and then resort to his claim against the county for reimbursement. If necessary for his protection, he should be permitted to retain and apply as money advanced by him all amounts shown to have been legitimately expended by him in support of the federal prisoners in his charge, prior to the commencement of this action.

In the second proceeding, case No. 6662, the petition for writ of mandate was dismissed upon sustaining of respondent's demurrer to the petition as not stating a cause of action. This ruling on the demurrer and order of dismissal was erroneous.

On the grounds set out in the foregoing opinion the judgment in each case is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

185 Cal. 321

PACIFIC WOOD & COAL CO. v. OSWALD et al. (L. A. 6422.)

(Supreme Court of Califorina. March 18, 1921.)

Appeal and error ⊂=1011(1)—Findings of the trial court on conflicting evidence held conclusive on appeal.

In an action on a public contractor's bond for materials and supplies furnished a subcontractor, *held* that there was such material conflict in the evidence as to the amount of supplies furnished that the appellate court would not disturb the findings of the trial court in defendant's favor.

Department 2.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Pacific Wood & Coal Company against George H. Oswald and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Eugene Daney and E. H. Lamme, both of San Diego, for appellant.

Charles C. Crouch and Crouch & Chambers, all of San Diego, for respondents.

SLOANE, J. This action was brought by plaintiff to recover for materials and supplies alleged to have been furnished to one Jesse Knight, a subcontractor upon a street grading contract, and alleged to have been furnished and used in connection with the work contracted for. The original contract was between the county of San Diego and George H. Oswald, and a certain portion of the work, namely, the grading and surfacing of a number of streets in road district No. 2 of the county of San Diego, in Normal Heights, a subdivision just outside of the city of San Diego, was sublet by the original contractor to the defendant Jesse Knight. In connection with the execution of the original contract the statutory bond was given, securing the payment for all labor, materials and supplies "furnished for or used in connection with said work." The bond was executed by defendants George Oswald, as principal, and John G. Althouse, Tillie M. Althouse, J. M. Oswald, and N. C. Oswald, as sureties. The action is against the sureties on this bond and against the subcontractor, Jesse Knight. The supplies and materials for which recovery is sought consist chiefly of hay and grain alleged to have been used

in feeding the horses and mules, and coal for operating machinery and for camp uses, on the contract. The liability of the sureties on the bond for supplies of this nature used in prosecuting the work was sustained in a former appeal in this action. Pacific Wood & Coal Co. v. Oswald et al., 179 Cal. 712, 178 Pac. 854. The items for which recovery is claimed cover a period of nearly two years from October 1, 1912, and aggregate the sum of $16,812.77, with payments credited of $12,348.80, leaving a balance for which judgment was demanded of $4,463.97. The appeal is from a judgment in favor of the defendants.

The controversy on the appeal centers on the following finding of the trial court. The court finds:

"That during the progress of the said work the plaintiff sold and delivered to the said Jesse Knight for use upon said work, hay, grain and supplies at the agreed price and of the reasonable value of $702.83 and no more. The court finds, however, that all of the materials sold and delivered or sold or delivered or furnished to the said Jesse Knight by plaintiff for use upon the said work, had been fully paid for by the said Jesse Knight prior to the commencement of this action."

It does not seem to be seriously controverted that the plaintiff sold and delivered substantially all of the supplies included in this action to Jesse Knight within the period specified. The dispute is as to the sufficiency of the proof that any greater amount or value than that found by the court was furnished for or used in connection with this contract.

The evidence on this point is certainly very confusing and unsatisfactory. It is conceded that Jesse Knight during this period of time was carrying on in his own name several other similar grading contracts in and about the city of San Diego, and was obtaining supplies of the same kind as charged in this account from the plaintiff for use on all of these contracts. Besides these personal ventures, he was engaged in other grading contracts in association with one or more partners, as "Jesse Knight & Co.," to which partnership the plaintiff also furnished like supplies.

Some pains seem to have been taken by plaintiff in its bookkeeping to segregate the personal accounts of Jesse Knight from those of the Jesse Knight Company, but as between the various personal contracts of Jesse Knight there is very little to determine to what account the larger number of the items are properly chargeable. The statement of the account as set out in Exhibit A, attached to the complaint, sets forth the entire itemized claim sued on under a charge to "Jesse Knight, as subcontractor under George H. Oswald for certain work in road improvement district No. 2, San Diego County, Cal."; but when we turn to the record of the original entries from plaintiff's books they do not satisfactorily show the items as charged to this account. The exhibits from plaintiff's ledger account show the charges variously to "Jesse Knight, Grape & Artic," "Jesse Knight, Spreckels Building, Grape & Artic," "Jesse Knight, Grape & Artic, Coral," "Jesse Knight (Spreckels Bldg) R. D. 2–98 K.," "Jesse Knight R. D. 2, 98 K," "Jesse Knight, Good Springs, Nevada."

From October 1, 1912, the beginning of the account sued on, the items in the ledger are charged to the address Grape and Artic streets, to the date February 24, 1913. From March 1, 1913, to June 21, 1913, they are charged to "Jesse Knight (Spreckels Building). R. D. 2, 98K," and from June 24, 1913, to February 28, 1914, to "Jesse Knight, R. D. No. 2, 98 K." From the latter date to August 13, 1914, the charge is made to "Jesse Knight, Good Springs, Nevada." The letters and figures, "R. D. 2," refer to road district No. 2 of San Diego county, and this Normal Heights contract is shown to have been in that district. But Jesse Knight appears to have been carrying on other contracts in this vicinity during the same period, some of which, at least, were in this district, and others were operated in the same neighborhood and from the same grading camp that served the Normal Heights job.

Practically all these various jobs which Jesse Knight was conducting in this vicinity and in widely separated sections of the city of San Diego required the same class of supplies charged to the account of this contract. It sufficiently appears that no supplies or materials furnished were used in furtherance of this contract excepting such as were finally delivered to the contractor's camp at Normal Heights, and defendants claim that much of the material delivered at this camp was for the use of other jobs.

There are certain items in this account initialed on the ledgers with the letters "N. H." The testimony on behalf of plaintiff is that these letters denote Normal Heights, and that they were entered from time to time, after the goods were bought and charged, by plaintiff's general manager, in the process of checking up the various items with Jesse Knight, and by his authority. But Knight creates a conflict on this point by denying such ratification. In fact, plaintiff's books are of little evidentiary value excepting as showing the general state of Jesse Knight's account with plaintiff without regard to any particular contract.

But even where the book account on its face shows items charged to the Normal Heights job, it furnishes but one element of the necessary proof to establish the liability of the sureties on the contractor's bond. Conceding that it is not required of plaintiff to show by direct evidence that every sack of barley, bale of hay, or load of coal furnished actually went into the furtherance of this contract, it is at least essential to show

that it was furnished and delivered on the job for that use. Here, again, the proof seriously fails.

The evidence relating to deliveries traces very little of these supplies to the Normal Heights job. It is claimed by respondent, and we are unable to discover that such is not the fact, that the actual delivery to this job of any greater amount of supplies than as found by the trial court is not shown by the evidence. Plaintiff's witnesses do testify to certain deliveries which they actually followed to the grounds. But in most instances the goods were either called for and hauled away from plaintiff's warehouses by Knight's teams, or were delivered for his use at other points than the Normal Heights headquarters.

The state of the evidence on this point most favorable to the plaintiff company is that of its manager, Mr. Akerman. The uncertainty and indefiniteness of this proof is shown by some of his testimony. He says:

"It was all delivered to the Normal Heights job or to Jesse Knight or his order, or to his teams at our warehouse yard. Once a month, I had a settlement with Jesse Knight and when that settlement was made and the account O. K.'d I would at the end of this month make a mark of some kind to indicate we had checked up the account and it was O. K.'d up to that date. * * * It was by his checks that all these statements were made. You must remember he had four or five jobs on at that time. He had one at Point Loma. I think there were two at Point Loma. He had one at Grape and Arctic. He had one at Ninth and C. He had one up near the reservoir, and then the Normal Heights job, and I think there were other smaller jobs at the same time, and he had a big feed corral down at Ninth, and I where he kept at times as high as 100 mules. We delivered a good deal of stuff at Ninth and I, to go to all the jobs. * * * The bulk of these supplies was taken from Fourth and K streets, but we also had a warehouse at Fifth and University, some of it went from there, and I think we drew some from Twenty-Sixth and Logan; we have a warehouse there. * * * In some cases we delivered the grain, in other cases he hauled it away. In some cases we would sell in cars, and he would come and unload them and haul them to the various jobs. * * * I know this, that we would get the order to deliver so many sacks of grain for a certain job, and deliver it to Normal Heights, if he was busy, or deliver it to Grape or Juniper or Point Loma, or he would say, 'I will come and call for it; or put it on my wagon and I will haul it myself.' Every kind of delivery conceivable was made during the time we were working on those jobs and selling Jesse Knight these goods. The only thing we have to show where any of these goods were delivered are the entries on our books and my knowledge of checking up with Jesse Knight on these various jobs. The tickets were all checked up monthly with Jesse Knight, and after they were checked up for the various jobs the tickets were destroyed."

There was much more testimony by Mr. Akerman, but to the same effect.

It is apparent that plaintiff relies principally for the accuracy of its charges to the Normal Heights job upon the alleged checking up of these accounts from month to month with Jesse Knight. This might, prima facie, be sufficient but for the fact that Jesse Knight testifies that he did not check up these accounts with plaintiff, or designate the items chargeable to the Normal Heights contract. He had testified regarding these matters substantially as follows:

"I did not instruct Mr. Akerman about the 15th of October, 1912, to charge all feed after that date to the Normal Heights job. I don't think he knew when I took it really. It was just one continuous account. I have never been out of his debt since I have been in the country that I know of. * * * I paid for all the stuff that I used on Normal Heights and more too. * * * I generally made the deliveries of the grain I bought from the plaintiff myself. The grain at Normal Heights I sent my own truck for and that which was delivered over there and used there. Q. Did you go down once a month and have statements checked up with Mr. Akerman and tell him this was to go there, and that was to go there, and so forth. A. No. We did not do that. It was just a running account. I would get it there when I could, and pay him when I could and it was just a running account all the time."

On cross-examination of Jesse Knight by plaintiff's attorney this testimony was elicited:

"Q. Is it a fact that you and Mr. Akerman, say on an average of once a month, met and went over your different statements and tags and distributed them to the particular account to which they belonged. A. No, sir. I never had time for that. Neither did he.

"Q. Didn't you meet about once a month and determine where the different items belonged. A. No, sir. What have I a bookkeeper for? I never bothered with that kind of stuff.

"Q. Did you ever go down to his place of business? A. Yes, sir, I have been there hundreds of times.

"Q. Did you at any time while you were there discuss your account? A. Yes, sir; we used to get the gloves on occasionally and go round and round.

"Q. Did you go over the items of the various accounts? A. No, sir. Not in detail. We never went into that. It was a general proposition. He thought the load was getting too heavy, and I knew it was. * * *

"Q. Did you ever know that Mr. Akerman or his company was attempting to keep separate accounts of the different jobs, of what went in from their place to the different jobs? A. Oh, no; they couldn't do that. They didn't know when I took a job and when I didn't. We had Jesse Knight Company and Jesse Knight, that is all."

While the testimony of Jesse Knight was quite as vague and uncertain in many partic-

ulars as that of the plaintiff's witnesses, and there was much to weaken the force of his testimony, it was sufficient to raise a substantial conflict as to the alleged method of segregating the items on the various contracts, and we are not at liberty to question the findings of the trial court based on such evidence. Moreover, there were many inaccuracies in the items of account as shown on the books charged to the account sued on. Throughout the account numerous charges occur of coal in considerable quantities for use in a steam shovel, whereas the only steam shovel on this job was an oil burner. In further illustration, a charge of January 21, 1913, for 19 bales of alfalfa was posted from a blotter entry which was marked "9th and I chg. Evans." February 5, 1913, 20 sacks white oats marked "9th and I. Chg. & paid by J. Spragel." There are some 35 or 40 of these charges aggregating hundreds of dollars, which respondent apparently has shown to have been delivered to other accounts than the one sued on.

This, with the other matters pointed out, further discredit plaintiff's evidence, and we think justify the court in rejecting all items not explicity shown to have been delivered for consumption on this contract.

We are not prepared to question the finding of the court that only items to the value of $702.83 were specifically traced for use on this job, so far as evidence of their sale and delivery for that purpose is affirmatively shown.

It was admitted by Jesse Knight that a large proportion of all the supplies for his horses and mules used on the Normal Heights contract was furnished by the plaintiff company, and this must have run into thousands of dollars in value. But the evidence also shows that thousands of dollars were paid on account.

The witness Granger, who was financing Knight on this contract, testified that he watched the job very closely, and knew where the grain was delivered and knew when the bills were rendered and put up the money for them, and that along the latter part he would not allow Knight to give a check unless he O. K.'d it, and that he gave checks for this grain and O. K.'d them. Summing the matter up, he testified:

"I put up the money and Jesse Knight made the checks and I O. K.'d them for this grain that was furnished by Mr. Akerman, I remember that."

The plaintiff credits defendants with payments on account of supplies furnished for use on this contract in the sum of $12,348.80. It may be conceded, therefore, that supplies to that amount were actually furnished and used. In order to recover anything in this action the plaintiff must furnish satisfactory proof that it sold and delivered to the use of this special contract supplies in excess of that amount. In view of the finding of the trial court that it can trace under the evidence materials only to the value of $702.83 to this job, and that "all of the materials sold or delivered or furnished to Jesse Knight by plaintiff for use upon the said work had been fully paid for," and the admitted payments exceeding $12,000, and with the general declarations of defendants' witnesses that all payments for such supplies had been made, we find ourselves unable, under the record here, to find proof of an unsatisfied balance on this account.

It may be conceded that the same degree of certainty in tracing the materials furnished into the actual application to the work under the contract is not required or perhaps possible under the law governing this class of contracts as would be required in the case of mechanics' liens, where the materials furnished enter into and become part of the structure.

Here, the sureties became liable for materials and supplies which contributed to the carrying on of the work. Feed furnished to the contractor's mules and horses used in prosecuting the work would be chargeable to this account, though delivered and used miles from the actual scene of operations. But it is incumbent upon the plaintiff to satisfactorily prove that all of the materials charged were delivered and used, or, at least, contracted for the promotion of this specific job, and although it is clearly established that some of the items of this account were so contracted and used, and it is apparent from the admissions of defendants that much more of the materials than were specifically traced to the job were actually received and used, it would be purely a conjecture to find that there had been materials furnished in excess of those covered by the credited payments.

This is one of the class of cases peculiarly difficult to review from the printed transcript. The trial court was in a much better position to unravel the intricacies of this confused account than this court can possibly be, and in view of the substantial conflict in the vital point in this controversy, as to the identification of the items properly chargeable to the defendants, we cannot disturb the conclusions of the court that there is nothing due the plaintiff.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.

185 Cal. 426

RIDEOUT v. CITY OF LOS ANGELES et al. (two cases). (L. A. 6499, 6500.)

(Supreme Court of California. March 31, 1921. Rehearing Denied April 28, 1921.)

1. Elections ⟹166 — General ballot requirements apply to ballots at special municipal election on propositions.

Under Gen. Laws 1915, No. 2371, p. 1151, and Los Angeles Charter, § 2, subd. 4, and sections 199, 202, requiring municipal elections to be held in accordance with the provisions of the state laws, the ballots at special municipal elections to vote on propositions submitted to the electors, as well as those containing names of candidates, must be marked "Municipal Ticket" and contain the instructions to voters, as required by Pol. Code, § 1197, subds. 6, 10, 11.

2. Elections ⟹291—Must be held valid unless plainly illegal.

In election contests, it is the duty of the court to validate the election, if possible, and it must be held valid unless plainly illegal.

3. Elections ⟹271—Departure from directory provision invalidates only if injurious.

While a violation of a mandatory provision regarding elections vitiates the election, a departure from a directory provision does not render it void, if there is a substantial compliance with the requirements and no showing that the result was changed or the rights of the electors affected by the deviation.

4. Elections ⟹271—Requirement not going to merits of elections is directory.

A provision, the observance of which is not expressly declared to be essential to the validity of the election, is mandatory if the act enjoined goes to the substance or necessarily affects the merits or results of the election; otherwise it is directory.

5. Elections ⟹186(1)—Requirement of printing "Municipal Ticket" on back of ballot is directory.

The requirement of Pol. Code, § 1197, that the words "Municipal Ticket" shall be printed on the back of the ballot, was intended primarily for the convenience of the election officials, in view of section 1257, requiring the canvass of general tickets to be completed before that of municipal tickets, and is directory, not mandatory.

6. Elections ⟹189—Proportion of space allotted to instructions on ticket submitting propositions held not to invalidate ballot.

The fact that the space allotted to instructions to voters on a special municipal ticket submitting propositions was greater than that in the sample ballot contained in Pol. Code, § 1197, does not invalidate the ballot, where it appeared that the question submitted was printed in full and in type not unreasonably small.

7. Elections ⟹186(1) — Noncompliance with directory provisions which prevent electors' expression of wills is fatal.

Though the requirements not observed in the printing of ballots were directory, the election cannot stand if the departure therefrom was of such nature that it precluded a considerable number of electors from expressing their wills at the polls, thus preventing a free and fair election.

8. Elections ⟹291—Burden is on contestant to prove defective ballots invalidated.

Where the violations of the directory provisions regarding the form of ballots were not so gross or radical as to give rise to a presumption of unfairness, the burden is on one contesting the result of the election to prove the unfairness claimed to have resulted.

9. Elections ⟹295(1)—Evidence held not to support finding defects in ballots affecting result.

In proceedings to annul a special city election on propositions submitted to the voters, evidence that more than enough ballots to have changed the result were voted blank or not voted by those who cast ballots at the general election held at the same time, and that some of the voters stated they thought the special ballots were samples, does not show that the form of instructions to voters or the omission of the words "Municipal Ticket" from the back of the ballots affected the result.

10. Appeal and error ⟹996—Inferences supported by evidence and not contrary to experience cannot be disturbed.

An inference by the trial court supported by the evidence, and not opposed to human experience and reason, cannot be disturbed by an appellate court, under Code Civ. Proc. §§ 1958, 1960.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Two actions by Mary Rideout, plaintiff, against the City of Los Angeles and others, to annul special municipal elections. Judgments for defendants in each case, and plaintiff appeals. Affirmed.

Edgar G. Pratt, of Los Angeles (Henry M. Willis, of Los Angeles, of counsel), for appellant.

Charles S. Burnell, W. B. Mathews, Lewis E. Whitehead, Ray C. Eberhard, and Trent G. Anderson, all of Los Angeles, for respondents.

LENNON, J. The two above-entitled cases are taxpayers' actions in the nature of equity proceedings to annul two special municipal elections held in the city of Los Angeles on June 3, 1919, and practically take the form of election contests. Gibson v. Board of Supervisors, 80 Cal. 359, 22 Pac. 225. Being identical in nature and in points raised,

the two cases were consolidated for trial. The present appeals are taken by plaintiff from judgments in favor of defendants.

At the special election attacked in the first above-entitled case, the question submitted to the voters involved the authorization of the issuance of bonds to the amount of $13,500,000, for the purpose of raising money to be expended partly in constructing and acquiring works for supplying the city with electricity for light, heat, and power, and partly in purchasing an electric distributing system; the proposition presented at the special election assailed in the second case was that of selling to the Southern California Edison Company, for a period not exceeding 15 years, surplus electric energy which said city might generate in excess of its own requirements, and also of supplying the city of Pasadena with such surplus energy. These two special elections were called and held at the same time, with the same precincts and polling places, as the general municipal election of the city of Los Angeles, and the same individuals acted as officials in all three elections. No consolidation of the elections was effected, however, and separate ballots were used in the three elections. Both propositions submitted at the special elections received the required two-thirds affirmative vote, the results, as ascertained upon a recount, being as follows: Bond election, 46,462 in favor and 21,270 against, or 1,308 in excess of the requisite two-thirds; power sale election, 43,679 in favor and 21,246 against, or 397 more than the required two-thirds.

[1] Alleged defects in the form of the ballots are the reasons assigned by appellant for the attempt to obtain the annulment of the special elections. According to the provisions of the Municipal Improvement Act, pursuant to which the bond election was held, that election was governed, in all particulars not recited in the ordinance calling the election, by the law covering and controlling the holding of municipal elections in the municipality. Gen. Laws 1915, p. 1151. The power sale election was held pursuant to the charter of Los Angeles (Charter of City of Los Angeles, § 2, subd. 4), and was likewise subject to the laws governing the holding of municipal elections. The ordinance calling the elections also expressly stated that the provisions for holding municipal elections applied. The charter of the municipality in question provides that all elections, except as otherwise provided in the charter, shall be "conducted and held in accordance with the provisions of the laws of the state for the holding of general elections in effect at the time." Charter of City of Los Angeles, §§ 199, 202. The form of the special election ballots here under consideration was therefore prescribed by section 1197 of the Political Code, which comprises the general law of the state upon the subject.

The omission to print the words "Municipal Ticket" on the back of these ballots and the heaviness of the type and size of the space occupied by the printed instructions to voters are the particulars wherein the special election ballots are claimed to have been defective. Subdivision 6 of section 1197 of the Political Code provides that—

> "All ballots printed by the clerks, registrars of voters or secretary of a legislative body of any incorporated city or town, shall have printed in the same manner [i. e., below the stub and immediately at the left of the center of the ballot, in 18-point gothic capitals], on the back, the words 'Municipal Ticket.'"

Subdivision 10 of the same section provides for the printing on the ballot of certain directions, under the caption "Instructions to Voters," and subdivision 11 provides, "except as to the order of the names of candidates, the ballots shall be printed substantially in one of the following forms," followed by the form, in which the instructions to voters covers a smaller proportion of the face of the ballot than in the present case. These particular provisions of the section must be interpreted as applicable to municipal ballots presenting propositions to be voted upon as well as to municipal ballots containing names of candidates. That such is the interpretation necessarily to be accorded these provisions is made evident by the generality of the language as well as by the fact that ballots presenting propositions are, by several subdivisions, expressly brought within the operation of the section.

[2, 3] It is appellant's contention that the fact that the ballots in controversy varied in the particulars stated from the prescribed statutory form in and of itself invalidated the election. It is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible; that is to say, the election must be held valid unless plainly illegal. People v. Prewett, 124 Cal. 7, 56 Pac. 619; State v. Board of Chosen Freeholders of Hudson County, 35 N. J. Law, 269, 277. Accordingly, a distinction has been developed between mandatory and directory provisions in election laws; a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation. Russell v. McDowell, 83 Cal. 70, 23 Pac. 183; Tebbe v. Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68.

[4] Whether or not a provision, the observance of which is not expressly declared by law to be essential to the validity of the election, is mandatory or merely directory, depends upon the character of the act pre-

scribed. If the act enjoined goes to the substance or necessarily affects the merits or results of the election, it is mandatory; otherwise directory. Murphy v. San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444; Dennen v. Jastro, 23 Cal. App. 264, 137 Pac. 1069; Parvin v. Wimberg, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254. Provisions prescribing minor details in regard to the form of ballots are held to be in a large measure directory, in so far as the voter is concerned, upon the theory that, where there are errors on the part of those intrusted with the preparation of ballots, the disenfranchisement of voters for these violations of the law over which they have no control would result in defeating the will of the people by technicalities, unless it appears that the mistakes in fact operated to prevent a free, fair and honest election. Dennen v. Jastro, supra; Miller v. Pennoyer, 23 Or. 364, 31 Pac. 830; Olson v. City of Lemmon, 33 S. D. 380, 146 N. W. 592; McCrary on Elections, § 538. It has been held that violations of statutes prescribing the dimensions of the ballots and the character of type and color of ink to be used in printing them do not, in themselves, render the election void, and an election was held valid where, in violation of the provisions of the election law, the marks on the face of the ballots were discernible on the back thereof, owing to insufficient thickness of the paper. Kirk v. Rhoads, 46 Cal. 398; Short v. Gouger (Tex. Civ. App.) 130 S. W. 267. An erroneous omission to print on the ballots instructions for voting a straight ticket and the erroneous designation of an office on the ballot as "councilman" instead of "trustee" were held not to invalidate the election. Jones v. State, 153 Ind. 440, 55 N. E. 229.

[5] There is no proof of fraudulent intent on the part of the officials having charge of the printing of the ballots in the instant case, and the deficiencies in the ballots under consideration were no more vital than in the instances enumerated. Section 1197 of the Political Code requires that the form prescribed must be "substantially" followed. The words "Municipal Ticket" on the back of the ballot are intended primarily for the convenience of the election officials. Section 1257 of the Political Code provides that—

> "At all elections where a general ticket and a municipal ticket are used, the canvass of the general ticket shall be completed before the canvass of the municipal ticket is commenced."

Clearly, the indorsements "General Ticket" and "Municipal Ticket" called for by section 1197 of the Political Code are designed to enable the election boards to distinguish and separate general and municipal tickets from a mere inspection of the backs of the ballots. In this case all three ballots were municipal ballots.

[6] Considering the other alleged defect, the law does not specify the size of type to be used in the printed instructions to voters; it merely provides a form in which the instructions are allotted a certain space. It is claimed by appellant that the instructions on the special election ballots should have covered no greater space in proportion to the face of the ballot than they did in the prescribed form. Conceding this to be the case, nevertheless the variance in question did not alter the form in which the propositions to be voted upon were submitted to the voters, for there was neither a diminution in the number of words nor an unreasonable small size of type in the printing of the propositions; the words "yes" and "no" were printed to the right of the proposition in large type, followed by ample space for the marks of the voters. Nothing of substance, either as to content or arrangement, was omitted or materially changed, and the ballots must therefore be pronounced adequate.

[7] However, while ballots which fail to comply with directory provisions may fulfill legal requirements in the sense that they are not lacking in fundamentals, it may still be true that the departure from the directory provisions was of such a nature that it precluded a considerable number of electors or voters from expressing their will at the polls, thus preventing a free and fair election. If the defects in the ballots actually produced that result, the elections cannot stand. Tebbe v. Smith, supra; Dennen v. Jastro, supra. Appellant claims that the violations in the instant case were the direct cause of confusing a considerable number of electors so that they refrained from voting.

[8, 9] We do not think the violations of the directory provisions were so gross or radical as to give rise to a presumption of unfairness. Atkinson v. Lorbeer, 111 Cal. 419, 44 Pac. 162. The burden was therefore upon appellant to prove the unfairness claimed to have resulted. Dennen v. Jastro, supra; Taylor v. Taylor, 10 Minn. 107 (Gil. 81). It was stipulated that, in the returns, there were 6,673 blank ballots in the bond election and 9,316 blank ballots in the power sale election, which had been deposited in the ballot boxes. In the bond election returns 180 ballots were missing, while 199 ballots were missing in the sale election returns. Appellant introduced as witnesses election officials from 75 precincts, who testified concerning the conduct of the voters at the elections. It was thereupon stipulated that appellant was prepared to call officials from 450 additional precincts, whose testimony would be of the same character as that already given. Briefly stated, this testimony was to the effect that, in each precinct, several voters attempted to leave their special election ballots in the booths, throw them on the floor, or carry them away. When they

were discovered doing so, the election officials asked for the ballots, whereupon some declared that they thought the ballots in question were sample ballots or instructions how to vote. Plaintiff claims thus to have proved that the blank and missing ballots, which were sufficient in number to have turned the election, were the result of the failure of the electors to understand that they were ballots. There was, however, considerable testimony to the effect that, after being informed that the papers were ballots containing propositions to be voted upon, the electors displayed indifference, either by stating that they did not care to bother with the special elections, or by failing to take time to do so. In this connection there is a further fact to be considered. The general municipal ballot, voted at the same time as the special election ballots, contained one proposition in addition to the names of candidates. This proposition concerned the incurring of a bonded indebtedness to raise money to be expended for sewer purposes. No confusion is claimed to have affected the voting on this proposition, yet the vote was as follows: 47,084 in favor, 17,612 against, total 64,696, which is less than the number of ballots voted at either of the special elections.

[10] Furthermore, still considering the question of confusion, there was no direct evidence that the defects in the ballots complained of were the cause of the misunderstanding of some of the electors. As previously stated, three ballots were delivered to each voter, the general municipal ticket, approximately 13 by 14 inches, and the two special election ballots, one yellow and the other blue, each about 4½ by 7 inches. Appellant merely proved statements of some electors to the effect that they thought the special election ballots were sample ballots or instructions to voters. This oversight might very likely have been due to the fact that each voter was given three ballots instead of one and to the difference in the size of the ballots, the electors in question carelessly assuming that all voting was to be done on the large ballot. At any rate, it is clearly apparent that carelessness in neglecting to read the ballots handed them was an actively contributing cause of the mistakes of many voters. From the facts proved the trial court evidently drew the inference that the claimed defects in the form of the ballots were a negligible factor, and that the real reasons for the blank and missing ballots in the special election returns were indifference and carelessness, combined with misunderstanding arising from the fact that the three elections were not consolidated, necessitating the use of more than one ballot. Such an inference was supported by the evidence. It is not opposed to human experience and reason, and therefore it cannot be disturbed by an appellate court. Code Civ. Proc. §§ 1958, 1960. It follows that the conclusion of the trial court that plaintiff is entitled to no relief in this action must be upheld.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; OLNEY, J.; SHAW, J.; WILBUR, J.; LAWLOR, J.

185 Cal. 361

MOON et al. v. MARTIN et al. (L. A. 6477.)

(Supreme Court of California. March 28, 1921.)

1. Partnership ⊂=64—Statutes requiring filing of certificate held not to apply to firm without place of business in state.

Civ. Code, §§ 2466–2472, requiring filing with the clerk of a county of certificates stating the names in full of all members of a partnership doing business under a fictitious name, etc., do not apply to persons carrying on business in another state without a place of business in California, and merely buying commodities in wholesale lots in California for delivery to them on board cars in the state; the orders being sent by mail or telegram to the California sellers.

2. Courts ⊂=97(5)—State courts bound by decisions of federal Supreme Court on questions depending on federal Constitution.

The state courts are bound by the decisions of the Supreme Court of the United States on questions depending on the construction of the United States Constitution.

In Bank.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by John S. Moon and others against Albert G. Martin and others. From judgment for defendants, plaintiffs appeal. Reversed.

George E. Farrand and Leonard B. Slosson, both of Los Angeles, for appellants.

Ben F. Gray, of Los Angeles, for respondents.

SHAW, J. The object of this action was to recover damages on account of the failure and refusal of the defendants to deliver to plaintiffs two carloads of beans, in the performance of an agreement for the sale and delivery thereof by the defendants to the plaintiffs.

The plaintiffs were partners doing business under the firm name of Moon-Taylor Company. They carried on their business in the city of Lynchburg, in the state of Virginia. The contracts for the sale of the two

carloads of beans aforesaid were made in the month of May, 1916, by letters and telegrams through the mail and over the wires, passing between the plaintiffs in Lynchburg, Va., and the defendants in Los Angeles, Cal. The plaintiffs had no place of business in California, and, so far as appears from the evidence, they did not carry on any business here with any other persons except the defendants, and that business consisted of occasionally buying beans from them in carload lots, to be shipped from California to Lynchburg, Va. This had been going on for about 18 months prior to May, 1916. The business was all conducted by correspondence. None of the plaintiffs ever personally appeared in California, except that at one time one of them, happening to be in California, bought one carload, not however either of the carloads in question here.

The defendants admitted the making of the contract, but denied that the damages for the refusal to perform it were equal to the amount demanded in the complaint. As a further defense they alleged that the plaintiffs were copartners and were doing business under the firm name of Moon-Taylor Company in the state of California at all the times involved in this action, and that they had not, nor had any one for them, ever filed with the clerk of any county in the state a certificate stating the names in full of all the members of the partnership; nor had they, or any one for them, published such certificate at any time in any newspaper in any county in the state, as required by section 2466 of the Civil Code.

The court below found that these allegations of the answer relating to the filing of the certificate were true, and that said name, "Moon-Taylor Company," is fictitious and does not disclose the names of the persons interested as partners in the business; that the plaintiffs had carried on the business of buying beans and other commodities in wholesale lots in the state of California under said partnership name for more than a year prior to May, 1916, such commodities so bought to be delivered to them on board cars in the state of California. Thereupon judgment was given and entered for the defendants, from which the plaintiffs appeal.

[1] We are of the opinion that the provisions of sections 2466 to 2472, inclusive of the Civil Code, do not apply to persons carrying on business in the manner disclosed by the evidence in this case. The plaintiffs had no place of business in this state. They did not come here to do any business. The transactions in question were carried on by correspondence as above stated. The business simply consisted of orders, sent by mail or telegram to the defendants and accepted by them, for the shipment of beans to be delivered to plaintiffs on the railroad somewhere in California for shipment to them at Lynchburg. We think this does not come within the scope of section 2466. That section provides that "every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which his or its principal place of business is situated, a certificate, stating" the names in full of all the members of the partnership and their places of residence. The certificate must also be published in a newspaper, if there be one in the county, and, if not, then in a newspaper in an adjoining county. This language clearly implies that the partnership so transacting business and required to make the certificate is a partnership having a place of business in some county in the state. Otherwise there would be no significance in the requirement that the certificate must be filed with the clerk of the county in which "its principal place of business is situated." We cannot conceive that it was intended to apply to persons who, being engaged in interstate commerce in a distant state, send orders by mail from that state to persons in this state for the shipment of goods to them at stated prices. It is true that in a certain sense the business it transacted in this state, it being held, as a matter of law, that the person so sending the letter thereby makes the mail carrier his agent to deliver the letter to the addressee. Also, when he directs goods bought by him to be delivered for him on board cars in California, he makes the carrier his agent to transport the goods from California to his home place of business, and in such cases and in some kinds of actions it is frequently held that the contracts are made in this state. It has also been held that the making of a contract is a business transaction and constitutes, in some instances and for some purposes, a doing of business, or, as section 2466 puts it "transacting business." But all this can take place without the persons concerned having a place of business in the ordinary sense of the word in the state or in the county where the transaction occurs. We know of no decisions upon this point with respect to partnerships, but it has frequently been decided with respect to corporations that the purchase of property in one state by a corporation having its place of business in another state, to be shipped to the place of its domicile from the state in which it is purchased, does not constitute doing business in the latter state. Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 Pac. 289; Commonwealth v. Standard Oil Co., 101 Pa. 148; Parsons, etc., Co. v. Stuart, 182 Fed. 779, 105 C. C. A. 211; Groneweg v. Estes, 139 Mo. App. 36, 119 S. W. 513; Dover L. Co. v. Whitcomb, 54 Mont. 141, 168 Pac. 947. We are unable to perceive any distinction between a corporation and a partnership with respect to this ques-

tion. If the corporation is not doing business when it makes a sale in this manner without entering the state for any purpose except through the mails, clearly a partnership is not doing so. The language of section 2466, as we have stated, clearly implies that it was intended to apply only to partnerships having "a local habitation" or a "principal place of business" situated in this state.

[2] It was decided by the Supreme Court of the United States in Sioux Remedy Co. v. Cope, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193, that a provision of the laws of South Dakota requiring all corporations of other states transacting business within the state to file in the office of the secretary of state a copy of its articles of incorporation, and providing that no action should be commenced or maintained in any court of the state by such corporation on any contract or transaction made in the state by such corporation unless it should have filed said articles with the secretary of state and should have appointed a resident agent upon whom process could be served, and filed a copy of said appointment in the office of the secretary of state and in the recorder's office in the county where the agent resided, was an illegal restriction upon interstate commerce which the state had no power to make. The court said that a state has power to make reasonable police regulations for the government of foreign corporations doing business in the state, calculated to protect and promote the health, safety, morals, and welfare of its people, and thereupon it proceeded to say:

"We think that when a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the state cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose."

Thereupon it held that the provisions we have stated making the maintenance of an action in the state conditional upon the filing of the articles of incorporation and appointment of an agent as aforesaid were invalid and void so far as actions to enforce contracts made in interstate commerce are concerned. If such conditions are an unreasonable burden on interstate commerce carried on by a corporation, they would be equally so where the interstate commerce was carried on by a partnership. This subject is one for consideration and decision of the courts of the United States. We are not concerned to consider whether the decision is or is not correct, for the state courts are bound by the decision of the Supreme Court of the United States on questions depending upon the construction of the United States Constitution. Under the principle of this decision, the plaintiffs could maintain this action without filing or publishing a certificate, even if our Code should declare that they could not do so.

It follows that the court below erred in holding that the plaintiffs could not maintain the action under the circumstances stated.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

185 Cal. 405

CITY OF LOS ANGELES v. SUPERIOR COURT OF CALIFORNIA IN AND FOR TUOLUMNE COUNTY et al. (L. A. 6492.)

(Supreme Court of California. March 28, 1921. Rehearing Denied April 27, 1921.)

1. Dismissal and nonsuit ⊜60(6)—Stipulation extending time for bringing case to trial does not defeat right to dismissal after expiration.

Under Code Civ. Proc. § 583, requiring dismissal of an action not brought to trial within five years after the answer was filed except where the parties stipulated that the time might be extended, a stipulation extending for one year the time within which the action must be brought to trial does not bar defendant's right to a dismissal under that section after the expiration of the time so extended.

2. Dismissal and nonsuit ⊜45—Statute for dismissal for nonprosecution is one of public policy.

The fact that Code Civ. Proc. § 583, requiring dismissal of actions not brought to trial within five years after answer, is, to an extent, one of public policy as well as of private concern to the litigants, affords the occasion for inserting therein the provision for extended time by stipulation, since, if the rights of the parties only were affected, they could enlarge or curtail the operation of the statute by stipulation at their pleasure, under Code Civ. Proc. § 3513.

3. Dismissal and nonsuit ⊜60(6)—Stipulation held merely to postpone right to dismissal for nonprosecution.

A stipulation postponing the time for trial for one year, and providing that no part of that year should be considered should any question arise concerning the failure to prosecute, merely extends the time within which plaintiff must bring the action to trial under Code Civ. Proc. § 583, but does not waive defendant's right to dismissal for failure to prosecute within the time so extended.

4. Dismissal and nonsuit ⊜60(6)—Stipulation postponing trial does not extend time for dismissal.

A stipulation merely postponing the time of trial for a specified period does not thereby ex-

tend the period of five years after answer, within which the case must be brought to trial to avoid dismissal under Code Civ. Proc. § 583.

5. Dismissal and nonsuit ⊜60(6)—Stipulation for 90-day notice before setting cause for trial does not extend time for dismissal.

In a stipulation postponing the trial of an action for one year and providing that such time shall not be considered in determining plaintiff's failure to prosecute, a provision that the action can be brought to trial only after 90 days' notice to the opposite party does not extend the period within which the plaintiff must bring the action to trial to avoid dismissal.

6. Dismissal and nonsuit ⊜50—Conferences and negotiations held not to waive defendant's right to dismissal for nonprosecution.

Conferences and negotiations between the parties to an action after the answer was filed relative to the place of trial and the judge before whom it was to be tried, with tentative suggestions for settlement, in none of which defendant indicated an intention not to rely on his right to a dismissal for plaintiff's failure to prosecute, but by stipulation extending the time within which the action must be brought to trial, indicated an intention to rely on his right of dismissal, do not defeat defendant's rights to a dismissal on the expiration of the extended time.

7. Dismissal and nonsuit ⊜60(1)—Importance of action or equities do not warrant denial of dismissal for nonprosecution.

The right of defendant to a dismissal of the action for failure to bring it to trial within the time fixed by Code Civ. Proc. § 583, as extended by stipulation, is not affected by the importance of the action nor by the equities of the parties on the merits.

In Bank.

Original application for a writ of mandamus by the City of Los Angeles against the Superior Court of California, in and for the County of Tuolumne, and the Judge thereof, to require the entry of dismissal of an action by the Inyo Development Company against the City of Los Angeles pending in that court. Peremptory writ issued.

Charles S. Burnell, City Atty., of Los Angeles, W. B. Mathews, of Los Angeles, W. A. Lamar, of Independence, Rowan Hardin, of Sonora, and S. B. Robinson, of Los Angeles, for petitioner.

William M. Abbott, William M. Cannon, and Kingsley Cannon, all of San Francisco, for respondents.

SLOANE, J. This proceeding involves the construction and interpretation of section 583 of the Code of Civil Procedure, which requires the dismissal of an action on motion of the defendant, or on the court's own motion, if not brought to trial within five years after answer is filed.

The matter is before this court on petition for a writ of mandate to require the superior court of Tuolumne county and the judge thereof to enter an order of dismissal in the case of Inyo Development Co. v. The City of Los Angeles, pending in that court. The action was begun July 19, 1913, and was brought to enjoin the city of Los Angeles from diverting the waters of the Owens river from their natural channel, to the alleged detriment of plaintiff's prior rights.

Although there is some controversy as to the date of the filing of the answer of defendant, it satisfactorily appears that such answer was filed on or about the 17th of November, 1913. The action was never brought to trial, and on or about the 21st day of November, 1919, over six years after answer was filed, the defendant served its notice of motion for a dismissal. On the hearing of the motion the court made its order denying the application, and thereafter defendant filed its petition in this court for the issuance of the writ which is the subject of this hearing.

Section 583 of the Code of Civil Procedure reads as follows:

"The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

The principal contention arises upon the interpretation of the last clause of the section, wherein the requirement for a dismissal after five years is qualified by the words, "except where the parties have stipulated in writing that the time may be extended."

Respondents insist upon a literal and restricted interpretation of the clause quoted as meaning that if there has been an extension of time by written stipulation, whether for a day or a year, whether expressly limited or general in its terms, that the mandatory force of the provision is forever waived and nullified.

In this case there was a stipulation which resulted in an extension of the five year limitation.

The case had been set for trial on the application of the defendant for the 4th day of October, 1915, nearly two years after the filing of the answer. A continuance was demanded by the plaintiff, which was opposed by the defendant on the ground, among others, that there were important witnesses who could not be obtained again for many months if the trial was postponed. A continuance for

one year was finally agreed to, however, under the following stipulation, signed by both parties:

"It is hereby stipulated by and between the plaintiff and the defendant, the City of Los Angeles, that the above-entitled cause shall not be tried prior to one year from the date hereof unless by the mutual consent of the parties hereto, and that at least ninety days' notice of the time set for the trial of said cause shall be given by the party moving for the setting of said cause, to the other party hereto.

"It is further understood that the said period of one year from the date hereof, during which the said cause shall not be tried, is consented to by both parties hereto; that the said plaintiff shall not be held to have failed to prosecute said cause during the said year, and that no part of the said year shall be considered should any question arise in said cause concerning the prosecution thereof."

There is nothing in the first paragraph of this stipulation postponing the trial for one year and requiring a notice of ninety days upon resetting the case for trial, which affects the operation of the statute. It would have still been incumbent upon the plaintiff to bring the matter to trial within the five-year period. The parties evidently recognized this fact and for plaintiff's protection the second clause was added, providing that the year covered by this postponement should not be taken into account if any question thereafter arose as to the due prosecution of the cause.

This provision was not an express stipulation that the time for trial might be extended beyond the five-year period. Defendant was still at liberty, after a reasonable space of time, at least beyond the year's continuance, to move the court for a dismissal under the discretionary power of the court to dismiss after two years for want of prosecution under the first provision of section 583; but it did have the further effect of eliminating the year covered by the stipulation from consideration if application for dismissal should be made under either clause of the Code section. It might still be questioned, however, if we are to insist upon a strict and literal interpretation of the statute, if this can be construed as a stipulation or consent that the bringing of the cause to trial could be postponed beyond the five years' limit. It merely effected an estoppel upon the defendant to count the period of this continuance as part of the time limit of the Code provision.

But conceding that the stipulation is within the exception of the Code section, and is an express stipulation in writing that the time in which to bring the cause to trial may be extended beyond the statutory limit, we cannot agree with respondents that the mandatory force of the statute is destroyed thereby. Its operation is merely postponed. It is clear that such was the intention of the parties. This express agreement that the year of continuance should not be counted was an implied notice that the right to rely upon the statute should not be otherwise impaired.

[1] Respondents' position goes to the extent of holding that an express agreement which would extend the time within which to bring a cause to trial beyond the five years for "one day and no more" would be a complete waiver of all right to a dismissal under this section for all future time. We think the requirement means that such dismissal "shall be granted unless such action is brought to trial within five years after the defendant has filed his answer," except where, pursuant to a stipulation of the parties, a different limit has been fixed. It would be a strange situation if a defendant who had the right under this section of the Code to a peremptory dismissal of the action against him could not give the plaintiff a few days of grace and at the same time reserve his right to insist upon such dismissal if the stipulated conditions were broken.

This exception was not intended to detract anything from the mandatory force of the statute. The provision was made for the benefit of both the courts and litigants. The court may exercise the power of dismissal on its own motion, but the right is given to the parties to extend the period, providing it is done by a written stipulation. The very word "extended" negatives the idea of termination or abrogation. The statute fixes the limitation at five years, the parties, by written agreement, may extend this period for a day, a month, or a year, which is the most that can be said for the stipulation in this case.

[2] Were it not for the fact that this enactment to prevent unlimited postponement of trials is to an extent one of public policy as well as of private concern to the litigants, there would have been no occasion for providing permission for an extension of the time by stipulation of the parties. Ordinarily, in matters affecting only the rights of the parties they are at liberty to enlarge or curtail the operation of the statute by stipulation at their pleasure. Civil Code, § 3513.

[3] And no one would think of construing a stipulation extending the time of a party to plead or serve notice, or to perform any other act, as a waiver of the right to its enforcement beyond the time expressly stipulated. None of the decisions cited by respondents covers the point raised here. Perhaps the nearest expression on the subject is in Larkin v. Superior Court, 171 Cal. 719, 154 Pac. 841, Ann. Cas. 1917D, 670, where the court was dealing with fixing dates of trial, extending time to plead, consenting to continuances and the like, all within the five years' period, and which the court holds not to constitute an extension of the statutory period for bringing the cause to trial. In that opinion the court uses the following language:

"A stipulation in terms waiving the benefit of this section, or one in terms providing that the time fixed by the section within which trial must be had, shall be extended indefinitely or for a definite time, or a series of stipulations continuing the trial to a date beyond the five-year period, might any of them suffice as an answer to a motion to dismiss, and constitute a stipulation in writing that the time (the five-year period) shall be extended."

This expression was outside the issues before the court, but it correctly states the law. Just what happened in the instant case was a stipulation not to take into account the period of the one year's postponement of the trial, in the consideration of any motion to dismiss for want of prosecution. Its effect was to postpone for a definite period of one year the time when defendant could avail itself of the right to this mandatory provision, and it was not until the expiration of six years, a full five years without taking into account the year covered by the stipulation, that the motion here sought to be enforced was made.

Johnston v. Baker, 167 Cal. 260, 139 Pac. 86, merely holds that the provision of section 583, authorizing the court in its discretion to dismiss an action for failure to bring to trial within two years, impliedly denies the power to exercise such discretion within a less period. Pistolesi v. Superior Court, 26 Cal. App. 403, 147 Pac. 104, and Long v. Superior Court, 31 Cal. App. 34, 159 Pac. 734, were both on motions to dismiss after appeal from justices' courts on questions of both law and fact where the cases had been brought to trial and tried in the lower court after answer filed. In the former of these cases one ground of denial of the writ arose through the inadvertent misinterpretation of the court of the provision that the action shall be dismissed "by the court in which the same shall have been commenced, or to which it may be transferred on motion of the defendant." The words "on motion of the defendant" were misapplied as referring to a transfer from one court to another on motion of the defendant, whereas the reference is to a dismissal on motion of the defendant, as obviously appears from the context. In Hickman v. Lynch, 27 Cal. App. 354, 149 Pac. 997, some 2½ years after the answer was filed, permission was granted defendant to file a cross-complaint. The court held that for this reason "it appears that the case at bar was not fully and finally at issue for five years, but only for a period of three years."

[4] Respondents call special attention to the decision in Nathan v. Dierssen, 164 Cal. 607, 130 Pac. 12, as being decisive in their favor. There is nothing on the face of that opinion to indicate the grounds upon which the order denying dismissal was sustained. The only comment made in the decision on appeal is that there was ample evidence to justify the court in holding that stipulations extending the time for bringing the action to trial had been made.

If it may be inferred from the record on that appeal that the court was of the opinion that mere written extensions of the time of trial during and not extending beyond the five-year period were stipulations within the meaning of section 583, Code of Civil Procedure, operating to prolong or extinguish the time within which an order of dismissal should be made, in the absence of conditions creating an estoppel, such opinion is overruled by the decision of this court in bank, in the case of Larkin v. Superior Court, supra.

In the absence of such express stipulation or equitable estoppel, the rule as laid down in Larkin v. Superior Court, is that no such extension of time can be inferred, from a stipulation fixing a trial date or granting continuances for periods within the five years, under circumstances which do not preclude the plaintiff from bringing the cause to trial within the prescribed time, notwithstanding such stipulated delay. As is said in that opinion:

"There is nothing in this that can fairly be taken as indicating any consent on the part of the defendants that the five-year period shall be extended by as much as a single minute, or as intimating to plaintiff that any such extension would be permitted. It is a stipulation in writing extending the five-year period that the statute provides for, and without such a stipulation, certainly in the absence of some element of estoppel, there can be no effective answer to a motion to dismiss."

For the reasons we have stated there is no merit in any of respondents' objections to the issuance of a peremptory writ of mandate, which are based upon the stipulation here considered.

It is true that the effect of the limitation in section 583, Code of Civil Procedure, on the five-year period of dismissal under the exception "where the parties have stipulated in writing that the time be extended" might well have been more fully expressed in the statute; but in view of the nature and purpose of the enactment there can be no reasonable question that this exception clearly implies that the extension referred to is only such as is covered by the stipulation. Whatever is necessarily implied in a statute is as much a part of it as that which is expressed and the statute must be construed with reference to the purpose to be served by it. Johnston v. Baker, supra; Bailey v. State, 163 Ind. 165, 71 N. E. 655.

"When the intention of a statute is plainly discernible from its provisions, that intention is as obligatory as the letter of the statute and will even prevail over the strict letter." 25 R. C. L. 968; Pickett v. U. S., 216 U. S. 456, 30 Sup. Ct. 265, 54 L. Ed. 566; State ex rel. Husting v. Board of Canvassers, 159 Wis. 216, 150 N. W. 542, Ann. Cas. 1916D, 159; Pool v. Simmons, 134 Cal. 621, 66 Pac. 872.

[5] The provision contained in the stipulation for a continuance of October 4, 1915, that at least 90 days' notice shall be given of the resetting of the cause for trial, did not operate in any way to extend the running of the five-year period. The plaintiff was at liberty to have the trial set for the day after the stipulated year of continuance had expired, and could have served notice thereof at any time within 90 days of such date. It had no more right to have a continuous extension of its time in which to bring the case to trial under this 90 days' stipulation than it would have had under the 5-day notice required by statute. It is true that under this stipulation for 90 days' notice there would have been no date within 90 days of the expiration of the 5-year period for bringing the cause to trial when it could have been set without the consent of defendant, but that was one of the contingencies arising under the stipulation that plaintiff was bound to provide against. No such attempt to set for trial was made, but it could not have extended plaintiff's rights in the premises if it had been made and opposed by defendant.

There are a number of other circumstances arising out of the proceedings in this case, which respondents contend should operate to establish waiver or estoppel of the defendant in pressing this motion for dismissal, which we do not deem it necessary to discuss separately. They are all based upon the nature and importance of the issues involved in the action, the delay in determining the court in which the action should be tried, and the judge who should preside at the trial, demands and agreements for continuances, negotiations for stipulations as to uncontested facts, correspondence and conferences with a view to reaching a settlement out of court.

[6] We, of course, are not concerned with the matters involved or the time that elapsed prior to the filing of the answer, as the five years only began to run from that date. After the answer, proceedings were had on the application of the defendant for procuring a trial before another judge, as the superior judge of Inyo county, where the action was commenced, was disqualified, and after negotiations between the parties it was in the early part of May, 1915, stipulated that the cause be transferred to the superior court of the county of Tuolumne. On application of defendant thereafter the trial was set for October 4, 1915. A postponement was then had at the instance of plaintiff for one year under the stipulation herein discussed. No further move was made towards again setting the date for trial until in November, 1918. In the early part of December, 1918, the new date of trial was agreed upon between the parties as of March 10, 1919. Discussion was had as to whether the trial should be held in Tuolumne county, or for the convenience of witnesses in the county of Inyo. Plaintiff claims that at the time of agreeing upon the date for trial it was orally stipulated that there might be further postponement at the instance of either party. Later, at the request of plaintiff, the order setting the cause for trial on March 10th was vacated. So far as we are able to discover from the record, no further effort was made to bring the matter to trial, although the notice of motion to dismiss was not filed until the 21st of November, 1919. During all the pendency of the action there was correspondence and conferences regarding preliminaries to the trial, and tentative attempts to settle the case out of court; but accepting as true the facts as stated in respondents' answer and affidavits, we fail to find any intimation by word or conduct that suggests a concession on the part of defendant or an understanding on the part of plaintiff that defendant might not avail itself of the provisions of section 583. Indeed, the express stipulation of the parties, taking the period of the one year's continuance from the statutory period, shows a reservation at that time of all rights under the statute except as modified by the stipulation.

[7] Counsel for respondent urge upon our attention the importance of this case to the plaintiffs, and both sides discuss at some length their respective equities on the merits; but these are considerations we cannot take into account. The question before us is on the construction of this statute, and we cannot make it over to fit the exigencies of this particular litigation. It is a salutary law and mandatory in its requirements. It can seldom happen that any good excuse exists in delaying trial of a cause for five years.

Let a peremptory writ of mandate issue as prayed for.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.

185 Cal. 347

PARKER v. FUNK. (L. A. 6555.)

(Supreme Court of California. March 25, 1921.)

1. Sales ⊂=476—Buyer in possession of part only held not in default.

Where a conditional sales contract of a truck not delivered recited receipt of the truck by the buyer, who later took possession of a part of the truck, his obligation to pay was subject to the implied condition of a full delivery, and he was not in default until delivery or a request by the seller to be allowed to attach the undelivered part to the part in the buyer's possession.

2. Sales ⊂=475—Seller's assignee took only the rights of the seller in conditional sales contract.

Under Code Civ. Proc. § 368, the assignee of the seller in a conditional sales contract

took the contract and the title to the thing sold subject to any rights existing in favor of the buyer against the seller.

3. Estoppel ⟸78(2)—Purchaser's conditional contract held not an estoppel as against seller's assignee.

A conditional sales contract of a truck acknowledging receipt by the buyer when a part was not delivered did not constitute estoppel by contract precluding him from showing the fact of nondelivery as against an assignee of the seller; Code Civ. Proc. § 1962, subdiv. 2, permitting dispute of recital of consideration.

4. Estoppel ⟸97—Recitals in sales contract held not an estoppel in pais as against seller's assignee.

Recital in conditional sales contract that seller had received the goods was not an estoppel in pais precluding him from disputing the recital as to his seller's assignee, not being intended as a representation on which a third person might rely.

5. Estoppel ⟸52—In pais is founded on doctrine that the truth would defraud.

The doctrine of estoppel in pais proceeds on the theory that the party estopped has by his declaration or conduct misled another to his prejudice, so that it would be a fraud on such other to allow the true facts to be proved.

6. Assignments ⟸100—Debtor may as against assignee assert existing equities not conforming to face of contract.

A party to a contract may assert as against the assignee of the other party any right which he could assert against the other party, regardless of whether such right conforms to the face of the contract.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Replevin by Edward F. Parker against B. E. Funk. From a judgment for defendant, plaintiff appeals. Affirmed.

R. S. Parker, of Pasadena, for appellant.

J. R. Whittemore, of Los Angeles, for respondent.

OLNEY, J. The present action is one of replevin for the possession of an automobile truck. Pending its determination, the plaintiff secured possession of a part of the truck, which was all the defendant had, upon a claim for delivery pursuant to sections 509 to 521 of the Code of Civil Procedure. The action was tried and resulted in a judgment that the plaintiff take nothing and that he either return the part of which he had secured possession or the defendant recover of him the value thereof, $300. The plaintiff appeals.

The facts are:

One Moon was engaged in the business of making automobile trucks by taking the front part of a Ford automobile with its engine and attaching to it what is known as an Ameston truck unit. The defendant was an automobile salesman and desired to purchase a truck for demonstration purposes. Moon had in his garage or place of business the front part that was necessary to make a truck, but without the Ameston unit attached. Under these circumstances, Moon and the defendant entered into a conditional sales contract, whereby the defendant agreed to purchase "One Ameston truck unit and Ford automobile, motor No. 1757717 ——— body ——— with complete equipment. Serial No. ———," for the price of $900, of which he paid $300 down and agreed to pay the balance in monthly installments of $50 each. The Ford automobile motor designated by the number quoted was the one owned by Moon, so that it was specified as a part of the subject of the sale. Whether there was any truck unit that was also agreed upon as the remaining part does not appear. Although the Ford part and the truck unit had not been attached and it was evidently intended that they should be before the subject-matter of the sale was complete, and although there was no actual delivery of anything to the defendant, the contract contains an acknowledgment by him of the receipt of "said property," which is described as quoted, and that it was in good condition and repair. The contract also contains the usual provision as to title remaining in the vendor until the purchase price should be fully paid, and that in case of a failure to pay any installment of the price as it became due the vendor should have the right to retake possession without demand.

Immediately upon the making of the contract, Moon, for a valuable consideration, assigned it and the title to the property specified in it to the plaintiff. A few days thereafter Moon's garage and the property in it, including the Ford automobile part, were attached by his creditors. The defendant thereupon secured possession of the part from the sheriff upon a third party claim. After securing such possession, he failed to make further payments on the purchase price, the truck not being complete, and because of his failure in this respect the plaintiff endeavored by the present action to secure possession of the part which the defendant had.

The position of the defendant, as might be surmised from the foregoing facts, is that he wants either a complete truck, for which he is willing to pay the agreed purchase price, or else the return of what he has already paid, and that until he receives either one or the other he is entitled to keep as much of the truck as he has secured. The position of the plaintiff, on the other hand, is that the completion of the truck is no concern of his; that he purchased the contract of sale from Moon in reliance upon the acknowledgment of the defendant, which it contained, that he had received the subject of the sale in good condition and repair; that it is not open to

the defendant to show that the subject of the sale was not in fact complete; and that the defendant is in default on the purchase price and the plaintiff is therefore entitled under the contract provisions to whatever of the truck that was to be the defendant has.

The merits of the controversy can best be gotten at by considering the case in the first instance as if it were one between Moon, the original vendor, and the defendant, and then considering to what extent, if at all, the rights of the plaintiff, the assignee of Moon, differ from those of Moon. As between Moon and the defendant, the acknowledgment or recital of the contract that the latter has possession of the subject of the sale can be given effect only by considering that the making of the contract was a constructive delivery of the truck or its parts by Moon to the defendant, so that thereafter Moon's actual possession was that of a bailee or agent for the defendant. On the other hand, reading the contract in the light of the circumstances under which it was made, it is evident that the parties contemplated that Moon should complete the truck, and that the contract was subject to the implied condition that he do so. We have, then, a case of a conditional sale of an uncompleted article, with possession of the parts of the article, or of such of the parts as had been specifically agreed upon, constructively in the vendee but actually in the vendor, and with an obligation on the part of the vendor constituting an implied condition of the contract that he should complete the thing called for by the contract.

[1] In this condition of affairs, the parts, or some of them, are taken from the possession of the vendor under process against him, and the defendant then claims and secures from the attaching officer one of such parts. It is evident that the actual possession so obtained by the defendant is a lawful possession as between him and his vendor, since as between them the part had been, in legal contemplation, in the possession of the defendant at the time the sheriff seized it; the actual possession by the vendor being but a possession held for the defendant. It is also evident that the defendant is entitled to hold such possession until he is in default under the contract for the nonpayment of some installment of the purchase price as it becomes due. It is also evident that while the contract specifies the installments of the purchase price as falling due on certain fixed dates, the vendee's obligation to pay is subject to the implied condition that the vendor complete the machine, and as long as the vendor is in default in completing it he cannot insist that the vendee pay anything further. If the vendor had requested possession of the part which the vendee had for the purpose of performing his obligation to complete the truck, the vendee would have had to give it to him or, at least, would have had to make the part available to him for that purpose, but the vendee could not be put in default in this respect until such request was made. None was made and until it was, and was refused and the vendor thereby prevented by the vendee from assembling the machine, the latter was not in default in failing to make further payments on the purchase price. As a consequence, the vendor would not have had the right, by reason of the vendee's failure to make such payments, to retake possession of the part which the defendant had. The fact was that defendant was not as yet in default.

[2-4] Is the situation any different as to the actual plaintiff, the vendor's assignee? It is not different unless there be some element of estoppel as between him and the defendant. As an assignee merely, the plaintiff but stepped into the vendor's shoes and took the contract and the title to the article specified in it subject to any rights which existed in favor of the defendant against the vendor. Section 368, Code Civ. Proc. The final question in the case, then, upon the merits, is as to the validity of the plaintiff's contention that because of the defendant's acknowledgment in the contract that he had received the subject of the sale in good condition and repair he is estopped as to the plaintiff from showing that the subject-matter was not in fact complete, with the consequence that the defendant's obligation to pay was not absolute as it appeared on the face of the contract, but was conditional on the subject-matter being completed. The contention is a somewhat novel one, and practically no assistance in determining the correct answer to it is given us by the briefs, which, in effect, but affirm the contention on the one side and deny it on the other. It is, however, fairly certain that the contention is not valid. There is no estoppel by contract, since the acknowledgment of the receipt of the article is in effect but an acknowledgment of the receipt of the consideration received by the defendant for the contract, and it is always open to a party to dispute the recital of a consideration. Section 1962, subd. 2, Code Civ. Proc. If there be an estoppel, it must be one in pais, arising from considering the recital in the contract as a misrepresentation by the defendant in effect made to and acted upon by the plaintiff.

[5, 6] The doctrine of estoppel in pais proceeds upon the theory that the party estopped has by his declarations or conduct misled another to his prejudice, so that it would be a fraud upon the latter to allow the true state of facts to be proved. Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365. It follows that the representation must be one intended by the party making it to be acted upon by the other, or made under such circumstances that the other had the right to believe that it was so intended, since otherwise there is no fraud, nor anything in the nature of fraud. 16 Cyc. 726, 749; Boggs v. Merced Mining Co., 14 Cal. 367; Smith v. Penny, 44 Cal. 161; Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257. Now, a recital in a contract is

not ordinarily intended as a representation to be acted on by third persons. Its sole purpose is to make plain, or affect in some manner, the rights of the parties as between themselves alone. The result is that a party to a contract may assert as against an assignee of the other party any right which he could assert against the latter, regardless of whether such right conforms or does not conform to the face of the contract. Rauer v. Fay, 110 Cal. 361, 42 Pac. 902. As a particular instance of this, it is permitted to show as against the assignee of a contract, even one reciting a consideration, either that there was no consideration or that the consideration has failed. Bergson v. Builders' Ins. Co., 38 Cal. 541; Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; Briggs v. Crawford, 162 Cal. 124, 121 Pac. 381; Crawfis v. Edwards, 178 Cal. 805, 175 Pac. 410. The present case would seem to be of just this character.

It is, of course, not difficult to imagine a case where a recital is put into a contract for the very purpose of having it acted on. For example, conditional sales contracts of automobiles are largely dealt in by way of sale and assignment, and if it appeared in the present case that the defendant had acknowledged the receipt of the subject of the sale prior to his actually having received it, in order that his vendor might the more easily realize upon the contract, or even under circumstances such that he should have known that some one in reliance upon the recital would not improbably purchase the contract as one for the sale of a completed and delivered article, he would undoubtedly be estopped from showing the contrary. Fugate v. Hansford's Exrs., 3 Litt. (Ky.) 262; National, etc., Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881. It is not at all impossible that such was the fact, but if it was, it devolved upon the plaintiff to prove it, and there is no evidence upon the point. It follows that the plaintiff stands in the shoes of his assignor, and as to him, as well, the defendant was not in default in refusing to make further payments until the article which he was to receive was completed.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

184 Cal. 330

HODGE et al. v. McCALL et al. (L. A. 6199.)

(Supreme Court of California. March 21, 1921.)

1. Public lands ⊂=128 — Person patenting lands by mistake holds legal title in trust for person entitled to patent.

If through a mistake of law on the part of officials of the Department of the Interior a patent to land to which one person is entitled under the public land laws erroneously issues to another, the latter will be held by the courts to hold the legal title received from the government in trust for him who should have received it.

2. Constitutional law ⊂=77 — Regulations of government departments cannot enlarge or impair right given by statute.

The function of government department regulations is to carry out the purpose of the statutes for whose administration they are adopted, and they must be reasonable and appropriate for this purpose, and cannot either enlarge or impair rights given by the statute.

3. Statutes ⊂=219 — Construction put upon doubtful statute by administering officers given weight.

Construction put upon ambiguous statute by administrative officers should be given great weight by the courts in determining its true meaning, but if its meaning is not doubtful, and regulations of a government department are in conflict with that meaning, they are simply void.

4. Public lands ⊂=33 — Statutes ⊂=49 — Statute giving preferred right to enter land to be applied where possible; impossibility of universal application does not destroy it.

Act Cong. March 3, 1909, providing that landowner or entryman whose land adjoined any lot should have a preferred right to purchase the one-half of the lot which abutted on his land, must be given effect as far as possible, and the fact that it might not be possible to give it effect as to lots which abutted on one side on the lands of more than one owner would be no reason for not giving it effect in other cases where it is possible.

5. Public lands ⊂=33—Landowner entitled to purchase one-half of lot abutting on property.

Under Act Cong. March 3, 1909, giving any landowner or entryman whose land adjoined any lot between subdivisions a preferred right to purchase the one-half of the lot which abutted on his land, each landowner had the preferred right to purchase the one-half of any lot on his side which was in front of or abutted upon his land; and, where a lot abutted on one side on the lands of more than one owner, each landowner had the preferred right to purchase the one-half of the strip on his side which was in front of or abutted upon his land.

In Bank.

Appeal from Superior Court, Imperial County; Franklin T. Cole, Judge.

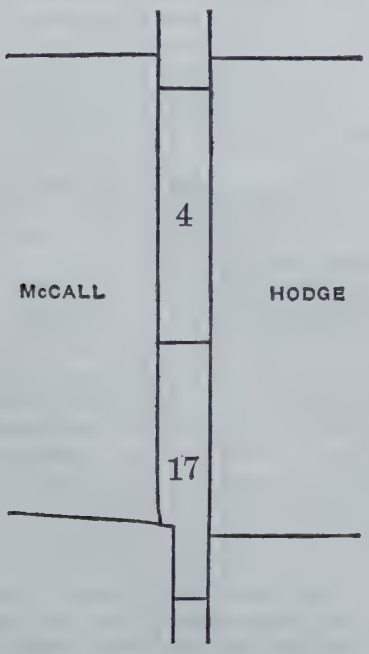
Action by Jennie M. Hodge and another against Cora McCall and another. Judgment for defendants, and plaintiffs appeal. Reversed, with instructions.

Conkling & Brown, of El Centro, for appellants.

Charles L. Childers, of El Centro, for respondents.

OLNEY, J. The original survey of the public lands in the Imperial Valley was ex-

ceedingly inaccurate, and when the valley came to be settled up another survey became necessary. This was made, and in its making the government subdivisions for which entry had been made were located as actually claimed by the entrymen on the ground. When so located, what theoretically should have been adjoining subdivisions were in many instances separated by small strips of land which did not come in either subdivision. The situation may be made clearer by the accompanying diagram of it as it exists in the present case:



The areas marked McCall and Hodge represent the governmental subdivisions upon which the plaintiff and the defendant, or their predecessors in interest, had respectively entered, and to which they had acquired title from the government. The strip between them, portions of which are marked 4 and 17, is one of the strips of which we are speaking. The strips were divided into subdivisions called lots, designated by numbers, and the numbers 4 and 17 are the numbers of the lots involved in the present controversy.

The strips were too narrow to be suitable for separate homesteads or farms, and could best be improved and used in connection with the homesteads and farms which they adjoined. To meet this condition of affairs, Congress passed an act (Act March 3, 1909, 35 Stats. at Large, 779) providing for the sale of the lots into which the strips were subdivided, at a price and under regulations prescribed by the Secretary of the Interior, but with a proviso that any landowner or entryman whose land adjoined any lot should have a preferred right to purchase the one-half of the lot which abutted on his land. The proviso reads:

"Provided, that any entryman or owner of such entered or patented tract shall have a preferred right to buy one-half of all such lots as abut on lands held under his entry or owned by him within six months after the time when the said Secretary shall fix the price of such tracts, and this preferred right shall not prevent such entryman or owner from buying all of any such abutting lots as may remain unsold at the expiration of said six months."

Pursuant to the act the Secretary of the Interior, through the Commissioner of the Land Office, fixed the price at which the lots would be sold by the government and promulgated regulations for their sale. These regulations however, instead of providing for a preferred right to each landowner to purchase one-half of any lot abutting upon his land, as the act prescribed, declared that literal compliance with the act in this particular was impossible and that preference would be given to those owners whose lands adjoined any particular lot who were best entitled to purchase under the special facts of each case. The regulations also provided that any landowner might claim a preferred right to purchase, not merely a half, but all, of any lot which adjoined his land, and that "if more than one application be made for the same tract by parties separately claiming preference of purchase, such right will be awarded to the applicant most equitably entitled thereto under all the facts and circumstances of the particular case."

Following the promulgation of these regulations, the plaintiff Jennie M. Hodge made application within the prescribed six months to purchase as a preferred purchaser the east half of lots 4 and 17 abutting on her land on the west, and the defendant Cora M. McCall made a similar application to purchase all of the same lots as abutting on her lands on the east. The Land Department decided that the defendant was more equitably entitled to purchase the lots than the plaintiff, rejected the application of the latter, and approved the application of the former for the whole of the lots. Upon appeal to the Secretary of the Interior, this ruling was affirmed, and patent issued to the defendant for the whole of the lots accordingly. Thereupon the plaintiff brought the present action against the defendant, alleging that upon the foregoing facts the plaintiff was legally entitled to purchase the east half of the lots in preference to the defendant, and that through mistake of law on the part of the officials of the Interior Department her right had been denied and a patent for the whole of the lots issued to the defendant. The complaint asked for judgment, declaring that the defendant held the east half of the lots in trust for the plaintiff, and directing that the defendant convey it to her. Judgment went for the defendant in the court below, and the plaintiff appeals.

[1] The rule is well established that if,

through a mistake of law on the part of the officials of the Department of the Interior, a patent to land to which one person is entitled under the public land laws erroneously issues to another, the latter will be held by the courts to hold the legal title received from the government in trust for him who should have received it. Sanders v. Dutcher, 168 Cal. 353, 143 Pac. 599. It is clear also that if there was any mistake on the part of the department officials in rejecting the application of the plaintiff, such mistake was a mistake of law, consisting in the belief of the officials that upon the facts, which are not in dispute, she did not have a preferred right to purchase. The question in the case therefore resolves itself into one as to whether or not the plaintiff had such preferred right.

[2, 3] This question must be determined by the statute and not by the regulations of the department. It is the rule that the function of department regulations is to carry out the purpose of the statute for whose administration they are adopted and that they must be reasonable and appropriate for this purpose and cannot either enlarge or impair a right given by the statute. U. S. v. United Copper Co., 196 U. S. 207, 25 Sup. Ct. 222, 49 L. Ed. 449; U. S. v. George, 228 U. S. 14, 33 Sup. Ct. 412, 57 L. Ed. 712; Anchor v. Howe (C. C.) 50 Fed. 366. If the plaintiff in this case was given by the statute a preferred right to purchase, it is wholly immaterial that the regulations purport to deny her that right. The only bearing which the regulations can have on the question is in connection with the construction to be given the statute. If its meaning be doubtful, then the construction put upon it in actual administration by the officers intrusted with that administration should be given great weight by the courts in determining its true meaning. But if its meaning be not doubtful, and the regulations are in conflict with that meaning, they are simply void. If this be not true, it is within the power of the department officials to override and annul an act of Congress.

[4, 5] As to the meaning of the statute, we do not see how there can be any reasonable question. The proviso under which the plaintiff claims, to quote again the pertinent portion of it, reads:

"Provided that any entryman or owner of such entered or patented tract shall have a preferred right to buy one-half of all such lots as abut on lands held under his entry or owned by him."

This language seems perfectly plain, and the carrying of it out in connection with such lots as the lot 4 involved in this case would seem to present no difficulty whatever. The only difficulty in carrying it out would seem to arise in connection with such lots as lot 17 which abut on one side on the lands of more than one owner. If the statute be read with the utmost literalness, it would seem to give to each of such owners the right to purchase the whole of that half of the lot which is on their side of the center line dividing the lot longitudinally. In other words, two men would seem to be given the preferred right to purchase the same thing, a manifest impossibility. But even if this difficulty exists in such cases, that fact would not justify the annulment of the statute in cases such as lot 4, where it does not exist. The statute certainly must be given effect as far as possible, and the fact that it may not be possible to give it effect in one class of cases is no reason for not giving it effect in other cases where it is possible. As to lot 4, then, we do not see how there can be any serious question but that the plaintiff had the preferred right to purchase, and, as a result, has a right to the relief which she now seeks.

It remains to consider the case as to lot 17. Here there is the difficulty mentioned. That difficulty, however, arises only by construing the statute with the utmost literalness. But it should not be so construed. It should be construed in the light of the situation which it was enacted to meet and the purpose which it seeks to accomplish. So construed, we have no doubt as to its meaning. The situation was one wherein lands which had come into private ownership were separated by strips of public lands too narrow to be desirable as separate holdings, and which could best be used and improved in connection with the holdings on each side. The thing which the statute manifestly sought to accomplish in this situation was to provide that the strips should be divided equally between the landowners on each side, provided they cared to purchase them. There is no difficulty whatever in accomplishing this purpose. If a lot extends beyond the boundary of one owner so as to abut on the same side on the land of another, then each of such owners would have the right to purchase the portion of their half of the strip which abuts on his land. It is perfectly plain that it was a division of the strips between the adjoining landowners in just this manner, in case they desired to purchase, which the statute sought to accomplish. The claimed impossibility of carrying out the statute arises only from an ignoring of this purpose and a construing of the statute with extreme literalness to provide the absurd thing of giving to each of two or more parties the preferred right to purchase the same land. This is not, in our judgment, a rational construction of the statute. It should be construed to mean that each landowner has the preferred right to purchase the half of the strip on his side which is in front of or abuts upon his land. With the statute so construed, the plaintiff here had the preferred right to purchase, not all of the east half of lot 17, but that portion of it which abuts upon her land. As to that portion of lot 17, as well as to the east

half of lot 4, she is entitled to the relief which she seeks.

The facts in the case all appear in findings, so that, while the judgment denying the plaintiff relief must be reversed, there is no necessity for a new trial.

Judgment reversed, with instructions to the lower court to enter judgment for the plaintiff in accordance with this opinion.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

185 Cal. 342

LOS ANGELES LIME CO. v. WITHERS et al. (two cases). (L. A. 6046.)

(Supreme Court of California. March 22, 1921.)

1. Municipal corporations ⊂=346—Sureties on bonds taken out in name of contractor's son not liable to materialmen.

Where street contractor's bonds under street improvement act of 1913 were executed in the name of the contractor's son instead of the contractor, sureties were not liable to materialmen.

2. Municipal corporations ⊂=348—Materialmen suing on street contractor's bond must prove valid statutory bond.

Materialmen suing on street contractor's bond under street improvement act of 1913 must prove the execution of a valid statutory bond.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Actions by the Los Angeles Lime Company against H. C. Withers, Martha McLain, and Katherine Ludwig, and against H. C. Withers, James M. Wadsworth, and John Hayes. Judgment for defendants other than H. C. Withers, and plaintiff appeals. Affirmed.

G. C. De Garmo, of Los Angeles, for appellant.

Albert J. Sherer, Robert Young, and Clarence J. Walker, all of Los Angeles, for respondents.

PER CURIAM. The plaintiff, Los Angeles Lime Company, brought two actions to recover on contractor's bonds for materials furnished and used on street grading contracts, alleged to have been executed by one H. C. Withers and the sureties named, under the street improvement act of 1913 (St. 1913, p. 954). In each case the materials were furnished to H. C. Withers. The contracts were with the city of Los Angeles and were executed in the name of H. O. Withers, as contractor, and the statutory bonds sued on here were executed in the name of H. O. Withers as principal, with defendants Martha McLain and Katherine Ludwig as sureties in one instance and defendants James M. Wadsworth and John Hayes as sureties in the other, but suit is brought upon them naming H. C. Withers as principal.

The name of H. O. Withers was signed to both contracts and both bonds by H. C. Withers. It does not appear from either the pleadings or the findings of the court that this was done with the knowledge or consent of H. O. Withers, and the sureties deny in their answers, and it is so found by the court, that they, or any of them, knew that H. O. Withers was not the real party in interest, and it is alleged and found that they signed as sureties in the belief that H. O. Withers was the actual principal and real party in interest on both the contracts and the bond. This finding is sufficiently sustained by the evidence.

In reality, H. C. Withers was the real party in interest, and executed these instruments and prosecuted the work under the contracts for his own sole benefit as is alleged in the plaintiff's pleadings and found by the court. H. O. Withers is his son, and was employed by the father on these street contracts, but had no other interest therein, and was not made a party to the actions. H. C. Withers used his name for his own personal reasons.

[1] We are unable to see on what theory these sureties can be held liable on a bond which they never entered into and for a principal for whom they never assumed liability. Surely, a surety has the right to choose the principal for whose obligations he becomes liable, and it is no answer to say that some undisclosed party to the contract may be a safer risk than the ostensible one.

The sureties here, for reasons of their own, may have been willing to assume responsibilities for the son when they would not for the father. There is some evidence in the record that H. O. Withers had authorized his father to use his name in executing these contracts, but as pointed out, no such authorization is pleaded or found by the trial court, and no attempt was made by the plaintiff to make him a party defendant; the father, H. C. Withers, being named as principal in both actions.

On the record here shown the sureties would be without recourse against their ostensible principal if judgment was given against them. In short, the bonds sued upon, as alleged and proven, are not the contracts executed by the defendant sureties.

[2] It is entirely immaterial in this connection that statutory bond under the street improvement acts is for the benefit of all persons furnishing materials and supplies for use on the improvement, and the cases

of Williams v. Tingey, 26 Cal. App. 574, 147 Pac. 584, and Hub Hardware Co. v. Ætna, etc., Co., 178 Cal. 264, 173 Pac. 81, have no bearing under the circumstances of this case. There must be in the first instance a valid statutory bond imposing this liability on the sureties before such a result can follow. It devolves on a materialman seeking to recover on such a liability to show such a bond. In these cases the plaintiff materialman has failed to show the bonds alleged in the complaint. To the contrary, it has shown that its only claim against the sureties here is based on bonds given by them for a different principal, without any knowledge that there was any other principal or real party in interest in so far as the street improvement contract was concerned.

The determination of the trial court under its findings was correct. We are not inclined to regard the technical objections made by the respondents to the consideration of this appeal as meritorious; but our position upon this matter is of no consequence to the respondents in view of our determination that the judgment should be affirmed.

The judgment is affirmed.

ANGELLOTTI, C. J., and SLOANE, OLNEY, SHAW, WILBUR, LAWLOR, and LENNON, JJ., concur.

185 Cal. 375

In re GARTENLAUB'S ESTATE.

GARTENLAUB v. UNION TRUST CO. OF SAN FRANCISCO et al.

(S. F. 9240.)

(Supreme Court of California. March 28, 1921, as Modified April 27, 1921, by Order Denying Rehearing.)

1. Life estates ⇐15(2)—Beneficiary of life interest held entitled to dividends from profits arising from sale of land by corporation.

Where corporation was maintained and conducted for the sole purpose of selling a tract of land in parcels at a profit and dividing the proceeds as dividends among its stockholders, life beneficiary under trust created by deceased stockholder giving such beneficiary a share "of the entire net income, revenue, and profit of every kind arising from said estate" was entitled to share in the profits realized from the sale of such parcels, but remainderman was entitled to the value of the corporate stock on the death of the decedent.

2. Life estates ⇐15(2)—Remainderman entitled to value of stock as of date of creation of trust.

Where corporate stock forms a part of a trust estate created by will, the income of which is to be paid to one for life with remainder to another, the remainderman is entitled to the value of the stock as of the date of the creation of the trust—that is, the testator's death—and any accumulations beyond that date are distributable as profits.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Abraham Gartenlaub, otherwise known as A. Gartenlaub, deceased. From an order settling the second annual account of Union Trust Company of San Francisco, trustee, and apportioning certain funds between Sarah Fox and others, Alice G. B. Gartenlaub appeals. Reversed.

Garret W. McEnerney, of San Francisco, for appellant.

Norman A. Eisner, Heller, Powers & Ehrman, and Samuel S. Stevens, all of San Francisco, for respondent.

SLOANE, J. This is an appeal by a beneficiary of a life interest under a testamentary trust from an order of the superior court settling the second annual account of the trustee and apportioning certain funds in the hands of the trustee between the interests created by the trust.

The entire residue of the estate of the testator, appraised at over $400,000, and consisting of real and personal property, stocks, bonds, and securities of various kinds, was distributed to the trustee under the terms of the will. It was directed that the entire trust property be sold and converted into certain interest-bearing securities. It was also directed that the trustee pay to the widow of said decedent, the appellant here, monthly for the remainder of her life, three-fourths "of the entire net income, revenue, and profit of every kind arising from said estate in said month in any way whatever," and the remaining one-fourth to a sister of decedent.

Part of the property of this trust which came into the hands of the trustee under the decree of distribution consisted of five hundred shares of the capital stock of the F. & K. Land Company, a California corporation. After the decree of distribution certain dividends were declared on this stock, and the estate's proportion thereof, aggregating $4,500, was paid to the trustee. These dividends were declared wholly from moneys derived from sales of a part of a tract of land belonging to the corporation, which sales were made after the decree of distribution. How these dividends should be apportioned between the life beneficiary and the remainder interests is the question in dispute.

While the purposes embraced in the articles of incorporation of this company authorize a general investment business, the only

property it ever acquired was this tract of land, consisting of 1,920 acres in Kern county, Cal., purchased for $9,792, at the rate of $5.10 per acre, and the only business it ever engaged in was the placing of this land upon the market and from time to time selling portions of it.

The land was prospective oil land and was clearly bought and held on a speculation. No attempt by the corporation was ever made to develop the property, or in any way derive a profit from it, other than by sale. Of this tract 450 acres were transferred to two of the seven stockholders for their two-sevenths of the corporate stock, which was then distributed between the remaining five stockholders. The property advanced rapidly in value, and prior to the death of the decedent 600 acres of the remaining land had been sold for $232,750, one-fifth of which had been distributed to decedent in dividends.

At the time, therefore, of the distribution to the trustee of these 500 shares, being one-fifth of the corporate stock, the assets of the corporation, upon which the value of the stock rested, consisted of the remaining 870 acres of this land. Although these 500 shares of stock were only appraised at $2,000 in the inventory of the estate, it is apparent from the figures shown by these various sales that the shares had an immensely greater value than indicated by this appraisement.

In any event, it is fairly obvious that at the time of the death of the testator, June 1, 1914, the corpus of the estate passing to the trustees, as represented by these shares, was the stock with its fair value as based on the remaining assets of the corporation.

The sole question before us is as to the relation of the dividends from the subsequent sales thereafter to be declared by the corporation and paid to the trustee to "income, revenue, and profit" upon this corporate stock. The trust under which these shares were distributed to the trustee directed that "as soon as may be" after the death of decedent the trustee shall "sell and convert into money" said estate and property, except such portion thereof as already consisted of interest-bearing securities, and invest the proceeds in certain enumerated classes of bonds and mortgages.

Such sale has not been made as to this stock. The trustee doubtless considered the investment in its present form more advantageous to the estate as a whole than it would be to immediately convert the stock into cash and invest the proceeds in the class of securities prescribed under the trust.

Under such circumstances the duty of a court of equity dealing with the administration of this trust fund is to determine in the light of all the peculiar facts, and the respective interests of the life beneficiary and the remaindermen, what is a fair apportionment of the proceeds of these dividends resulting from land sales, and which represent almost in their entirety a clear gain of some sort on the original investment, whether considered as stock dividends or income profits.

We do not need to concern ourselves as to how the dividends accruing and paid in testator's lifetime were considered or applied by him. At his death he was the owner of 500 shares, being one-fifth of the capital stock of the corporation. The value of the total stock was represented by the remaining 870 acres of land, the only asset of the corporation. These 500 shares on the death of the testator by the terms of his will, became part of the trust estate. Irrespective of what they originally cost or what dividends had previously been declared on them, they added to the capital fund of the estate just what they were worth at that date. Had the actual conversion into interest-bearing securities as directed by the will been made at that time, the securities so obtained would have become part of the residuary capital, and three-fourths of the interest therefrom would have been payable to the appellant as a life beneficiary.

As already indicated, this asset of the trust estate was not converted, but still remains in the hands of the trustee in its original form, and there has been received thereon in dividends from the corporation the $4,500 referred to. These dividends are part of the proceeds of two sales of land made by the corporation from the remaining acreage, one on December 12, 1916, of 80 acres at $1,500 per acre, and the other on March 19, 1917, of 200 acres at $1,500 per acre. The dividends were from the cash payments on the sales and interest on deferred payments. The remaining payments are owing to the corporation in periodical interest-bearing installments.

Appellant contends that the entire dividend payments upon this stock above the original investment by the testator should be treated as profits in the nature of income, and be paid to the life beneficiary.

Respondents insist that the money from which these dividends are declared is in no sense income or profits from the business in which the corporation is engaged, but the natural increment of the capital fund, and should be added to the permanent fund of the trust.

The lower court held with respondents and only allowed for distribution to the life beneficiaries such portion of the dividends as were derived from interest on the deferred payments owing to the corporation from the land sales, aggregating $832.

No subject has been more prolific of controversy or productive of more divergent judicial opinion than that of the distribution of revenues of trust property between the parties entitled to the income and the corpus of the estate. Able counsel on both sides of

this controversy have been very diligent in collecting and presenting these authorities, and their number is such that it will not be practicable to attempt to review them in detail. The apparent conflicts in the decisions can be largely reconciled, however, by taking into account the great variety of circumstances out of which they arose.

In this case, it is stipulated between the parties:

That, notwithstanding it possessed general powers to engage in land investments, "the corporation has never done any business from the time of its organization except to sell from time to time portions of the land originally conveyed to it as a consideration for its stock, and divide among its stockholders the proceeds of such sale. It has never had any assets except said land and the proceeds of sales of the same. It has never bought any additional land or dealt in any other commodity or done any other business, nor has the corporation at any time developed any of the land, worked the same, or taken any products therefrom, or raised or produced any commodity thereon. It has never received any income, revenue, or profit from any source whatever except the proceeds of sales of its lands."

In other words, the sole purpose and business of this corporation has been to market this tract of land and to secure a profit to its stockholders by obtaining a price from it in advance of what it cost them. If the money obtained through this increase in value cannot be considered and divided as profits of the business in which the corporation is engaged, then there can be no profits for the stockholders. The distinction seems clear between this kind of corporate business, and one where the corporation acquires and owns land for the purpose of farming it, or leasing it or developing its mineral deposits, or selling timber from it. In such cases the stockholders are looking to the income thus produced for their profits, and any increase in the market value of the land itself is an increase in the value of the capital investment. Under the conditions first stated the dividends from the increased values would go to the life tenant, under the latter to the remainderman.

Respondents cite the case of Miller v. Payne, 150 Wis. 354, 136 N. W. 811, as being closely in point with the case before us. If we read that decision aright, it recognizes the distinction just stated. In the course of the opinion it is said:

"Any dividend derived from a mere enhancement of the value of assets representing capital from sources other than the accumulation of earnings belongs to the remainderman, and not to the life tenant. It represents corpus, not income"—citing Kalbach v. Clark, 133 Iowa, 215, 110 N. W. 599, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647; Holbrook v. Holbrook, 74 N. H. 201, 66 Atl. 124, 12 L. R. A. (N. S.) 768; Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; Outcalt v. Appleby, 36 N. J. Eq. 73; Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45; Eisner's Estate, 175 Pa. 143, 34 Atl. 577.

"To this rule there is a well-known exception in the case of a corporation engaged in buying and selling real estate at a profit; and if the St. Paul Avenue Improvement Company could be considered a trading corporation in real estate within the meaning of the exception to the rule stated, the profits accruing to the corporation, whether derived from an enhancement of value of real estate, or from rents and profits in excess of cost and maintenance, would be considered income and belong to the life tenant."

[1] To bring the F. & K. Land Company of the instant case under this exception it, of course, must appear that it is "a corporation engaged in buying and selling real estate at a profit." This would seem to be sufficiently conceded by the terms of the stipulation hereinbefore quoted that it has not done any business except to sell from this tract of land and divide the proceeds of the sales among its stockholders, and that it never has received any income, revenue, or profit from any source except the proceeds of these sales. In other words, this corporation has been maintained and conducted for the sole purpose of managing and selling this land in parcels at a profit, and dividing the proceeds among its stockholders. The only purpose of its existence has been to realize a profit from the sale of these lands. Under its articles of incorporation it is authorized to do a general investment and trading business. It practically confined its activities to this one venture, which was clearly that of handling this tract of land as a commodity and selling it at an advanced price for the purpose of securing a profit for its stockholders.

We find a very striking analogy between this case and that of the Appeal of Merchants' Exchange Fund Association, referred to by both appellant and respondents here as the Oliver Case, 136 Pa. 43, 20 Atl. 527, 9 L. R. A. 421, 20 Am. St. Rep. 894. The closeness of the parallel appears from the syllabus given in the Atlantic Reporter as cited which is as follows:

"Testator left his residuary estate to trustees to pay the net income therefrom to his daughter during her life, and, after her death, the principal to a charitable association. Part of the estate consisted of shares in a land company, held by testator. The company was unincorporated, but was organized by a contract entered into by its members, which provided that its business should be to buy and sell land, and should be carried on by trustees in their own names; that the interest of each member should be measured by his shares of stock, which he could sell and transfer without consulting with his associates, and without impairing the power of the trustees, or the existence of the company; that the stockholders should select the trustees to manage the business, and should be entitled to a distributive share in

the profits. After testator's death, the trustees sold part of the land belonging to the company, and declared a dividend of the profits thereon. The increased price of the land was due to the discovery of copper on adjacent lands after testator's death. Held, that the dividend was personal estate representing income, and that, having accrued after testator's death, it went to his daughter."

The court in its opinion says:

"The object in buying was not to mine or operate in any other manner, but to sell again so as to make gain by the purchase and sale of land; and the articles provided for the division of the profits made by such purchase and sale among the stockholders. The interest of each member was therefore an interest in the profits made. He had no title to the land bought by the trustees for the company, as a tenant in common or otherwise, and could neither convey nor incumber it. His interest in it was personal estate and the extent of that interest was shown by his certificates of stock. * * * The trustees under his will succeed him as holders of his shares, and their interest as such holders is neither greater nor less than his interest was while he was living. The company was not dissolved by Oliver's death and has not yet been dissolved. It has done but little business for several years, but has paid the taxes on its lands and kept up its own organization, and still holds undisposed of nearly 600 acres in the names of its trustees. * * * The dividend made by the company out of the proceeds of the 40 acres [sold after the testator's death] has the same character, and is governed by the same rules as though it had been made in his lifetime. It represents part of the difference between the cost of the land sold, including taxes and expenses and the price received for it. That difference is the profit made by means of the purchase and sale of the land which it is the duty of the trustees to divide among the stockholders. It is clear, therefore, that this dividend is personal estate, and represents gain or profit made in the proper business of the land company, that of buying land for the purposes of sale, and selling it with a view to make gain for the stockholders. The will directs the payment of the net income from his estate, real and personal, to his daughter, and as this dividend represents income it goes to the daughter, and not to the remainderman. The shares are part of the residuary estate and belong to appellant. The profit accruing from the sale of lands is income from the investment in the stock of the land company, and, if made since the death of Oliver, is not to be distinguished from income derived from any other source."

Respondents seek a distinction from the present case in the fact that in the Oliver Case the company bought as well as sold the land. This distinction, if important, is more apparent than real in this instance. Here the land was purchased for the purpose of sale by the incorporators who organized the corporation with the object of its taking over the land and managing and marketing it; and, as in the Oliver Case, "the object * * * was not to mine or operate in any other manner, but to sell again so as to make gain by the purchase and sale of the land."

We can see no force in the argument that the handling of this one tract of land was the only business the F. & K. Land Company ever engaged in, as affecting its status as a trading corporation. The activities of a mercantile corporation might be confined to handling a single stock of goods but, if its object was to sell the goods at retail and divide the profits among its stockholders, it would be dealing in these goods as a commodity, and its net receipts from such sales over and above the cost thereof would constitute profits of the business. Taylor on Private Corp. (5th Ed.) p. 786; Clark & Marshall, Priv. Corp. (2d Ed.) p. 1621; Fletcher's Enc. Law of Corp. vol. 6, § 3721, and citations.

The life beneficiaries here are entitled to a liberal construction of the terms of this trust in their favor under the broad provision thereof that they are to receive the net income, revenues, and profit of every kind arising from said estate in any way whatever.

While we are satisfied that the gain from this investment through increase in its selling values is to be considered as income or profits, it is equally apparent that, in the division of the proceeds of the residue of the lands which constituted the corporate assets at the inception of the trust, the value of the stock as of the date it came into the trust estate must be conserved for the remainderman. It is just as evident that the distribution as profit of all the dividends from sales of the remaining lands would destroy the value of the capital stock as that the distribution of all such dividends to the capital stock would cut off all income.

[2] The doctrine generally adopted by the courts of America, and recognized by this court in Estate of Duffill, 183 Pac. 337, is that, where corporate stock forms a part of a trust estate, the income of which is to be paid to one for life with remainder to another, what the remainderman is entitled to is the value of the stock as of the date of the creation of the trust—that is, the testator's death. Any accumulations beyond that date are distributable as profits. Estate of Duffill, supra; Appeal of Boyer, 224 Pa. 144, 73 Atl. 320; Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237; Pritchitt v. Nashville Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856; In re Osborne, 209 N. Y. 450, 457, 103 N. E. 723, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298; In re Stokes' Estate, 240 Pa. 277, 87 Atl. 971; In re Quay Estate, 253 Pa. 80, 97 Atl. 1029; In re Schaefer, 178 App. Div. 117, 165 N. Y. Supp. 19, 22.

In Duffill's Estate, supra, the court says:

"In such a case as this the court will ascertain whether the giving of the stock dividend

or the money dividend to the life tenant reduces the value of the corpus of the estate as it existed at the time of the death of the testator. * * * The intrinsic value as shown by the books of the corporation (and in this case by the stipulation) is to be taken into consideration. This establishes that which the remainderman is entitled to have preserved for ultimate distribution to him."

No evidence appears in the record in this case as to the value of this stock other than the statement that it was appraised at some stage of the probate proceedings at $2,000, but in view of the fact that on June 11, 1914, at the time of testator's death, the corporation held undisposed of 870 acres of this land, and that in April, 1912, two years prior thereto, 280 acres of the land had been sold at $875 per acre, and that a year and a half after the testator's death 80 acres were sold at $1,500 per acre, and a few months later 200 acres were sold at the same price per acre, equity will hardly permit such appraisement to stand as the basis of valuation in this settlement.

It is not for this court to fix such valuation, but by way of a tentative estimate it may conservatively be conjectured that at the time this stock passed into the trust estate the remaining lands of the corporation on a basis of the selling price shortly before and after had a market value somewhere between the sale prices of the earlier and later dates. The value of this land furnishes the basis for arriving at an estimate of the value of the stock, as an asset of the trust.

In what way can this value, be it more or less than the speculative figures given, be conserved to the capital fund of the trust, and at the same time meet the requirements of the will that the entire net income, revenue, and profits be paid to the life beneficiaries?

As the only value of the stock is based upon the value of the land, the necessary computations can be made in terms of price per acre of the land. Assuming, for illustration only, that the land was worth $1,000 per acre at the time the trust estate vested, every acre since sold at the $1,500 rate represents an advance of $500, or one-third of the total. So long as this ratio exists between the basic price representing the stock interest of the trust estate and the selling price, whatever dividends are declared should be divided in that proportion. If other portions of the tract are sold at a greater or less advance in price over the fixed value due the corpus of the trust estate, the proportion of profits to the life interests will vary accordingly.

The dividends from these sales, of course, represent both principal and interest derived from the sale of land, less the operating costs and liabilities of the corporation, but there is no reason why this fact should alter the ratio of the division.

The order appealed from is reversed, with directions to the probate court to ascertain and fix the value of the stock of the F. & K. Land Company belonging to the trust estate as of date June 1, 1914, and to apportion respectively between the remainder interest and the life beneficiaries any dividends arising from subsequent sales by the corporation, on the basis of the ratio between the value of the land at date June 1, 1914, and the advanced price at which such sales have been and may be made.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

185 Cal. 336

TOMBOY GOLD & COPPER CO. v. MARKS et al. (L. A. 6462.)

(Supreme Court of California. March 21, 1921.)

1. Appeal and error ⊂⊃931(1)—Findings liberally construed in support of judgment.

The finding of a trial court must be liberally construed in support of the judgment given.

2. Sales ⊂⊃153, 391(9)—Tender of goods unnecessary on refusal to go on with contract; on buyer's default, seller can retain payment made.

Where, day after agreement to purchase machine from defendant, plaintiff definitely and finally refused to go on with the contract and demanded back a payment made, defendant was not called upon to make any tender of the machine in the absence of a retraction of the refusal in order to avoid a default on his part in the matter, and could retain the payment made.

3. Sales ⊂⊃391(9)—No recovery of money paid by vendee on refusal to accept property.

In the absence of a mutual rescission of a contract of sale of a machine, there can be no recovery of a payment made by the vendee who without lawful right refuses to go on with his contract.

4. Sales ⊂⊃92—Subsequent sale by vendor immaterial on question of consent to a rescission.

Where plaintiff purchased machine and made down payment, and then, without lawful right, refused to go on with the contract, a sale of the machine by the vendor to a third person within a month after the repudiation of the contract by plaintiff cannot be taken as a consent to rescission on the part of the vendor.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Tomboy Gold & Copper Company against D. O. Marks and another. Judgment for defendants, and plaintiff appeals. Affirmed.

L. L. Burns and Hocker & Austin, of Los Angeles, for appellant.

Wm. L. Jarrott and James S. Jarrott, both of Los Angeles, for respondents.

ANGELLOTTI, C. J. This is an action for $500 alleged to have been had and received by defendants for the use of plaintiff. Judgment went for defendants, and plaintiff appeals upon the judgment roll alone. The claim is that the findings of the trial court do not support the judgment, and that upon such findings judgment should have been given for the plaintiff.

As to the defendant D. O. Marks, referred to in the answer as the president of defendant corporation, it is clear that the findings fully support the judgment in his favor.

As to plaintiff and defendant corporation, the findings are, in accord with affirmative allegations of defendants' answer, substantially as follows: On December 12, 1916, plaintiff agreed with defendant corporation to purchase from the latter a milling machine known as the Marks pulverizer for $1,625, paying to the latter $500 in cash on account thereof, and agreeing to pay the balance of $1,125 on the delivery of the machine, which delivery was to be made on or before December 18, 1916. The machine was one used for the reduction of rock. "Defendant corporation did not manufacture said machine, but assembled it from constituent parts, which, according to its practice, it purchased ordinarily, after the order for the machine. * * * Plaintiff selected the machine from a demonstrating machine at the place of business of the defendant corporation. At that time said defendant corporation had just one machine like the demonstrating machine, which it could assemble and deliver. Other deliveries could be secured by the defendant corporation from the manufacturer in not less than 60 days." On December 13, 1916, the day after the agreement for the sale, "the plaintiff, concluding that he (it) did not want the machine, believing that it would not serve plaintiff's purpose, so informed the defendant corporation, and demanded back said sum of $500. The defendant corporation declined to repay said sum. The defendant corporation within a month thereafter sold the machine for the same price that the plaintiff had agreed to pay."

[1, 2] It is a thoroughly well settled rule that the findings of a trial court must be liberally construed in support of the judgment given. So construed, we are satisfied that they must be held to mean, as is apparently conceded by counsel for both parties in their briefs, that the plaintiff absolutely refused to complete its purchase, and by its notice and demand on December 13, 1916, finally renounced and repudiated the contract. It was substantially alleged in the answer that on December 18, 1916, defendant corporation notified plaintiff that the machine was ready for delivery, and that plaintiff then refused to receive the same, but the court did not specifically find on this allegation. However, because of the construction that must be given to the findings made in view of the judgment, the absence of such a finding is immaterial. If on December 13th plaintiff definitely and finally refused to go on with the contract on its part, defendant corporation was not called upon to make any such tender, in the absence of a retraction of the refusal, in order to avoid a default on its part in the matter.

[3] The case then, as presented by the findings, is simply that of a vendee on a contract for the purchase of specific personal property, who, without lawful cause, finally refuses to go on with his contract by accepting the property and paying the balance of the purchase price, seeking to recover from the vendor, who is in no way in default, the money paid by him to such vendor on the contract for purchase, on the theory of an implied promise to repay the same. This is the exact situation, unless the mere fact that within a month after plaintiff's renunciation of the contract defendant corporation sold the personal property to another purchaser compels the conclusion that said defendant acquiesced in and agreed to plaintiff's attempted rescission, thereby accomplishing a rescission of the contract by mutual consent. In the latter event plaintiff would, of course, be entitled to be repaid the money it had paid on account.

In the absence of a mutual rescission there can be no recovery by the vendee under such circumstances. No rule is more firmly settled with relation to contracts for purchase, whether concerning real or personal property, than that to the effect that a vendee who without lawful right refuses to go on with his contract, cannot recover from a vendor not in default, who is ready and willing to proceed and fulfill all his obligations, all or any of the money that he had paid to the vendor in accord with the terms of the agreement. This rule has been uniformly applied in California. It was declared in both opinions in Glock v. Howard, 123 Cal. 1, 10, 19, 20, 55 Pac. 713, 716, 720 (43 L. R. A. 199, 69 Am. St. Rep. 17), the opinion of Mr. Justice Henshaw saying that in such a case the vendor, "still resting upon the contract, * * * may remain inactive, yet retain to his own use the moneys paid by the vendee, so that it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages," and the opinion of Mr. Justice Harrison declaring it to be the law of the state that "the vendee, who was himself in default in the payment of a portion of the money, could not against the will of the vendor repudiate the contract and recover the portion

already paid." Many cases might be cited in which this rule has been applied, but the rule is not disputed, and it is plain that plaintiff has no right of recovery here except upon the theory of mutual abandonment and rescission. Upon the facts of this case there is no other possible foundation for a right of recovery on the part of plaintiff.

[4] The single question presented, then, is whether the sale of the machine to another vendee by defendant corporation within a month after the final and definite repudiation of its contract by plaintiff must be taken as a consent to rescission on the part of defendant corporation. We think this question was squarely decided against the contention of plaintiff in Rayfield v. Van Meter, 120 Cal. 416, 52 Pac. 666. In that case the defendant, in an action to recover the property brought by the vendor against the vendee who refused payment and also refused to restore the property, sought by cross-complaint filed after plaintiff had obtained possession of the property, by process of claim and delivery, and had sold all of the same to others, to recover the money paid by him on the contract less such compensation to plaintiff for the use of the goods as justice might require. This relief was granted by the trial court, and the judgment was here reversed. It was held that the vendee, having without lawful justification repudiated any further obligation under the contract, by his acts "the vinculum juris arising from the contract was broken, and there was nothing which plaintiff needed to rescind." The court then, declaring that a buyer who, without lawful excuse, refuses to go forward with his contract is not entitled to recover back money paid on account thereof, and that the rule applies to agreements for sale of personalty as well as realty, said:

"It is immaterial that plaintiff sold the goods. In Ketchum v. Evertson, 13 Johns. 359, 7 Am. Dec. 384, an action for money paid on a contract for the conveyance of land, it was justly and forcibly remarked: 'To say that the subsequent sale of the land gives a right to the plaintiff to recover back the money paid on the contract would, in effect, be saying that the defendant could never sell it without subjecting himself to an action by the plaintiffs. Why should he not sell? The plaintiffs renounced the contract and peremptorily refused to fulfill it; it was vain, therefore, to keep the land for them. The plaintiffs cannot, by their own wrongful act, impose upon the defendant the necessity of retaining property which his exigencies may require him to sell. This would be most unreasonable and unjust, and is not sanctioned by any principle of law.' These views are equally appropriate to a case of sale of chattels."

The court then distinguished Miller v. Steen, 30 Cal. 402, 89 Am. Dec. 124, relied on by plaintiff, showed that section 1749, Civil Code, had no application under the circumstances, and also that no ground for relief in equity appeared. The decision was approved in Liver v. Mills, 155 Cal. 459, 463, 101 Pac. 299, 300, where it was substantially said that a distinct and unequivocal repudiation of his contract by the vendee relieves the vendor "from all obligation to perform on his part," and that, "in the face of a repudiation of the contract by respondent, *they were not bound to rescind, but were at liberty to treat the right of purchase as ended and to retake the property*," being entitled to such possession as the owners thereof. (Italics are ours.) The theory of the decision is that the vendor in such a case has the right, if he so elects, to regard the rights of the purchaser under the contract as ended solely by the purchaser's unlawful repudiation thereof, and that in so far as he is concerned there is nothing to rescind. He may treat such rights as ended solely by the default of the vendee, retaining the money paid him by the vendee thereunder. See Oursler v. Thacher, 152 Cal. 739, 93 Pac. 1007. In such a situation the mere subsequent sale of his own property by the vendor is, of course, entirely immaterial on the question of consent by him to a rescission.

The decision in Rayfield v. Van Meter, supra, is in accord with the rule generally prevailing in other states. See 27 Ruling Case Law, 624. The opinion in Sanders v. Brock, 230 Pa. 609, 79 Atl. 772, 35 L. R. A. (N. S.) 532, which, like this, was an action by the vendee in default for money paid on such a contract, the vendor having within a very short time resold the property for a larger sum than that fixed by the agreement, contains an exceedingly clear discussion of the principles applicable, entirely in line with our own decisions. We are satisfied that, in view of our own decisions it must be held that there was no such mutual rescission of the contract for purchase as would give to plaintiff, the sole party in default, the right to recover moneys paid under the contract.

It is, perhaps, needless to say that the question of actual detriment to the vendor by reason of the vendee's breach is in no way involved in this action. Entirely regardless of gain or loss to the vendor, the vendee has no right of recovery in view of his own repudiation of the contract. However one may feel as to the disposition of the vendor under such circumstances as are found to exist in this case, to insist on retaining all of the money paid by plaintiff, it is simply standing on its strict legal right.

The judgment of the superior court is affirmed.

We concur: SHAW, J.; OLNEY, J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

185 Cal. 458

In re RICCOMI'S ESTATE.

BARTOLOZZI v. MALLEGNI.

(Sac. 3104.)

(Supreme Court of California. April 1, 1921. Rehearing Denied April 28, 1921.)

1. Death ⟸18(1)—Action solely for benefit of heirs for pecuniary losses suffered by them.

The action for wrongful death authorized by Code Civ. Proc. § 377, is solely for benefit of the heirs, to compensate them for pecuniary loss suffered by them by reason of the death, the sum recoverable being the aggregate of their losses; and no substantial recovery being authorized on account of any heir who has not suffered pecuniary injury.

2. Executors and administrators ⟸51—Recovery for death not part of estate, but held in trust for heirs.

The money recovered in action under Code Civ. Proc. § 377, for wrongful death does not belong to decedent's estate, but where action is by his personal representative he acts solely as statutory trustee for benefit of the heirs, on account of whom recovery is had.

3. Death ⟸101—Distribution of recovery on basis of pecuniary loss of each heir.

Distribution among heirs of money paid to the personal representative of deceased in settlement of any claims of heirs on account of death of deceased must be on the basis of the pecuniary loss of each, and not on the basis of their rights under the succession statute with regard to property of decedent's estate.

4. Appearance ⟸19(1)—Gave court jurisdiction of parties, so that, it having jurisdiction of subject-matter, judgment was effective.

Though the proceeding was entitled in the matter of the estate of deceased, and was treated as a proceeding in probate, it being in substance one on behalf of an heir against a trustee for an accounting and recovery of money as to which a beneficial interest on behalf of the heir is alleged, the subject-matter of which the court had jurisdiction, appearance of the parties gave the court jurisdiction of the parties, so that its order or judgment is an effective adjudication between the parties.

In Bank.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Proceeding, entitled in the matter of the estate of Egisto Riccomi, deceased, instituted by Costanza Riccomi, for whom on her death Artomira Bartolozzi, her administratrix, was substituted as petitioner, against Maria Mallegni, formerly Maria Riccomi, individually and as administratrix of Egisto Riccomi, deceased. From an adverse order of judgment, the substituted petitioner appeals. Affirmed.

H. W. Zagoren, Geo. E. Foote, Downey, Pullen & Downey and Markham Johnson, all of Sacramento, for appellant.

Thos. H. Christiansen, of Sacramento, for respondent.

ANGELLOTTI, C. J. This is a proceeding instituted by Costanza Riccomi, mother of Egisto Riccomi, deceased, against the surviving wife of said Egisto Riccomi, deceased, both as administratrix of his estate and individually, to obtain one-half of $3,000 paid to the latter as such administratrix by the Pacific Gas & Electric Company in full settlement of any claims the "heirs" of Egisto Riccomi might have against said company on account of his death, which death it was claimed was caused by "the wrongful act or neglect" of said company. Admittedly the money came into the hands of the administratrix as the personal representative of the deceased, Egisto Riccomi, and as money recovered by such personal representative under the provisions of section 377, Code of Civil Procedure. Pending determination of the matter in the superior court, the mother died, and the administratrix of her estate was substituted as petitioner. The superior court concluded that fifteen-sixteenths of the money so received should go to defendant, as the surviving wife of Egisto Riccomi, and one-sixteenth to the mother's estate, and made its order or judgment accordingly. The petitioner appeals from this order, claiming that the mother was entitled to one-half.

The material facts, in addition to those we have already stated, are as follows: At the time of his death the deceased, Egisto Riccomi, was 45 years of age. Maria Riccomi, aged 26, was then, and for many years immediately preceding had been, his wife, living with him as such, and entirely dependent on him for her support and maintenance. The mother, Costanza Riccomi, was a resident of the kingdom of Italy, of the age of 75 years. She was not dependent on deceased for care, support, or maintenance, but for a few years prior to his death deceased had voluntarily sent her $30 per year. The wife and mother were the only heirs left by deceased.

The claim of appellant is that, in view of the language of section 377, Code of Civil Procedure, any amount recovered thereunder as damages for the death of a deceased person must be divided among those who constitute his lawful heirs under our statutes of succession, in the proportions provided by those statutes; in other words, that it must go exactly as his own property would pass under our succession statutes. The wife and mother being the only heirs of deceased, and each being entitled to succeed under our succession statutes to one-half of his property, it is claimed that this money should have been distributed in the same proportions, one-half to each. It is not claimed that the apportionment in fact made was erroneous if the statute authorizes an apportionment up-

on any other basis than that of dividing the money among those constituting the heirs of the deceased in the same proportions as it would be divided if it constituted part of the estate of the deceased.

Section 377, Code of Civil Procedure, is as follows:

"When the death of a person not being a minor is caused by the wrongful act or neglect of another his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just."

A review of the decisions in this state under this statutory provision makes it clear that the claim of appellant is based upon a complete misconception of the settled construction of the statute and its purpose and object.

[1, 2] It is settled that the action authorized by the section is one solely for the benefit of the heirs by which they may be compensated for the pecuniary loss suffered by them by reason of the loss of their relatives. The money recovered constitutes no part of the estate of deceased, and where the action is brought or the money recovered by the personal representative of the deceased, such personal representative is acting solely as a statutory trustee for the benefit of the heirs on account of whom the recovery is had. See Ruiz v. Santa Barbara, etc., Co., 164 Cal. 188, 191, 128 Pac. 330; Webster v. Norwegian M. Co., 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181. In this case the important thing to bear in mind is that the action "for damages" for the benefit of the "heirs" is one solely for the purpose of compensating them for the pecuniary loss suffered by them by reason of the death of the deceased. An examination of the decisions involving questions of the elements of damage to be considered in such cases demonstrates this. While there can be but one action brought or one recovery had, either by the personal representative of the deceased or the heirs (see Daubert v. Western Meat Co., 139 Cal. 480, 69 Pac. 297, 73 Pac. 244, 96 Am. St. Rep. 154), and while the recovery in such an action should be of a single "lump sum" for all (see Robinson et al. v. Western States, etc., Co., 194 Pac. 39), the total recovery to be had is the aggregate of the pecuniary loss of each of the heirs who has suffered a pecuniary loss by reason of the death of the deceased. As put in Robinson v. Western States, etc., Co., supra, this "lump sum" includes "of course, the damages to each of them." In Johnson v. Southern Pacific Co., 154 Cal. 285, 297, 97 Pac. 520, 526, an action by the surviving husband and the children of a deceased wife and mother, it was held that the trial court properly instructed the jury:

"That the husband was entitled to recover the value of the present and future services of the 'wife and companion,' and the children the value of the mother's 'nurture and instruction, moral and physical, and intellectual training'; that they 'must award such a lump sum for damages as will fully compensate the plaintiffs, both the husband and children, for the pecuniary value to them of the life of the wife and mother."

It is the pecuniary loss to an heir by reason of the death that is recoverable, and that only. See generally on this subject Simoneau v. Pacific Electric Railway Co., 159 Cal. 494, 505, 509, 115 Pac. 320. It follows, inevitably, that there can be no substantial recovery on account of any heir who has not suffered substantial pecuniary injury. This was in effect decided by this court in Burk v. Arcata, etc., R. R. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52, where the syllabi correctly state the questions decided as follows:

"In an action for a death brought by the adult collateral heirs of the deceased, the mere fact that they are such heirs does not tend to show pecuniary damage; and in the absence of other proof tending to show actual damages, or, at least, probable loss, resulting to them from the death, the jury should be instructed that their recovery must be limited to nominal damages."

"Mere speculative or conjectural possibilities of benefits to the parties complaining are not a proper basis for an estimate of damages resulting from a death."

[3] In the light afforded by the views expressed in our decisions, it is obvious that the distribution among "heirs" of damages recovered by the statutory trustee must be upon the basis of the pecuniary loss of each, rather than upon his rights under our succession statutes with regard to property constituting the estate left by the decedent. How perfectly absurd it would appear to be to hold that where the whole amount of a recovery is given solely on account of the pecuniary injury to the surviving wife, one-half thereof must go to a surviving father or mother or brother or sister of decedent who has suffered no pecuniary injury whatever. Yet such would be the effect of appellant's construction of the section. Her contention is based almost solely on the use of the word "heirs," and the meaning of that word as used in the law of this state. Appellant is undoubtedly right in her claim as to the meaning of the word "heirs." It denotes, as said in Redfield v. Oakland, etc., Co., 110 Cal. 277, 290, 42 Pac. 822, 825, all "those who are capable of inheriting from the deceased person" under our statutes of succession, or as said in Estate of Watts, 179 Cal. 20, 22, 175 Pac. 415, 416, "the persons who would by the statute succeed to the real

estate [or in California estate of any kind] in case of intestacy." But, as said in the Redfield Case, supra:

"The recovery is for the injury inflicted upon the plaintiffs personally, and not for injuries inflicted upon her [the deceased]; and the word 'heirs' in the statute is intended to *limit the right of recovery* to a class of persons who, because of their relation to the deceased, are supposed to be injured by her death." (Italics are ours.)

In other words, the plain design of the statute is to give solely to the members of a certain class the opportunity to recover damages for such pecuniary loss as they had suffered by reason of the death of the decedent, and to recompense, in so far as the law can do so, each of such class who has suffered pecuniary loss.

There is nothing in our statute compelling a different construction from that which, in our opinion, our decisions give to section 377, Code of Civil Procedure, as was the situation in Snedeker v. Snedeker, 164 N. Y. 58, 58 N. E. 4, relied on by appellant. The New York statute expressly provided that the amount collected in such an action "must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands after payment of all debts and expenses of administration." Manifestly this decision cannot assist in the construction of our statute. And we may well say with relation to decisions from other states relied on by counsel for appellant, as was said in Earley v. Pacific, etc., Ry. Co., 176 Cal. 79, 80, 167 Pac. 513 (L. R. A. 1918A, 997):

"It would not be without interest, but at the same time it is wholly unnecessary to follow these learned counsel in their analyses of the varying statutes and the decisions of the courts upon them. For when the last word shall have been said in such a consideration, the paramount fact will still remain that rights under our section 377 of the Code of Civil Procedure are to be defined, not by what other courts have said touching their own statutes, but from the meaning and intent of our own law derived from a reading of it."

It is interesting to note that our original statute relative to actions of this character (Stats. 1862, p. 448) contained a provision directing distribution of the proceeds of the action to "the widow and next of kin," "in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate," and that when it came to the enactment of the Codes the whole subject-matter was revised and the direction as to distribution entirely omitted.

[4] One word more with relation to the procedure adopted in this matter. The matter was apparently treated as a proceeding in probate, and is entitled "In the matter of the Estate of Egisto Riccomi, deceased." As we have seen, this money constituted no part of the estate of said deceased, and the proceeding is not one within the probate jurisdiction of the superior court. However, the proceeding was in substance one on behalf of an heir of the deceased against a trustee for an accounting and recovery of moneys as to which a beneficial interest on the part of such heir is alleged. It was one as to the subject-matter of which the superior court had full jurisdiction, and by virtue of their appearance the court had jurisdiction also of the parties, with the result that its order or judgment is an effective adjudication as between the parties. See Faxon v. All Persons, 166 Cal. 707, 711, 712, 137 Pac. 919, L. R. A. 1916B, 1209.

The judgment or order appealed from is affirmed.

We concur: SHAW, J.; OLNEY, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

(185 Cal. 307)

KAVANAUGH v. FRANKLIN FIRE INS. CO. OF PHILADELPHIA, PA. (L. A. 6479.)

(Supreme Court of California. March 15, 1921.)

1. Insurance ⟸328(5) — Buyer of property "sole and unconditional owner," within policy.

The buyer and not the seller of property was the "sole and unconditional owner," within the meaning of the term as used in a policy of fire insurance, providing the policy should be void, unless otherwise agreed in writing, if insured was not sole and unconditional owner.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Sole and Unconditional Ownership.]

2. Insurance ⟸377(1)—Fire insurer, which did not know of changed ownership, could not have waived condition of policy.

Where a fire insurance company knew nothing of the changed ownership of the insured premises, it cannot be said that it waived the condition of the policy that it should be void if the interest of insured should be other than unconditional and sole ownership.

3. Insurance ⟸392(1)—Fire insurer not estopped to set up invalidity of policy under clause relative to unconditional ownership.

Fire insurer, which issued policy providing it should be void, unless otherwise agreed in writing, if insured was not sole and unconditional owner, *held* not estopped to set up invalidity of the policy under such provision, where, immediately on ascertaining the fact that a mistake had been made, the company recovered the policy from its custodian and issued a new and valid policy, and did not collect the premium on the old policy from plaintiff insured, but collected the premium from the person properly insured under the new policy.

In Bank.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by John A. Kavanaugh against the Franklin Fire Insurance Company of Philadelphia, Pa. From a judgment for plaintiff, defendant appeals. Reversed.

W. W. Hindman, of Los Angeles, for appellant.

Allison & Dickson, of San Bernardino, for respondent.

WILBUR, J. Plaintiff brought this action to recover for a fire loss upon an insurance policy issued by the defendant corporation May 26, 1915, in San Bernardino. The policy was in the standard form required by our statute (Stats. 1909, p. 406, § 1), which statutory form contained the following provision:

"*Unless otherwise provided by agreement indorsed hereon* or added hereto, this entire policy shall be void * * * (b) if the interest of the insured be other than unconditional and sole ownership. * * *"

It is required that there shall be printed upon the back of such policy the following:

"Read this policy. * * * Policy is void, *unless otherwise agreed in writing*, if * * * (5) insured is not sole and unconditional owner."

Section 9 of the statute (page 411) provides:

"Clauses may be added to the standard form (a) covering property and risks not otherwise covered; * * * (d) waivers of any of the matters avoiding the policy or suspending the insurance. * * *"

And section 12, page 411, provides as follows:

"Any insurer, or the agent, countersigning or issuing a fire insurance policy covering * * * property in California varying from the * * * standard form of policy except as herein provided is guilty of a misdemeanor but any policy so issued shall notwithstanding be binding upon the company issuing the same."

On the trial it was stipulated: That plaintiff at the time the policy was written was in San Diego, and that he made no written representation to the company and no representation to the company of any kind, character, or nature regarding his title of the property. That prior to the issuance of the policy in question there was a policy that had been issued by N. Adair as the agent for this defendant company. That the policy was made payable to plaintiff and to the Santa Fé Building & Loan Association, mortgagee. That that policy was at the time of the issuance of the policy in suit in possession of the building association. That at the time the former policy expired N. Adair, as agent of the company, without any solicitation from the plaintiff in this case, but with his full approval and consent that a new policy be issued, issued the policy in question and delivered it to the Santa Fé Building & Loan Association, the policy of the defendant company. That at the time this policy was issued and delivered neither the defendant nor its agent, N. Adair, knew or had notice of the fact that plaintiff in this case had executed and delivered to one Marks an agreement of sale for the premises insured. After the making and executing of the policy, and on the 22d day of June, 1915, the agent of the defendant company, N. Adair, went out to the insured house to collect the premium on the policy of insurance that had been issued and delivered to the building association in the name of Kavanaugh and the building association, and inquired of the occupants of the house where Mr. Kavanaugh was. That he was informed by the wife of Mr. Marks that plaintiff had sold the property to Mr. Marks and had placed him in possession thereof, and that that was the first actual notice that he had of any change of title to this property, or anything that would affect the title of the property. On the same day, and immediately upon receiving such information, the agent of the defendant company went to the Santa Fé Building & Loan Association, and requested them to return the policy of insurance in this case, which was done, and that that policy was at once canceled by the agent of the defendant company, N. Adair. The plaintiff, however, did not give his consent to the cancellation of the policy, and no notice of cancellation was given him, as required by the terms of the policy, of an intended cancellation. He simply asked the building association for the policy, and they delivered it up to him, and he took it over to his office, and marked "Canceled" across the face, and sent it to the company. No notice of any kind was ever given by N. Adair, the agent of the company, to plaintiff of his intention to cancel it, until August, 1917, after the fire, which occurred December 29, 1916. That immediately after taking up the policy of insurance in question in this case, on the 22d of June, 1915, the defendant company, through its agent, N. Adair, issued another policy, being policy No. 2,741,852 and made it out in favor of A. L. Marks, with a loss payable clause to the Santa Fé Building & Loan Association, mortgagee. That that policy was delivered to the building and loan association at the time of its issuance. That after its issuance the building and loan association was paid off in full, and the policy was then delivered to Mr. Marks. After the fire occurred Mr. Marks made claim on the defendant for the loss, and the defendant settled with Mr. Marks for the loss, and refused to recognize the rights of the plaintiff in this case. No premium was ever paid on the policy in question. Marks paid the premium on the other policy issued to him.

As to the nonpayment of the premium, the plaintiff offered the following explanation,

stating that it would be substantiated by Mr. Marks, namely, that Mr. Marks had paid the premium; that Mr. Kavanaugh was in San Diego; and he relied upon that information, and no bill was sent to him, and he assumed it had been paid, having no information to the contrary; and it being proper and right Mr. Marks should pay it, Mr. Marks being indebted to Mr. Kavanaugh.

On July 31, 1914, the plaintiff and one Arthur L. Marks had entered into a written contract for the sale of the insured premises for the sum of $2,800. The vendee was immediately given possession of the premises and continued to keep up his payments upon the property, and at the time of the fire had paid approximately $1,100, and after the fire paid $1,285, and had received a deed from the plaintiff, and was at the time of the trial the owner of the property. With reference to the effecting of the insurance the plaintiff testified that—

"Mr. Marks agreed to pay the premium; that he had never been billed by the company or any of its agents for the premium on the policy; that Mr. N. Adair had been writing plaintiff's insurance for about ten years, and he was to write this policy for three years and deposit it with the Building and Loan and I would pay the premium. I don't think I saw a policy for ten years. I trusted him to be my agent for the insurance, and he deposited it with the Building and Loan."

Plaintiff testified that he received a letter from Mr. Adair, stating that he had written the policy; that when the property was sold it was with the understanding that plaintiff pay the premium and protect the building and loan association and that Mr. N. Adair would write the policy and deposit it with the building and loan association. He was questioned and answered as follows:

"Q. You told him to keep the property insured? A. Well, he just took it for granted.

"The Court: You mean insurance agents don't need any telling? A. He didn't seem to. When the policy of insurance expired, he would notify me and say he had deposited the policy with the Building and Loan, and I supposed he was protecting my interest.

"Q. (by Mr. Hindman): You expected him to protect your interest? A. Yes.

"Q. And did you have a conversation with him about protecting your interest? A. Only originally. When I bought the place there was a policy on it then, and he said that policy would continue, and I would pay my pro rata. That was more than ten years ago, and I don't think we ever had any conversation about protecting my interest after that. It was just a matter of course.

"Q. Did you tell him to issue the policy of insurance? A. I did not. He just issued them, and sent them, and sent me the bill. * * *

"Q. You say this course was kept up for 10 years? A. Yes; I think it was over 10 years. My impression is there were four policies issued; that is, with the one I took up in the first place."

The plaintiff recovered judgment for $350.09. The amount was arrived at by a somewhat Solomonic process. The defendant appeals, but makes no complaint concerning the amount of plaintiff's loss.

[1] The plaintiff was not the sole and unconditional owner of the property at the time the policy was issued. Sharman v. Continental Ins. Co., 167 Cal. 117, 138 Pac. 708, 52 L. R. A. (N. S.) 670. On the contrary, the vendee was the sole and unconditional owner, within the meaning of that term as used in the policy of insurance. McCollough v. Home Ins. Co., 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862. This seems to be the general rule in the United States. See note to Sharman v. Continental Ins. Co., supra, 52 L. R. A. (N. S.) 670, where it is said:

"As stated in note in 2 L. R. A. (N. S.) 512, it is held that one who is at the time of the issuance of a policy of fire insurance under contract to sell to another who has absolutely bound himself to purchase the property involved cannot recover in case of loss upon a policy providing that it shall be void if the interest of the insured (unless otherwise stated) be other than 'unconditional and sole ownership.'"

See, also, Turner v. Home Ins. Co., 195 Mo. App. 138, 189 S. W. 626; Livingstone v. Boston Ins. Co., 255 Pa. 1, 99 Atl. 212; Waller v. City of New York Ins. Co., 84 Or. 284, 164 Pac. 959, Ann. Cas. 1918C, 139; Globe & Rutgers Fire Ins. Co. v. Creekmore (Okl.) 171 Pac. 874. It follows that the policy sued upon was void ab initio, and that plaintiff can recover, if at all, only upon the theory of waiver or estoppel as to the ownership of the insured property.

Prior to the enactment of the law establishing the form of a fire insurance policy, this court held that a policy issued to a person other than a sole and unconditional owner was valid as to the insurable interest of the insured, where the policy was issued without inquiry as to the title, and without any misrepresentation or concealment by the insured, and was accepted by the insured where the premium was paid to and retained by the insurer, without offer of rescission after knowledge of the facts, notwithstanding a clause that, if the interest of the insured be other than unconditional and sole ownership, the policy should be void. Sharp v. Scottish Union, etc., 136 Cal. 542, 69 Pac. 253, 615. This was a step in advance of the rule stated in Allen v. Home Ins. Co., 133 Cal. 29, 65 Pac. 138, where it was held that the issuance of such a policy waived known facts inconsistent with the conditions of the policy, as pointed out in the dissent of Chief Justice Beatty in Sharp v. Scottish Union, etc., Co., supra, 136 Cal. 546, 69 Pac. 253, 615.

Respondent relies upon the case of Raulet v. N. W., etc., Ins. Co., 157 Cal. 213, 107 Pac. 292. There a widow, sole executrix and sole

devisee and legatee under the will of her deceased husband, insured the property in her own name as the sole and unconditional owner thereof. The house was destroyed by fire April 19, 1906, and thereafter, on January 8, 1907, the real estate was distributed to her. In considering the matter the court said:

"In the light of subsequent events it is clear that, if it could be said that technically she was not the sole and unconditional owner of the property because of her right to its temporary possession as executrix, she had the insurable interest in it, and no one else had any title to it, and defendant suffered no prejudice by her representation as to ownership. * * * The entire loss was sustained by plaintiff, and it seems to be a narrow view that would defeat the claim on the ground that within the contemplation of the policy she was not 'the sole and unconditional owner.' * * * In the case at bar there was no actual nor constructive fraud, no intentional misrepresentation nor concealment, no inquiry on the part of the insurance company; the plaintiff was really vested with the title, the entire loss was sustained by her, and it cannot be held that the policy was void by virtue of the sole and unconditional ownership clause."

It is apparent that the effect of this decision is that in substance and effect the widow was the "sole and unconditional owner of the insured premises." However, in that case, in discussing the question of waiver and estoppel as to a chattel mortgage upon the property, a case involving the sale and unconditional ownership clause is extensively quoted. Philadelphia Tool Co. v. British America Assurance Co., 132 Pa. 236, 19 Atl. 77, 19 Am. St. Rep. 596. It was held that the condition as to incumbrances was waived by the conduct of the defendant. It was there stated:

"There was no written application for the insurance, and, as we have seen, no actual fraud and no intentional misrepresentation by plaintiff. She was ignorant of this provision in the policy, which was secured by her agent, and no inquiry was made by the company as to the existence of any chattel mortgage.

"It must be presumed, ordinarily, that persons are familiar with the terms of written contracts to which they are parties, and in the absence of fraud they are justly bound by the provisions therein; but the rule should not be strictly applied to insurance policies. It is a matter almost of common knowledge that a very small percentage of policy holders are actually cognizant of the provisions of their policies, and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous—the one before us covering 13 pages of the transcript—and in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary. The insured usually confides implicitly in the agent securing the insurance, and it is only just and equitable that the company should be required to call specifically to the attention of the policy holder such provisions as the one before us. The courts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter, nor should they be slow to aid the confiding and innocent. The defendant should either have made inquiries in reference to the chattel mortgage, required a written application covering by question and answer all the material provisions of the policy, or have consulted the records in the recorder's office where it would have been apprised of the incumbrance. Considering the nature of the contract and the relation of the parties, there should be no difficulty in reaching the conclusion that this provision was waived; and it therefore constitutes no bar to recovery."

The appellant contends that these rules which have been evolved as a part of the law relating to insurance policies have no application to the situation in California, where the form of the policy is prescribed by statute and the insurance company is prohibited by penal enactment from issuing any other form of policy. While it is true that an insurance policy is a contract, it is recognized that, in the decisions bearing upon the responsibility of the insurance company, the policy has been treated more as a commodity than as a contract, and rules have been evolved which are not applicable to ordinary contracts. It is therefore considered that when an insurance company, without any inquiry as to the character of the ownership of the insured, issues a policy and receives a premium therefor, it is just to assume that the insurance company intended to cover whatever interest the insured had in the property, and that the insured, by accepting a policy and paying the premium, had the same understanding as to the legal effect of the policy. This conclusion is based somewhat upon the fact that insurance policies are usually very lengthy and contain a great many conditions in language which is somewhat obscure to the layman, and that the insurance company, having the power to write its policy in any form and in any language it chooses, should be deemed to have adopted language which would fulfill the mutual intent of the parties, or, if not, should be estopped from claiming that its policy was void ab initio. A number of states have adopted laws providing for a standard form of insurance policy. These laws are not uniform in terms, and the decisions thereunder have varied, not only because of such lack of uniformity, but because of a divergence of views of the courts passing upon the effects of such legislation. Cooley, Briefs on the Law of Insurance, 528.

[2] This much is clear, at least, that both parties to the fire insurance policy must be deemed to have entered into a contract with reference to the statutory form. In other words, the statutory form is the commodity which is bought and sold in an insurance transaction. The policy in this case, as al-

ready stated, was void ab initio. It can only be given validity as against the insurance company by the applications of the principles of waiver and of estoppel. It cannot be said that the insurance company waived this condition of the policy because the company knew nothing of the changed ownership of the premises. Byrant v. Granite Fire Ins. Co., 174 Mich. 102, 107, 140 N. W. 482; Dahrooge v. Fire Ass. Co., 175 Mich. 251, 141 N. W. 572.

[3] Is the company estopped under the circumstances to set up the invalidity of the policy herein sued on? Assuming that the agent, N. Adair, was at all times acting for the corporation, we find that the policy was issued under a mistake of facts, which resulted from the fact that the insured had sold the property and thus invalidated the policy of the defendant company then in existence, and had failed to notify the company in connection wth the renewal of the insurance that such change of ownership had occurred. Immediately upon ascertaining the fact that a mistake had been made, the company recovered the policy from its custodian and issued a new and valid policy covering the same property. It did not collect the premium upon the old policy from the plaintiff, who was thereby insured, but, instead, collected the premium from the person who was properly insured under the new policy. On the other hand, plaintiff made no application for the insurance, did not accept the policy when issued, and failed to pay the premium thereon when demanded. In short, he did nothing, said nothing, and paid nothing, and now seeks to recover upon a policy which he never received, never saw, and of which he alleges in his complaint he does not now know the contents. If the plaintiff can be said to have acted at all in the matter, he acted either through N. Adair, who issued the policy and replaced it by the new, or through the building and loan association, which accepted the old policy and surrendered it for the new, or through Marks, who, upon being notified of the issuance of the policy which was void ab initio, arranged for the issuance of a new policy properly covering the property and paid the premium thereon. All of these parties actively participated in the arrangement by which the new policy was substituted for the old.

It is proper to observe in this connection that both the policy sued on and the one issued in lieu thereof contained the provision that, "if the insured now has or shall procure any other insurance, whether valid or not, on property covered in whole or in part by this policy," the entire policy shall be void. The second policy enabled the purchaser to secure the money with which to pay the purchase price, notwithstanding the fact that the building purchased had been destroyed. It is fairly apparent, though not expressly proven, that this insurance money was in fact used to pay the plaintiff the balance upon the contract price. It would obviously be unjust to the insurance company under such circumstances to hold them under both policies, where each contemplated that no other policy should be issued or should be in existence. There is no basis upon which to establish an estoppel against the company. The only wrong complained of is that they substituted a valid policy for a void policy; that they secured the premium for the issuance of the valid policy, and refrained from collecting the premium upon the void policy; and that when the loss occurred they paid the full amount of the loss to the holder of the valid policy, who in turn was thereby enabled to pay to the plaintiff the amount of his purchase price.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; SHAW, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.

185 Cal. 366

WESTERN LITHOGRAPH CO. v. VANOMAR PRODUCERS. (L. A. 6423.)

(Supreme Court of California. March 28, 1921. Rehearing Denied April 27, 1921.)

1. Corporations ⟸410—President of canning company held authorized to order labels.

President of a canning corporation, who was also the general manager and in general charge of its business, had authority to contract for the purchase of labels, their purchase being but a detail of the business.

2. Corporations ⟸426(10)—Use of labels a ratification of contract of purchase by president of canning company.

Where president of canning corporation without authority contracted to pay a price in excess of contract price for labels purchased, there was an ample ratification by the corporation where it accepted the labels and paid for them at the increased price for one season and part of another.

3. Contracts ⟸75(2)—Promise to pay consideration in excess of contract without consideration.

Where plaintiff agreed to sell to a canning company all labels it should require for five years for a certain price, its naked promise to pay an increased price by reason of increase in cost of labor and material is not supported by a valuable consideration and is not enforceable, under Civ. Code, § 1605.

Department 1.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the Western Lithograph Company against the Vanomar Producers. Judg-

ment for plaintiff and defendant appeals. Reversed.

Frank Bryant, of Los Angeles, for appellant.

E. A. Lane, of Los Angeles, for respondent.

OLNEY, J. This is an appeal by the defendant, a corporation, from a judgment for the plaintiff in an action to recover the price of certain labels sold and delivered by the plaintiff to the defendant. It appears that the defendant is a fruit canning concern requiring labels for its goods, and the plaintiff is a maker of labels. In February, 1916, they entered into a formal contract in writing whereby the defendant agreed to buy of the plaintiff and the plaintiff agreed to furnish the defendant all the labels the latter should need during the next ensuing five years at certain specified prices dependent upon the character of the labels ordered. The contract was performed for the year 1916 at the prices specified. By June of the next year, however, the cost of materials and labor had increased greatly, with a consequent increase to the plaintiff of the cost of making labels. This was represented to the president and general manager of the defendant, and he was requested to agree to a flat increase of thirty-five cents per thousand on the contract prices. This he did by letter dated June 15, 1917, addressed to the plaintiff, and reading:

"Gentlemen: Referring to the conversation held between your Mr. Courtlander and the writer, we wish to say that we shall be very glad to pay you a sum equal to 35c per M., beyond our contract price, for all labels which we may receive from you this season's pack.

"We appreciate the efforts you have made in the past to meet our wishes and requirements and thoroughly understand some of the obstacles which confront you in the endeavor to take care of your large business this season."

The labels for 1917 were delivered and paid for at the increased rates. Those for 1918 were likewise delivered and payments on account made. There was, however, an unpaid balance of some $6,700 at the original contract prices and of some $9,400 at the increased prices, and for the latter sum the present action was brought. The defendant's answer admits liability for the $6,700, but denies it for anything over that amount. The plaintiff recovered judgment for the $9,400, and the defendant appeals.

It is evident that the defendant's liability for the difference between the two sums mentioned, which is all that is in controversy, turns on the validity of the defendant's promise to pay the extra thirty-five cents per thousand evidenced by the letter quoted.

The defendant advances two grounds why the promise is not valid—first, that the defendant's president had no authority to give it, and, second, that it is not supported by a consideration.

[1] The first of these grounds cannot be sustained. It is true that the original contract was formally executed in the name of the defendant by its president and secretary and under its seal and with authority from its board of directors while the letter was not under seal, was signed by the president only, and was not authorized by the defendant's board of directors, who knew nothing about it. But the fact was that the president was also the general manager of the corporation and in general charge of its business, that the matter of purchasing labels was but a detail of that business, and that the president was permitted by the defendant to make other contracts of similar nature, either for the purchase of supplies or for carrying on the regular business of the company in other respects, without reporting them to the directors or securing specific authority from them. This was enough. The authorities on the point are numerous, and the more modern ones are practically without conflict. It is necessary only to refer to Crowley v. Genesee Mining Co., 55 Cal. 273, and Aigeltinger v. Burke, 176 Cal. 621, where at page 626 of 176 Cal., page 376 of 169 Pac., the following is quoted with approval:

" 'Where one has the actual charge and management of the general business of a corporation, with the knowledge of the members, or the directors, this is sufficient evidence of authority, and the company will be bound by his contracts, made on their behalf, within the apparent scope of the business intrusted to him. * * * A corporation which suffers appearances to exist, and its officers and agents to so act, as to give one employed by such officers and agents reason to believe that he is employed by the company, becomes liable to such person as his (its) employee to pay for the services rendered.' "

[2] Furthermore, it made no difference whether the defendant's president originally had authority or not. It accepted the labels and paid for them at the increased price for one season and part of another. This was an ample ratification. McKell v. Chesapeake, etc., Co., 175 Fed. 321, 99 C. C. A. 109, 20 Ann. Cas. 1097.

[3] The second contention of the defendant, however, must be sustained. A naked promise unsupported by a consideration is not enforceable, and a consideration is defined by the Code (section 1605, Civ. Code) as follows:

"Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer as an inducement to the promisor, is a good consideration for a promise."

Now, the letter of June 15, 1917, was merely an agreement to pay an increase over the prices at which the plaintiff was already lawfully bound to the defendant to deliver labels. It is evident that because of the promise the defendant received no benefit, nor was it agreed that it should receive any, to which it was not already lawfully entitled. It is likewise evident that the plaintiff did nothing and agreed to do nothing which it was not already obligated to do. A plainer case of a mere naked promise it would be difficult to imagine. The courts in some instances have held that where one party to a contract refuses to go on with it, and the other party to induce him to go on promises to pay him additional compensation, such promise is supported by a consideration. The theories upon which this conclusion is reached are various and it is exceedingly doubtful if any of them are sound. Alaska Packers' Ass'n v. Domenico, 117 Fed. 99, 54 C. C. A. 485. The authorities are collated and their different rules well stated in 13 Corpus Juris, 351–355. But so far as we are aware, the authorities are in practical agreement that where, as here, all that appears is that one party found himself with a losing contract and, without abandoning it, requested the other party to pay him more, which the other party promised to do, the promise is without consideration.

It is stated in Corpus Juris (vol. 13, p. 355) that—

"In Minnesota the court, while adopting the view that the obligation imposed by a contract is to perform the contract and not to pay damages, and that there is ordinarily no consideration for a promise of additional pay to induce performance, introduces the anomalous exception that, where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulty in the performance of the contract, which was not known or anticipated by the parties when the contract was entered into, and which cast on him an additional burden not contemplated, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. * * *"

The plaintiff seeks to bring the present case within this supposed rule of the Minnesota cases because of the unexpected increases in the cost of manufacture which confronted it. But surely unexpected increases in manufacturing costs are just the risk which every manufacturer assumes and contemplates when he enters into a contract to make goods for future delivery. Furthermore, an examination of the Minnesota cases will show that the unforeseen difficulties to which they refer are difficulties existing by reason of facts unknown to the parties when they enter into the contract, so that it was entered into under a mistake. Michaud v. MacGregor, 61 Minn. 198, 63 N. W. 479; King v. Duluth, etc., Co., 61 Minn. 482, 63 N. W. 1105. In the latter case it is said: "Inadequacy of the contract price which is the result of an error of judgment and not of some excusable mistake of fact, is not sufficient." Whether the rule of these cases be correct or not, it has no application to a case where the increased costs of the contractor are due merely to fluctuations in the market price of labor and materials. The risk of such fluctuations is a burden which he necessarily contemplates and assumes when he makes the contract. Such, and such only, is the present case.

Judgment reversed.

We concur: SHAW, J.; LAWLOR, J.

185 Cal. 285

THOMAS HAVERTY CO. v. JONES. (L. A. 5711.)

(Supreme Court of California. March 14, 1921.)

1. Contracts ⊂=294—Party not entitled to any part of contract price until full performance, unless excused or prevented.

At common law, the general rule is that one agreeing to do a thing for another for a specified sum, to be paid on full performance, is not entitled to any part of the contract price until he has done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the other party, by operation of law, or by the act of God or the public enemy.

2. Contracts ⊂=295(1)—Rule as to recovery on substantial performance of building contract stated.

Where the owner has taken possession of a building, and is enjoying the fruits of the building contractor's work in performance of the contract, if there has been a substantial performance by the contractor in good faith, and the failure to make full performance can be compensated in damages, and the omissions and deviations were not willful or fraudulent, and do not substantially affect the usefulness of the building for its intended purposes, the contractor, in an action on the contract, may recover the contract price, less the amount allowed as damages.

3. Contracts ⊂=295(1)—Curable defects in construction of plumbing, heating, and ventilating plant held not to prevent substantial performance.

Where the contract price for constructing a plumbing, heating, and ventilating plant was $27,332.66, and the total cost of the building about $186,000, defects in the construction of the plant, which could be removed or compensated at a total cost of $99.21, did not prevent recovery as for substantial performance.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Contracts ⊂⊃295(1)—Defects in plumbing, heating, and ventilating plant, reducing value of building, held within the rule as to substantial performance.

Where the contract price for installing a plumbing, heating, and ventilating plant was $27,332.66, and the total cost of the building about $186,000, omissions and substitutions in the construction of the plant, not virtually affecting the usefulness of the systems, nor impairing their efficiency, serviceability, or durability, but which reduced the value of the building in the sum of $2,180.88, *held* within the rule as to substantial performance.

5. Appeal and error ⊂⊃989—Evidence contrary to findings and creating conflict cannot be considered.

Where the trial court's findings are supported by substantial evidence, opposing evidence, which merely creates a conflict, cannot be considered by the Supreme Court.

6. Contracts ⊂⊃295(1)—Injury to supports of building by contractor's employees held a trespass, not affecting the question of substantial performance.

The cutting of cantilevers, composing part of the foundation supports of a building, by employees of a contractor installing a plumbing, heating, and ventilating plant, was a mere trespass, and had no bearing on the question of substantial performance of the contract.

7. Appeal and error ⊂⊃1011(1)—Findings on sharply conflicting evidence not disturbed.

Where there was a sharp conflict in the evidence as to whether cantilevers, cut by employees of a plumbing contractor, could be repaired, so as to support additional stories, which the owner intended to erect, the findings cannot be disturbed.

8. Evidence ⊂⊃568(1)—Opinion not admissible as to whether supports of building, when repaired, would uphold additional stories.

Whether cantilevers supporting a building, cut by employees of a plumbing contractor, could be repaired, so as to sustain additional stories which the owner intended to erect, was a question of fact, and not of law, to be determined from the evidence, and not solely from the opinion of the owner, his engineers, and architect.

9. Contracts ⊂⊃284(3)—Performance to satisfaction of architect not required, when named architects discharged, and no other substituted.

Where a contract required the work to be performed to the satisfaction of architects named therein, but they were discharged, and another architect employed, without any agreement for his substitution, architect's certificates were not required, and performance to the satisfaction of the architects was not a condition of the contractor's right to recover.

10. Contracts ⊂⊃282—Performance of building contract, which should satisfy reasonable persons, satisfies contract providing for performance to owner's satisfaction.

A contract to install a plumbing, heating, and ventilating plant to the satisfaction of the owner was complied with by performance which should be satisfactory to a reasonable person; the question being one of operative fitness or mechanical utility, and not involving matters dependent on fancy, taste, sensibility, or judgment.

11. Appeal and error ⊂⊃970(3)—Permitting testimony that contract was performed according to specifications, without requiring specific proof, held harmless.

In an action on a contract for the installation of a plumbing, heating, and ventilating system, the admission of testimony in answer to a general question asked the contractor's employees, that work was performed in accordance with the specifications, was harmless, where ample opportunity was given to cross-examine them, and the whole matter was gone into at great length.

12. Contracts ⊂⊃305(1)—Strict performance of provision of plumbing contract as to making drawings held waived.

Where a contract for the installation of a plumbing, heating, and ventilating plant required the contractor to keep complete records of his installation, and to show by drawings every important detail of the system, but the owner never expressed dissatisfaction with inaccurate drawings, or demanded any different or additional report or statement, strict performance was waived.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Thomas Haverty Company against G. M. Jones to recover an unpaid balance on a contract. From a judgment for plaintiff, and from an order denying a motion to set aside the judgment, and render judgment for defendant, defendant appeals. Affirmed.

Meserve & Meserve, of Los Angeles, for appellant.

J. H. Shankland, Sheldon Borden, and George H. Moore, all of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment, and also from an order, made after judgment, denying his motion to set aside the judgment and render a judgment in his favor on the findings.

The complaint states a cause of action to recover the balance alleged to be due from defendant to plaintiff upon a contract for the construction of the plumbing, steam heating, and ventilation plant in a four-story building erected by the defendant. The answer admitted the making of the contract but denied that the same had been fully performed by the plaintiff, and also alleged that the performance was defective in many particulars, whereby he was damaged in a large sum of money, exceeding the amount claimed by the plaintiff, and also that certain damages had been caused to the building by the carelessness of the plaintiff in doing the work called for by the contract, whereby he

was also damaged. He asked judgment for the amount of damages claimed in his answer. The same matters were also set up in a separate pleading designated as a cross-complaint.

The court found that the plaintiff had performed the work called for by the contract, except in certain particulars set forth at length in the findings, concerning which the court found that the specifications included in the contract were not directly followed. As to nine of these particulars the court found that the omissions could be remedied at a cost amounting in all to $99.21. With respect to certain other defects, the court found that they could not be remedied without a greater expense than their importance would justify, but that the resulting damage to the building amounted to only $2,180.88. With respect to these failures to fully perform the contract the court further found that they were not done willfully or fraudulently, but that the same were due to mistakes and misinterpretations of the contract by the plaintiff's employees, or because the deviations from the specifications were believed to be necessary for the proper construction of the work and beneficial to the defendant; that there was a substantial performance of the contract, and that the difference in value to the defendant by the failure in full performance, and the damages caused thereby could be compensated by a deduction from the contract price. It also found that in the course of construction certain workmen of the plaintiff, without its orders, partially cut through some cantilevers in the basement of the building, and that the same could be repaired at an expense of $650.78. The balance due to the plaintiff upon the contract price, including the charges for extras furnished in pursuance of a provision of the contract, after deducting certain omissions which were agreed to, certain labor performed by the defendant himself, and the payments made by him before the beginning of the action, amounted to $10,775.64. From this sum the court deducted the sum allowed for the remediable defects, as aforesaid, the damages amounting to $2,180.88 arising from the irremediable defects, and $650.78, allowed for the cost of the repairing the cantilevers, amounting in all to $2,930.87, leaving a balance of $7,844.77, for which sum judgment was rendered in favor of the plaintiff.

[1, 2] The principal point presented in the case is the question of the right of a building contractor to recover the contract price where he has not completely performed the contract. The law in this state on this subject has been considered in several recent decisions and is now comparatively well established. The general rule on the subject of performance is that—

"Where a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy." Carlson v. Sheehan, 157 Cal. 696, 109 Pac. 30.

This, of course, refers to actions upon the contract for the contract price. The right to sue on an implied contract for the value of a partial performance is a different question, and is not here involved. The rule just stated is that prevailing at common law. It has now been greatly relaxed, and it is settled, especially in the case of building contracts, where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages, to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not willful or fraudulent, and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action upon the contract, recover the amount unpaid of his contract price less the amount allowed as damages for the failure in strict performance. 9 Corp. Jur. 739; 2 Elliott on Cont. § 1607; 6 R. C. L. 967, 970; 1 Beach on Cont. §§ 111, 112; 3 Page on Cont. §§ 1385, 1387; Connell v. Higgins, 170 Cal. 556, 150 Pac. 769; Jones, etc., Co. v. Doble Co., 162 Cal. 505, 123 Pac. 290; Smith v. Mathews, etc., Co., 179 Cal. 801, 179 Pac. 205; Rischard v. Miller, 188 Pac. 50; Collins v. Ramish, 188 Pac. 552; City S. I. Co. v. Kroh, 158 Cal. 325, 110 Pac. 933; Perry v. Quackenbush, 105 Cal. 308, 38 Pac. 740; Harlan v. Stufflebeem, 87 Cal. 511, 25 Pac. 686.

In 9 Corpus Juris, 739, the rule is summarized as follows:

"The hardship of the rule requiring strict performance in order to permit recovery on a contract generally, when applied to a builder who has undesignedly violated his contract, and the inequitable advantage that it gives to an owner who receives and retains the benefit of the builder's labor and materials, have led to its qualification; and it is generally held that, where the compensation is due only on the performance of the contract, a literal and strict performance is not required, and if the builder, acting in good faith and intending and attempting to perform his contract, does so, he may recover the contract price, notwithstanding slight and trivial defects or deviations in performance, for which compensation may be made, in all its material and substantial particulars, by an allowance to the owner; but the owner is entitled to an allowance for the damages he may suffer by reason of the failure to perform strictly, such as the cost or expense of putting the structure or work in the condition called for by the contract."

Many cases supporting the several statements of the text are cited in the footnotes. One of the clearest statements of the law on the subject is found in Handy v. Bliss, 204 Mass. 518, 90 N. E. 864, 134 Am. St. Rep. 673, where the court said:

"There must be such an approximation to complete performance that the owner obtains substantially what was called for by the contract, although it may not be the same in every particular, and although there may be omissions and imperfections on account of which there should be a deduction from the contract price. It is not necessary that the work should be complete in all material respects, nor that there should be no omissions of work that cannot be done by the owner, except at great expense or with great risk to the building. There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable. Notwithstanding such omission, there might be a substantial performance of the contract. * * * An intentional omission to do certain things called for by the contract, if he believes that they are not called for, and intends in good faith to do all that he has agreed to do, does not prevent the application of the doctrine."

It is worthy of remark that this relaxation of the rigid rule of the common law is, after all, little more than a change from form to substance in the administration of justice. At common law, where a person failed to strictly perform a building contract, if the work actually done benefited the owner and to some extent served his purpose, the contractor could recover the reasonable value of the work done, in an action in quantum meruit, and the owner could recoup the damage he had sustained from the breach of the contract to fully perform. But if the contractor, believing he had fully performed, sued on the contract for the agreed price, the action, under the rigid rules as to forms of action, would be defeated upon a showing by the owner that there had been a failure to perform the contract in the least material particular. Forms of action are now abolished, and one of the main reasons for adherence to the rigid rule of the common law is thereby removed. Since the contractor would in justice be entitled to recover the reasonable value of the work done, not exceeding the contract price, no good reason now appears why, in a suit upon the contract for the price, he should not be allowed to recover the price, less the reasonable compensation to the owner for any damages arising from a failure to completely perform, provided the contractor has acted in good faith, and the article or building is so far completed that it reasonably serves the purpose for which it was intended by the owner. Substantial justice is provided by this course of procedure and no real property right is violated.

The question what constitutes substantial performance is one of some difficulty. In Connell v. Higgins, supra, it was said that the question is usually "to be determined in each case with reference to the existing facts and circumstances." In 9 Corpus Juris, 741, it is said that there is a substantial performance where the variance from the specifications of the contract does not impair the building or structure as a whole, and where after it is erected the building is actually used for the intended purpose, or where the defects can be remedied without great expenditure and without material damage to other parts of the structure, but that the defects must not run through the whole work, so that the object of the owner to have the work done in a particular way is not accomplished, or be such that a new contract is not substituted for the original one, nor be so substantial as not to be capable of a remedy, and the allowance out of the contract price will not give the owner essentially what he contracted for.

[3] According to the testimony of the defendant, the actual cost of the building, including the Haverty contract was about $186,000. The contract price of the work to be done by the plaintiff under the contract sued on, including the extras, was $27,332.66. The sum of $99.21, deducted as the cost of remedying the curable defects, was of course, a trivial matter. In Rischard v. Miller, supra, the defects could be removed or compensated at the total cost of $99.50 in the building of a house costing $2,600, and we there held that the performance was substantial, and that the contractor could recover the balance due on the contract price, less the $99.50. So far as this point is concerned, that case fully answers the objections of the defendant.

[4] The sum of $2,180.88, allowed as damages on account of defects which could not be removed or remedied, seemed at first blush to be rather large to come within the rule as to substantial performance. It was because of our desire to further consider this point that a rehearing of the case was granted after decision of the District Court of Appeal affirming the judgment. The finding as to damages from these defects is that they reduced the value of the building by the amount of $2,180.88. As compared to a building costing $27,332, a reduction in value of $2,180.88 by departures from the contract might appear to be substantial, although we would not say, in view of the above authorities, that it would of necessity prevent a recovery of the contract price less the damages. But, when the reduction is only $2,180.88 in the value of a building costing $186,000, it does not seem so large in comparison. Upon a consideration of the details of the respective failures in performance, we find them to be really of trifling character compared to

the cost of the building. The character and effect of the departures from the contract as shown by the detailed findings, scarcely sustain the general finding as to the reduction in the value of the building caused thereby. Certainly the court gave the defendant the benefit of every doubt on the subject.

There were twelve so-called "irremediable defects," to wit: (1) The substitution of wrought iron screw fittings to waste and drain pipes, instead of cast iron fittings, known as "Durham couplings." (2) The substitution of galvanized steel pipe for extra heavy cast iron pipe in certain sewer connections. (3) The failure to cover with asbestos paper the hot-water pipes extending through parts of the second and third stories, which failure was in part due to the fact that the defendant inclosed the walls before the covering was put on. The defendant erected the other parts of the building. (4) The substitution of galvanized iron sleeves where pipes passed through walls and floors, instead of so-called Crane telescoping sleeves; the latter being unsuitable for such a building. (5) The failure to install 597 feet of radiation out of 3,502 square feet required by the specifications. This omission was due in part to the fact that part of the specified radiation was omitted by order of the defendant. (6) The failure to install air chambers at the top ends of service pipes for hot and cold water in the attic. (7) The installation of cut-out valves on the hot-water pipes in the attic, instead of installing them near to the ceiling of the top floor. (8) The use of short bends, instead of long turn bends, in the 3-inch cold-water main supply pipe at several places in the basement and attic, and at one place between the basement and attic. (9) The use of supply pipes in the attic for a portion of the distance required to be run, which were smaller than the sizes specified. (10) The substitution of three-fourths inch pipe, instead of one-inch pipe, in 15 out of 31 of the cold-water pipes extending through the third and fourth floors. (11) The substitution of three-fourths inch pipe for one-inch pipe in eleven out of 31 of the hot-water pipes extending through the third and fourth floors. (12) The substitution of No. 8 steel for No. 10 steel in the breeching of the boiler.

With respect to the defects numbered 1, 2, 4, 6, 7, 8, 9, 10, 11, and 12 the court found that the material and construction substituted for that specified was equally as efficient and durable when so placed, as that which was specified would have been. As to the failure to cover the hot-water pipes with asbestos paper (No. 3), the court found that it was not true that it would or did result in serious damage or injury to the building. With respect to the failure to install the whole of the radiation (No. 5), the court found that the radiation as constructed is amply sufficient for the purpose intended. With respect to the substitution of smaller for larger sizes of cold-water and hot-water pipes (Nos. 10 and 11) the court further found that the smaller sizes are sufficient to amply supply with water the fixtures connecting therewith.

It further appears from the evidence that the difference between the actual cost of the articles substituted and the actual cost of those specified in the several defects classed as irremediable amounted to only $196.32. Of this difference $137.31 is due to the cost of the 597 square feet of radiation omitted by the plaintiff. Some of this, but how much does not appear, was omitted by direction of the defendant. This leaves $59.01 as the difference on account of the other items. The evidence also shows that the plaintiff in many things substituted better and costlier material in place of the material specified, and that this additional cost was greater than the reduction in cost by the substitutions of less expensive material. It also appears that in some instances it was difficult, and in other instances impossible, to obtain materials of the exact character prescribed in the specifications, and that the plaintiff obtained such material as could be had, sometimes at greater and sometimes at less expense than adherence to the specifications would have required.

In summing up the case finding X states that the changes and substitutions made by plaintiff in the systems of plumbing, heating, and ventilation it constructed in performing the contract "do not virtually affect the usefulness of said systems," nor "impair the efficiency, serviceability, or durability thereof," that they have performed, are performing, and are adequate to perform all the purposes intended, "to the same extent as if there had been no departures from the contract"; "that the same are useful and beneficial to said building and to the defendant, and that he has taken possession of the same and has voluntarily accepted the benefit thereof"; and that ever since the completion of the building he has used and is now using it for the purposes for which it was intended.

[5] All the findings are supported by substantial evidence. We cannot consider the opposing evidence. It merely created a conflict. The court's final conclusion was that the imperfections due to plaintiff's failure to perform the contract in strict accordance with its terms are trivial and of a minor character, as compared with the extent and magnitude of the entire work embraced in said contract, and that the damages occasioned thereby can be recouped by the defendant in this action. We agree with this conclusion, and we are of the opinion that the case comes within the established doctrine under which a contractor may recover in a suit for the contract price upon showing substantial, though not in all respects complete, performance.

[6-8] The item of $650.87, deducted from

the price on account of the injury by the plaintiff's employees to the cantilevers composing part of the foundation supports of the building, has no bearing on the question of substantial performance. It was no part of the work of construction required by the contract, but was a mere trespass by the employees of the plaintiff, committed in the course of their work. The court found that it did not destroy the use or value of the cantilevers, and that the damage to the defendant therefrom did not exceed said sum of $650.78. The court found that this sum would be the reasonable cost of repairing them, and that when so repaired they would fully serve the purpose for which they were designed, and would support and sustain the three additional stories which the defendant intends at some future time to erect on the building. The defendant claims that these findings are not in accordance with the evidence. On this point, however, there was a sharp conflict in the evidence, and we cannot disturb the findings thereon. The question whether or not the cantilevers, when repaired, would support the additional stories, was a question of fact, not of law, and it was to be determined from the evidence and not, as defendant claims, solely from the opinion of himself and his engineers and architect. This part of the findings and judgment must therefore be upheld.

[9, 10] The appellant claims that the plaintiff was not entitled to a judgment because it does not appear that the contract was performed "to the satisfaction of the defendant" nor "to the satisfaction and acceptance of the architect," nor that it had obtained the architect's certificate of acceptance. The court upon this subject found that the contract was not performed to the satisfaction of the defendant, but that it was "performed in such a manner as should be satisfactory to a reasonable person." The contract stated that two persons, named MacGibbon and Frary, were the architects for the building, and with respect to many of the matters required thereby it stated that the performance should be to the satisfaction of said architects. The court found, however, and the evidence is sufficient to sustain the finding, that in the course of the work MacGibbon and Frary were discharged as architects, and that no person was substituted in their place. One C. H. Russell was employed by the defendant as advising architect, but there was no agreement between defendant and plaintiff that he should be substituted for MacGibbon and Frary. The result was that after the discharge of the architects named the architect's certificate was no longer required, nor was performance to the satisfaction of the architects a technical condition of the right of the plaintiff to recover. The finding of the court that the contract was performed in such a manner as should be satisfactory to a reasonable person is sufficient to entitle the plaintiff to recover in the action, so far as that point is concerned. As was stated by the District Court of Appeal:

"A stipulation in the contract to perform to the satisfaction of one of the parties only calls for such performance as should be satisfactory to a reasonable person." Gladding, McBean & Co. v. Montgomery, 20 Cal. App. 276, 128 Pac. 790; Bryan, etc., Co. v. Law, 31 Cal. App. 204, 160 Pac. 170; Bruner v. Hegyi (App.) 183 Pac. 369.

This rule does not apply where the performance involves matters dependent on fancy, taste, sensibility, or judgment of the other party, but it does apply where the question is merely one of operative fitness or mechanical utility, and especially to contracts for the erection of buildings. Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 702, 182 Pac. 428, 6 A. L. R. 1493.

We do not think the findings sustain the contention of the defendant that the court measured the damages by the difference in the service value of the building rather than by the difference in the market value thereof. For the defects classed as remediable the damage was measured by the reasonable cost of correction thereof. For the other defects, it is plain that the damages allowed did not consist of the difference in cost, but were measured by the difference between the value of the building with those imperfections and its value without such imperfections. This contention, therefore, is not sustained by the record.

[11] In proving its case the plaintiff was allowed to introduce its employees in charge of the work to testify that, in answer to a general question, the work had been performed in accordance with the specifications. It is earnestly contended that in this the court erred; that the plaintiff should have been required to prove exact performance of each and every item concerning which there was a contest. We do not find it necessary to decide whether this is technically correct or not, although there are many reasons for allowing such prima facie proof of performance to be made. The record shows that no harm ensued to the defendant from this ruling. Ample opportunity was given to cross-examine these witnesses, and the whole matter was gone into at great length during the trial.

[12] The contract provided that the contractor should keep careful and complete records of his installation of the systems provided for, and show by drawings "every important detail of the system," and that this record should be delivered to the owner before final acceptance. It is claimed that this condition was not complied with. Drawings were furnished to the defendant in attempted compliance with this provision; but they were, in certain unimportant particulars, inaccurate. The court found that

no damage was sustained by reason thereof. The evidence shows that the defendant never expressed any dissatisfaction therewith or demanded any different or additional report or statement. We think strict performance of this provision was waived.

In conclusion we quote the following from the decision of the District Court of Appeal:

"Upon other issues, covering the many details about which appellant has made exceptions and has presented exhaustive arguments, a separate statement and decision on each point would require far more space than even a generous indulgence should allow. Counsel will, we trust, content themselves with the assurance that these questions have had the attention of the court. Having reached the conclusions which have been announced upon the principal issues of the case, we need only say in addition that the evidence was fully and fairly received and considered by the trial court, that the judgment expresses a correct conclusion upon the facts found, and that the evidence is sufficient to justify those findings upon the material issues necessary to support the judgment."

The judgment and order are affirmed.

We concur: OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

185 Cal. 355

HAMMOND LUMBER CO. v. YEAGER et al.
(L. A. 6432.)

(Supreme Court of California. March 28, 1921.)

1. Mechanics' liens ⟸288(3)—Completion of building is question of fact.

Whether or not a building has been completed within Code Civ. Proc. § 1187, so as to start the running of the time for filing mechanics' liens is a question of fact, and not of law.

2. Appeal and error ⟸842(1)—What constitutes trivial imperfection permitting filing of mechanic's lien is question of fact.

Under Code Civ. Proc. § 1187, providing that trivial imperfections shall not be deemed such a lack of completion of a contract as to prevent the filing of a mechanic's lien, what constitutes a trivial imperfection is a question of fact to be determined by the trial court under the conditions and circumstances of each case, and its finding can only be overturned when there is no substantial evidence to support it.

3. Mechanics' liens ⟸132(7)—"Trivial imperfections" not preventing recovery for substantial performance do not delay time for filing lien.

Imperfections in the performance of a building contract so trivial in character as to permit the contractor to recover for substantial performance are trivial imperfections not preventing the filing of a mechanic's lien under Code Civ. Proc. § 1187.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trivial Imperfection.]

4. Mechanics' liens ⟸132(7)—Time for filing not delayed because contractor after acceptance replaced defective work.

Where a building contract was substantially completed on September 20th, and the owner accepted it, took possession, and entered into its occupancy on September 28th, a finding that the building was completed September 20th so as to start running the time for filing mechanics' liens was warranted, though the contractor after the owner had taken possession replaced work defectively done at a cost of $35.50.

5. Mechanics' liens ⟸96—Contractor's representations as to date of completion of contract did not estop owner.

Under Code Civ. Proc. § 1183, providing that contractors, etc., shall be held the agents of the owner for the purposes of that chapter, a building contractor was not the agent of the owner in informing a materialman as to the date of the completion of the contract, and his representations did not estop the owner where he was acting in his own interest in endeavoring to hold off the materialman's lien until he obtained a certain payment.

6. Mechanics' liens ⟸132(1)—Owner's refusal to make payment until claims settled held not contemporaneous construction as to date of acceptance.

An owner's refusal to pay a building contractor a "35-day payment" under the contract until he had settled with all lien claimants *held* not a contemporaneous construction by the owner as to the date of acceptance of the building, as respected the time for filing mechanics' liens.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Hammond Lumber Company against W. S. Yeager and others to foreclose a mechanic's lien. From a judgment for defendants, plaintiff appeals. Affirmed.

R. L. Horton and C. S. Anderson, both of Los Angeles, for appellant.

George W. McDill, of Los Angeles, for respondent.

WILBUR, J. The plaintiff brought this action to foreclose a mechanics' lien for the value of building materials furnished to defendant Yeager as contractor for the construction of a dwelling house on the real property of the defendants Woods.

The cause of action was fully maintained under the evidence, with the exception that it was found that plaintiff's claim of lien was not filed in time, and judgment rendered for the defendant.

The controversy on this point arises upon

a dispute as to the time of the completion of the contract. The trial court found that the plaintiff's contract for furnishing materials was fully performed and completed on or about the 20th day of September, 1917, and that the building was completed on the 28th day of September, 1917, and that the defendants Woods paid the contractor, Yeager, the completion payment under the contract for the erection of said building on the said 28th day of September, 1917, and that said defendants Woods accepted said building as completed and entered into its use and occupation on said date and ever since said date have continuously occupied and used said building for the purpose for which it was built, to wit, as their private home, that no notice of completion of the construction of such building has ever been filed of record, but that more than 90 days since the said completion of said building has elapsed before the date of filing of the mechanic's lien sued upon herein.

Section 1187, Code of Civil Procedure, provides:

"* * * And, in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: The occupation or use of a building, improvement, or structure, by the owner, or his representative; or the acceptance by said owner or said agent, of said building, improvement, or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for. * * *"

In the case at bar the evidence is undisputed that the defendants accepted the building as completed on the 28th day of September, 1917, and on that date entered into the possession and occupancy thereof and had continued at all times subsequent thereto to occupy the same as their home.

Appellant's contention that the building was not completed until the 26th day of October, 1917, is based upon the undisputed fact that after such acceptance and occupancy it was discovered by the contractor that certain woodstone work constituting the floor of the bathroom and the sinks in the kitchen, composed of a chemical composition, were defective by reason of the fact that the chemicals were improperly mixed. The contractor, believing and claiming that such work would rapidly deteriorate, persuaded both the owner and the subcontractor who laid the woodstone work to replace the same. The work of replacement was completed October 26, 1917. The appellant's contention is that the removal of the defective work and its replacement was a part of the original contract, and that the time for filing liens began at the time the work was finally replaced by good material, and that therefore, its claim or lien having been filed within 90 days after October 26, 1917, it was filed in time.

[1-3] The question as to whether or not a building has been completed is a question of fact, and not a question of law. It is provided in section 1187, Code of Civil Procedure, that—

"Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, improvement or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; * * *"

What constitutes a trivial imperfection is a question of fact to be determined by the trial court under the conditions and circumstances of each case (Willamette, etc., Co. v. College Co., 94 Cal. 229, 238, 29 Pac. 629; Bianchi v. Hughes, 124 Cal. 24, 27, 56 Pac. 610. This finding can only be overturned when it can be said that there is no substantial evidence to support it. Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. 686; Schindler v. Green, 149 Cal. 752, 755, 87 Pac. 626. No doubt any imperfections in the performance of the work which were of so trivial a character as to permit the contractor to recover for substantial performance notwithstanding such defects would be trivial inperfections within the meaning of section 1187, Code of Civil Procedure. This was the view of the court in Willamette, etc., Co. v. College Co., supra.

"In the absence of any statutory qualification or definition of the term 'completion,' there would be no room for its construction by the court, but it would be construed to mean actual completion, and would be a question of fact to be determined in each case. The statute has, however, provided that a substantial completion is all that is required in any case, whether the work be done at the direct instance of the owner, or under the provisions of a contract between him and an original contractor, by declaring that a 'trivial imperfection' shall not be deemed such a lack of completion as to prevent the filing of a lien."

[4] There have been a number of recent decisions by this court upon the subject of substantial compliance in the case of building contracts and there has been a tendency to a more liberal view of that subject than formerly. These cases are cited in the recent case of Thomas Haverty Co. v. G. M. Jones, 197 Pac. 105, decided March 14, 1921. In the case of Rischard v. Miller, 188 Pac. 50, the contractor was allowed to recover for a substantial performance of the contract, although there were much more serious imperfections than in the case at bar. It is clear from the foregoing cases that the trial court was justified in finding that there was a substantial performance of the contract on September 20th. This performance was followed by acceptance and occupancy and payment of the installment due upon the

completion of the building on September 28th.

That the contractor subsequently replaced the work defectively done at a cost of $35.-50, instead of paying damages in that amount by way of deduction from the contract price, does not alter the fact that the work had been substantially completed on September 20th and accepted as such on September 28th.

We conclude, therefore, that the finding of the trial court that the building was completed September 20, 1917, is sustained by the evidence.

[5] Appellant also claims that the defendants are estopped from contending that the 26th of October is not the date of completion because of certain conversations between appellant and the contractor with relation to the completion of the building. These conversations were testified to by R. C. Johnson, collector and credit man for the appellant. He testified as follows:

"I presented our bill to Mr. Yeager, and he said that he could not pay us for the reason that the woodstone work that had been put in was very poor, and that he would have to have that replaced before he could—before the Woods would accept the job, and before he could get his payments from them."

He also testified that on October 27, 1917, he again presented his account to the contractor, and the contractor said:

"The woodstone people had just replaced their work, and that undoubtedly now he would be able to get the job accepted, and have our money for us very shortly. * * * He said that the job had been completed the day before —that is, on the 26th of October. * * *"

The witness also testified:

That shortly before filing the claim of lien he again saw Mr. Yeager and told him "that the account was long past due, and our time for filing the lien was getting rather short, and that we must insist on his paying it or the lien would be filed; and I told him that on account of his past business relations with us we didn't care to file a lien if there was any opportunity for him to get the money and pay it, and he said, 'Well, I will tell you what you do, Johnson; you hold that off as long as possible, if you do have to file a lien, and you can collect from the Woods; why, if there is a deficiency, why, I will give Woods my note for the deficiency.' I told him we insisted upon being paid in full."

Johnson also testified that he relied upon the date given him by Yeager.

Appellant's claim is that the contractor was the agent of the owner, and that his representations were consequently binding upon the owner and operated to estop the owner from claiming that October 26th was not the date of completion. This contention is based upon that portion of section 1183, Code of Civil Procedure, reading as follows:

"* * * Every contractor, subcontractor, architect, builder or other person having charge of the construction, alteration, addition to or repair either in whole or in part of any building, or other improvement as aforesaid shall be held to be the agent of the owner for the purposes of this chapter."

There is nothing in the chapter which requires the owner to inform the materialmen as to the date of the completion other than by filing a notice of completion. The statute does not purport to give authority to a contractor or architect to represent the owner in fixing the date of completion. The interests of the contractor and owner with reference to the date of completion are hostile, and it is apparent from the record in this case that the contractor was acting in his own interest in endeavoring to hold off appellant's lien until after he had obtained his 35-day payment. Our view concerning the limited nature of the contractor's agency is in accord with the views of the Supreme Courts of Washington, Oregon, and Idaho. Whittier v. Puget Sound, etc., Co., 4 Wash. 666, 30 Pac. 1094, 31 Am. St. Rep. 944; Fitch v. Howitt, 32 Or. 296, 52 Pac. 192; Valley Lumber Co. v. Nickerson, 13 Idaho, 282, 93 Pac. 24. The owner is not estopped by the representations.

[6] There is nothing in the point that the owner by withholding and refusing to pay the contractor the 35-day payment under his contract until he had settled with all lien claimants, including the plaintiff, was a "co-temporaneous construction" by plaintiff that the building was not accepted until October 26, 1917.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; OLNEY, J.; LAWLOR, J.

185 Cal. 386

ANDERSON v. CITIZENS' SAVINGS & TRUST CO. et al. (L. A. 5873, 5874.)

(Supreme Court of California. March 28, 1921.)

1. Municipal corporations ⊂⊃581 — Deed to purchaser at sale for nonpayment of assessment without personal notice to owner of record to redeem held void.

Deed to purchaser at sale thereof for nonpayment of street assessments under St. 1903, p. 376 (Deering's Gen. Laws, Act 3928, p. 1693, as amended in 1909, 1911, and 1913, § 28), was void where personal notice to redeem was not served upon owner of record as required by section 33, subd. 7.

2. Eminent domain ⊂⊃243(2)—Judgment not adjudication as to ownership of tract of which condemned land was a part, where ownership thereof was not in issue.

Judgment of condemnation, indicating that the property condemned belonged to one of the

defendants, was not conclusive that the large tract of land of which such condemned land was a part belonged to such defendant, and not to one of the other defendants, where the ownership of such large tract of land was not in issue.

3. Eminent domain ⟸243(3)—Judgment of condemnation conclusive as to ownership of land as against defendant not appearing.

Judgment of condemnation, adjudicating that the land condemned belonged to one of the defendants, was conclusive as against another defendant, who did not appear therein and assert its claim as owner of such land.

4. Boundaries ⟸20(1)—Deed of land described as bounded on street conveys to center of street.

Where land is conveyed by description which bounds it by a street, the boundary line of the land conveyed is not the side line of the street, but its center line, unless it clearly appears that it was intended to convey land only to the side line of the street, in view of Civ. Code, §§ 831, 1112, and Code Civ. Proc. § 2077, subd. 4.

5. Boundaries ⟸20(5)—Grantee of lot shown by map bounded by street takes to center of street.

Where deed describes land as a lot shown on a certain map, and where such map shows such lot to be bounded by a street, the grantee takes to the center of the street, unless it clearly appears that the intention of the parties was to the contrary.

6. Easements ⟸17(2)—Description of land as bounded by street creates street as between grantor and grantee, regardless of existing dedication as between grantor and public.

Where a deed described land as being bounded by a street, and where such street has been abandoned, a street is created as between the grantor and grantee, regardless of whether there is an existing dedication as between the grantor and the public.

7. Boundaries ⟸20(1) — Grantee of land bounded by street took to center of street notwithstanding abandonment of street.

Where deed described land as being bounded by street, the grantee took to the center of the street, where it did not appear that the parties did not so intend, notwithstanding that the street had been abandoned by the public.

8. Boundaries ⟸37(4)—Grantor's testimony as to intention insufficient to overcome rule construing deed as conveying to center of street.

Grantor's testimony that she did not intend to convey land to center of street, in execution of deed describing lot bounded by street, *held* not to overcome rule of construction that grantee in such case takes to center of street, unless it clearly appears that the parties intended otherwise.

9. Deeds ⟸90—Construed in grantee's favor except as to reservations.

Under Code Civ. Proc. § 1864, a deed in case of doubt is to be construed in favor of the grantee, except as to reservations or other provisions which it may contain for the benefit of grantor.

Sloane, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Actions by John Francis Anderson against the Citizens' Savings & Trust Company and others, from which such defendants brought action against Mary Martin. Judgments for plaintiff, and the Savings & Trust Company and others appeal. Reversed.

C. A. Stice, of Los Angeles, for appellants.

Harold E. Thomas, and George W. MacLellan, both of Los Angeles, for respondent.

OLNEY, J. Two actions to quiet title were tried together in the court below. As the actions were originally brought, there were a number of parties, and the parties plaintiff and defendant were not the same in each, but there occurred such disclaimers, transfers of interest, and shifting of position that at the time of trial the controversy had in each case been reduced to one between J. F. Anderson, whom we may call the plaintiff, and Citizens' Savings & Trust Company, a corporation, whom we may call the defendant, each claiming to be the owner of the property involved, the latter as trustee for two minors by the name of Lempertz. Judgment went for the plaintiff in the court below in each action, and the defendant appeals. Both actions present the same questions, and, for purposes of discussion, may be treated as one.

There is no dispute as to the material facts. It appears that one J. G. Griffith was originally the owner of a considerable tract, including the land in controversy. He subdivided the tract into blocks and lots, with streets, and recorded a map of the tract as so subdivided. This map showed lot 1 in block 7 as the lot forming the easterly end of the block and extending the whole width of the block, so that on its easterly side it was bounded by a street called Vandal street, and on its northerly and southerly ends by streets called Grand and Los Feliz avenues, respectively. Each of these streets was shown as 60 feet wide, and Grand and Vandal, with which alone we are particularly concerned, were shown as and were in fact parts of the subdivided tract.

On June 29, 1889, Griffiths conveyed the lot mentioned to one Martin, describing it by lot and block number, as shown on the subdivision map. Since Griffiths was the owner of the fee in the streets, it is conceded that his conveyance of the lot operated to convey as a part of it the fee to the center line of the streets on which it abutted. In

1898, while Martin was still the owner of the lot and of the fee to one-half of the streets upon which it abutted, the two streets on the north and east of the lot, Grand and Vandal, were with her consent abandoned as public streets by order of the board of supervisors of the county. Whether the offer of dedication of them as public streets made by the recording of the map by Griffiths had ever been accepted by the public authorities or by actual user does not appear. There was, however, either an abandonment of them as public streets, or else an authorized withdrawal of the offer of dedication made by the recording of the map. The parties have treated it as an abandonment, and we may do so likewise. It is due to this abandonment that the present controversy arises, the dispute being as to the ownership of the two 30-foot strips on the north and east sides of the lot which comprised the half of the streets on those sides.

In 1911, that is, after the abandonment of the streets, Martin conveyed the lot to one Lempertz by deed likewise describing the property merely by its lot and block number according to the subdivision map, and the most importaant question in dispute is as to whether this deed operated to convey the 30-foot strips which were part of the adjoining streets as shown by the map. The claim of the plaintiff, who has succeeded to any interest which remained in Martin, is that her deed to Lempertz did not so operate, while the claim of the defendant, who has succeeded to the interest of Lempertz, is that it did.

In addition to claiming title on the ground just stated, the plaintiff also claims title to the 30-foot strip which was part of Vandal street, the street to the east, on two other grounds. The first of these is that this strip was sold to satisfy the lien of a street assessment imposed upon it for the improvement of Los Feliz street, upon which it abuts at its southerly end, and pursuant to such sale was deeded by the proper public authority to one Colkins, to whose interest likewise the plaintiff has succeeded. The second ground is based upon the following facts: For the purpose of widening Los Feliz street the city of Los Angeles brought a condemnation suit to condemn a 60-foot strip along the northerly side of that street, which strip included 60 feet off the southerly end of the 30-foot strip which was formerly a part of Vandal street. Both the defendant and Martin were made parties to the suit, and it resulted in a judgment that the latter was the owner of the portion of the 30-foot strip sought to be condemned and entitled to the compensation for its taking. The plaintiff claims that this judgment was an adjudication of the rights of the defendant and Martin, not only in the land condemned, but in the whole 30-foot strip, and that this adjudication inures to his benefit as Martin's successor. As these two grounds so claimed by the plaintiff may be easily disposed of, we will discuss them first.

[1] The street assessment proceedings were under the act of March 24, 1903 (Stats. of 1903, p. 376, Deering's Gen. Laws, Act 3928 as amended in 1909, 1911, and 1913). Section 28 of the act provides that after the expiration of 12 months from the date of the sale of any property to satisfy the lien of an assessment under the act, the property may be deeded by the street superintendent, or other corresponding public authority, to the purchaser, but only in case the purchaser has previously given 30 days' written notice to the owner of the property that the property has been sold, that a certain amount is necessary to redeem, and that, unless redemption is made within 30 days, application will be made for a deed. The section further provides that such notice must be personally served on the owner if he can be found, and, if he cannot, must be conspicuously posted on the property; that an affidavit showing such notice must be filed with the street superintendent; and that he shall make no deed until such affidavit is filed. Such an affidavit was filed preliminary to the execution of the deed under which the plaintiff claims, but it shows on its face, taken in connection with the state of the record title, that the notice given was wholly insufficient. The term "owner" is defined by the act (section 33, subd. 7) as the person in whom the legal title appears of record. At the time of the notice in question, Lempertz had died, and any interest she had acquired by her deed from Martin had been distributed to the defendant by decree of distribution in her estate, so that it was the latter who appeared of record as the owner of such interest, and upon whom the notice had to be served in order to foreclose that interest. The affidavit does not show either personal notice to the defendant, or that the defendant could not be found, nor does it show the posting of notice on the property. All that it shows as to the defendant is that notice was mailed to it. The statute requires personal service, and not service by mail, and the notice given is plainly insufficient. The affidavit does show personal notice on the administrator of Lempertz's estate and on the guardian of the two minors for whom the defendant held the property in trust, and if the property had been still under administration, or if the title had been in the minors, service upon the administrator or the guardian would have been sufficient under certain further provisions of the statute. But since the property was no longer under administration, and the title to whatever interest Lempertz had acquired was in the defendant and so appeared of record, notice in the manner provided by the statute had to be given to it. This was not done, and as

a consequence the deed is void as to whatever interest the defendant held as the successor of Lempertz.

[2] As to the judgment of condemnation, it was an adjudication that the property condemned belonged to Martin, but it was not an adjudication that any other property belonged to her. It is one of the functions of a condemnation suit to determine as between the defendants, who is the owner of the property and therefore entitled to the compensation for its taking, and where it appears on the face of the pleadings that the property sought to be condemned is part of a larger tract, which is claimed adversely to each other by two or more defendants, it may well be that a judgment that one of the defendants is the owner of the property condemned will be an adjudication as to the title to the whole tract of which it is but a part. But nothing of this sort appears here. Martin did not appear in the action at all, and there were no pleadings raising any question of title as between her and the defendant, so that no such question was adjudicated as between them. It is true there are allegations in the complaint as amended which possibly might be taken as presenting an issue as to the ownership of the whole 30-foot strip, so that it may be that as between the plaintiff and the defendants that issue might be taken as adjudicated by the condemnation decree or judgment; but there was no such issue as between Martin and the defendant here, and since there was not, the condemnation judgment was an adjudication as between them of ownership only as to the land actually condemned.

[3] In this connection, however, there is a question incidentally involved and which we may as well determine at this point for the guidance of the parties on a new trial. Martin received under the decree of condemnation some three hundred odd dollars as compensation for the portion of the 30-foot strip which was taken. The defendant by cross-complaint against her in this action seeks to recover this amount from her on the ground that it, and not she, was the real owner of the property, and entitled to the compensation for its taking. But if the defendant was the real owner, it should have asserted its claim as such in the condemnation action. Not having done so, the judgment is final that as between it and Martin it is the latter who was entitled to the compensation.

[4, 5] The plaintiff, then, is not entitled to prevail over the defendant, either because of the condemnation judgment or because of the assessment deed, and we are brought to the question as to the effect of the deed by Martin to Lempertz as the final and controlling question in the case; did or did not that deed, describing the property conveyed as lot so and so in block so and so as shown by a certain map, operate to convey the land in front of the lot to the center of the streets shown on the map, although such streets had been abandoned as public streets? There can be no question but that the deed would so operate, except for the circumstance that the streets had been abandoned, so that the question is, Does such abandonment change what would otherwise be the rule? In determining this question, it is well to ascertain at the outset the reason or theory upon which the rule is based that the fee in the streets would pass by a deed of the streets, if the streets were really there. Section 831, Civil Code, reads:

"An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown."

Section 1112, Civil Code, reads:

"A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant."

Section 2077, subdivision 4, Code of Civil Procedure, reads:

"The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

* * * * * * *

"4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title."

In other words, where land is conveyed by a description which bounds it by a street, and the grantor is the owner of the fee in the street, as he is presumed to be, the real boundary line of the property is not the side line of the street, but its center line. This is stated in so many words in Moody v. Palmer, 50 Cal. 31, 36, where it is said:

"It is well settled that land described in a deed as bounded by a public highway or street, will be considered as extending to the center of the street or highway, unless it clearly appears that it was intended to make a side line instead of the center line the boundary. The highway is a monument, and in legal contemplation the thread of the highway is the monument, unless a contrary intention clearly appears. That this is the rule is established by a multitude of authorities."

A description of a lot as that shown on a certain map is a description of it as bounded by a street when the map shows it to be so bounded, so that to such a description the same reason and the same rule apply. Bissell v. N. Y. C. R. R. Co., 23 N. Y. 61; Henessy v. Murdock, 137 N. Y. 317, 33 N. E. 330. Putting it in another way, the fee in the half of the street upon which the lot abuts is in fact

a part of the lot, so that a conveyance of the lot conveys the fee in the street as a part of it.

[6, 7] Such being the reason or theory of the rule, it would seem that it should make no difference that there is in fact no public street there, provided the conveyance be one which describes the lot as bounded by a street. By such a description a street is created as between the grantor and the grantee, regardless of whether or not there is an existing dedication as between the grantor and the public. This is the settled law of this state. Danielson v. Sykes, 157 Cal. 686, 109 Pac. 87, 28 L. R. A. (N. S.) 1024; Eltinge v. Santos, 171 Cal. 278, 152 Pac. 915, Ann. Cas. 1917A, 1143. Under these decisions, there can be no question but that Lempertz, under her deed from Martin, which, in effect, described the property as fronting on the two streets in question took the property as between herself and Martin as so fronting, whether there were public streets there or not. Such being the case, there would seem to be no reason for not applying as between them the rule that a conveyance of a lot bounded by a street carries the fee to the center of the street as a part of the lot. It may well be—in fact, it is certain that it would be—that in such a case the grantor would reserve an easement over the fee in the street for its use for street purposes appurtenant to other nearby property which he might retain, and to which the use of the street as such would be of value. But if he retained no such other property, as Martin did not so far as appears, then no easement would arise, and the fee of the grantee would be unincumbered.

It may likewise well be that the rule would not apply to the conveyance of a lot bounded by a street where the street is described as abandoned. The final question after all is one as to the intention of the parties, and it would seem not unreasonable to consider such a description as one of a lot bounded by what is now private property, although once a street, so that the real boundary was the line of that property. But it is to be noted that the description in this case is a description of the lot as shown by the map, and the map shows the street as existing, and not as abandoned, so that by the description the boundary line of what is conveyed would normally be the center line of the street as shown.

A somewhat analogous situation is presented where the way by which the property is bounded according to the description is a private way only. The decisions differ as to what is the rule in such a case, but the weight of authority is that the fee to the center line of the way passes. 2 Devlin on Deeds (3d Ed.) § 1025a. Another somewhat analogous situation is where the conveyance is of a lot or tract described by reference to a map, and the map shows the lot or tract as abutting on a road or street, but such road or street has not in fact been dedicated. Here, likewise, it is held that the fee to the center line of what is shown as a street passes. Bissell v. N. Y. C. R. R., supra; Easton Borough Appeal, 81 Pa. 85; Jarstadt v. Morgan, 48 Wis. 245, 4 N. W. 27; Freelon v. Adrian, 161 Cal. 13, 118 Pac. 220.

The authorities in which the exact situation found here is presented are not very numerous and are in conflict, and it would be of little purpose to review them. They are collated in the note to White v. Jefferson, 110 Minn. 276, 124 N. W. 373, 125 N. W. 262, as reported in 32 L. R. A. (N. S.) 778, 784. The question is considered at length and with great care by the United States Circuit Court of Appeals for the Sixth Circuit in Paine v. Consumers', etc., Co., 71 Fed. 626, 19 C. C. A. 99, Judge Taft delivering the opinion. Among the reasons advanced by the opinion in support of the view which it adopts is the following, the force and good sense of which are sufficient, it seems to us, to resolve any doubt in the matter. It is said (71 Fed. 632, 19 C. C. A. 105):

"The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots. And modern decisions are even more radical in this regard than the older cases. For a very good statement of the present condition of the law on the subject, reference may be had to the new and valuable work of Mr. Dembitz on Land Titles, § 11. Most of the decisions are rested on some peculiarity of phrase in the description, and it is very difficult to lay down any general rules for determining when the grantor has used language sufficiently explicit to exclude from the operation of the deed the fee to the center of the abutting road. The Supreme Judicial Court of Massachusetts has decided that it is impossible, if any respect is to be paid to the principles of the common law of real estate, to hold that a fee in land not described can pass as appurtenant to that which is described. Tyler v. Hammond, 11 Pick. 193. But in the later cases especially that court has used every device of logic to include in the description of a lot by the side of a road the fee to the center of the road. It has treated the highway or private way in the description of a lot as a monument, and in obedience to the rule that a reference to monuments controls descriptions by courses and distances it has carried the lot to the center line of the monument, however clear a departure this may be from the linear or superficial measurements. It would seem from the language of Mr. Justice McLean, speaking for the Supreme Court of the United States in Barclay v. Howell, 6 Pet. 512, that the difficulty of passing the fee in the adjoining street as appurtenant to the conveyance of the abutting lot did not weigh so heavily on that court, for

he said: 'Where the proprietor of a town disposes of all his interest in it, he would seem to stand in a different relation to the right of soil, in regard to the streets and alleys of the town, from the individual over whose soil a public road is established, and who continues to hold the land on both sides of it. Whether the purchasers are not, in this respect, the owners of the soil over which the streets and alleys are laid, as appurtenant to adjoining lots, is a point not essentially involved in this case.'

"The whole question is most exhaustively discussed by the learned American editors of Smith's Leading Cases (8th Ed., vol. 2, p. 178) in the notes of Dovaston v. Payne, and the conclusion reached that the treatment of the highway as a monument furnishes the means to include the fee to the street center in every case where there is not express language excluding it. See, also, 3 Kent, Comm. 349. The wisdom of such a construction is manifest, and the great weight of authority sustains it."

Sanchez v. Grace M. E. Church, 114 Cal. 295, 46 Pac. 2, has been referred to in other jurisdictions and is now cited to us as supporting a contrary rule. There is language in the opinion which, taken by itself, would justify this view of the case, but which hardly does so when taken in connection with the facts with reference to which it was used. The map in that case did not show the lane on which the lots abutted as a part of the subdivided tract, nor did the grantor own the fee of the lane until after it was vacated as a public way. Moreover, the claim of the grantee was that by a conveyance of the lots, described by reference to the map, there passed, not only the fee to one-half of the vacated lane on which they abutted, but the entire width of the lane in front of them, plus land on the further side of the lane which had never been in a street and which lay between the lane and a new way which had been opened, title to all of which the grantor had obtained by conveyance from its owners after the vacation of the lane. The decision upon these facts cannot, we think, be taken as establishing as the law of this state governing such a case as the present a rule contrary to that which now so strongly commends itself to us. We hold, then, that in the absence of any circumstances showing clearly that the parties intended otherwise, the deed by Martin to Lempertz, describing the lot by reference to the map of the tract, operated to convey as a part of the lot the fee in Martin to the center line of the streets, which the map showed as bounding the lots, although such streets had been previously abandoned as public streets.

[8, 9] We have discussed the case so far as if there was no evidence other than the language of the deed, the recorded map, and the vacation of the streets as public streets, which throws light upon what the parties to the deed really meant should be conveyed by it. The final question in the case is, of course, what was the intent of the parties as expressed in the deed? and the rule which we have been discussing and which we have adopted is after all but a rule of construction, to be followed if, as is usually the case, there is nothing which points plainly and certainly to a contrary intention, but not to be followed if there is. Section 2077, Code Civ. Proc. In the present case, there was other evidence introduced for the purpose of showing the intent of the parties, but it is of little significance. That which is most significant is that the land in the streets was assessed for taxes as a part of the adjoining lots after the streets were vacated, and that apparently, for the evidence is very meager, Martin, after her conveyance, allowed it to continue to be so assessed and the taxes to be paid by Lempertz and her successors without concerning herself about the matter. The testimony shows that prior to her deed to Lempertz she was aware that it might be that as an incident of her ownership of the lot and the vacation of the streets in front of it she had the full ownership of one-half of the streets and if she conceived that she was dividing what she owned and conveying but a part of it, it is to be supposed both that she would have her deed indicate this unmistakably, and also that she would concern herself about the matter of taxes on the part she retained, and would take steps to have that part set off from the part she conveyed, and separately assessed. The fact that she did not attempt to have this done or concern herself with the matter of taxes, if be really the fact, would seem to indicate that by her conveyance she intended to part, and believed she had parted, with all she had. Outside of this evidence, there is practically nothing of any significance. Martin herself testified that she did not intend to convey the land in the streets, but her intention in this respect is to be ascertained by what she said in the deed as construed in the light of the circumstances under which it was made and her conduct with reference to it, and not by extrinsic testimony as to what she intended. Her testimony was wholly incompetent, and, even though admitted without objection, entitled to almost no weight. It is wholly insufficient to control and overcome the rule of construction we have been discussing. It is also to be borne in mind that in case of doubt a deed is to be construed in favor of the grantee, except as to reservations or other provisions which it may contain for the benefit of the grantor. Section 1864, Code Civ. Proc. The rule of construction, then, which we have been discussing governs the case upon the circumstances shown and the evidence appearing, so that under those circumstances and upon that evidence the deed by Martin to Lempertz operated to convey to the latter as a part of the lot specified in the deed the land in controversy.

The two judgments appealed from are reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; LAWLOR, J.; WILBUR, J.

SLOANE, J. (dissenting). I dissent from the majority opinion that land which was formerly, but is no longer, a street or highway, passes as of course from the grantor to the grantee by a deed to land bordering on said vacated street or highway.

The common-law rule governing the presumption in relation to conveyance of land bordering on a highway or stream has been formulated in our Codes as follows:

Civil Code, § 1112:

"A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant."

Section 2077, subdivision 4, Code Civ. Proc.:

"When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title."

The obvious limitation to this rule is that in order for it to become operative there must be an existing highway or stream at the time of the transfer. How can it be logically contended that such a conveyance carries beyond the described limits, where the highway no longer exists, more than in a case where it never existed?

The only theory that can uphold this rule as to vacated streets is that taken by the majority opinion that the actual boundary of a tract bordering on a highway is the center line of such highway, and that the abutting land of the highway is an integral part of the lot or tract, and remains such after the highway is vacated. This is avowedly the position taken in Justice Olney's opinion. He says:

"Putting it another way, the fee in the half of the street upon which the lot abuts is in fact a part of the lot, so that a conveyance of the lot conveys the fee in the street as part of it."

If this is the correct theory, it would logically follow that the soil of the street would remain a part of the lot, although the easement of the street was abandoned. Such a consideration might be tenable under a description which, in terms, carries the boundaries to and along a street or highway, such reference to the street or highway being read as referring to the median line. But it cannot consistently apply to the conveyance of a lot as delineated on a map. In such a description the outlines and dimensions of the tract conveyed are plainly defined and limited by scale and diagram, which show the area within the lines of the plat and without the street. To hold that a lot so described extends to the center of the street is a contradiction of terms. The reductio ad absurdum of such a construction is demonstrated by the department opinion of this court in the case of Earl v. Dutour, 183 Pac. 438, 6 A. L. R. 1163. In that case the plaintiff and defendant acquired title respectively to the easterly and westerly one-half each of lot 17 of the Hillard tract as per recorded map of said tract. On the westerly border of the lot as delineated on the map is a street 60 feet in width. The plaintiff, owning the easterly half of the lot, contended, in accordance with the view of the majority of the court here that the lot extended into the street, and that his half of the lot extended from the easterly border halfway to the line marking the center of the street. As a result, if the lot as marked on the map happened to be an ordinary 50-foot town lot, but included in its legal entity 30 feet additional of street, the defendant would be left with 30 feet of street and 10 feet of real available land as his westerly half of the lot.

There was some reason for plaintiff's contention in that case, since the plat by a dotted line carried the apparent boundary of the lots to the middle of the street. Of course, the court held, as justice demanded, that in such case, when the deed referred to the undivided half of a lot it meant lot and not street.

But let us consider a more extreme and not at all impossible illustration. Suppose we have a 50-foot lot abutting on the west upon a 100-foot street. The owner conveys the west half of the lot. If the boundary of the lot is the middle of the street the grantee gets nothing but street.

It would be a queer construction that would define the two halves of a lot separately conveyed as including only the land within the prescribed boundaries of the map, but would embrace 30 or 40 additional feet of street within its dimensions in the conveyance of the entire lot. It would present a condition in which the whole is greater than its parts. We must accept this incongruity as the legal effect of such a conveyance, or hold that the transfer by reference to lot numbers which carries title to the center of the adjacent street does so by way of intendment as something appurtenant to but outside the land described, and not on the theory that the law enlarges the lot by extending its boundaries to the middle of the street.

Under the plain terms of the law, this can only result when the abutting land is at the time of the conveyance impressed with the public easement of a street or highway. It is said that the intention of the parties must prevail, and that in these conveyances the

law presumes the intention of the grantor to transfer his title in the fee of the street, but that is true only when there is a street. Such is the doctrine laid down in the only decision of this court heretofore considering this question. In Sanchez v. Grace M. E. Church, 114 Cal. 295, 46 Pac. 2, it was said as to land formerly part of a highway, claimed under conveyance after the public way had been vacated:

"A more serious question is whether the land in Messer's lane to the middle of it did not become, when the lane was vacated, by a sort of accretion, parcel of the abutting lots so as to pass with them by the deed to Leonis without further designation. * * * We think no such rule can obtain in this case; the conveyance of land bounded by a highway is presumed to carry title to the median line of the way, but there is no reason in a like presumption to include land which has formed, but forms no longer, part of a highway."

While the doctrine laid down in this decision is weakened as authority by uncertainty as to who was the owner in the fee of the lane, it is at least a clear and explicit expression of the view at that time approved by the court on this point.

The above doctrine is clearly adopted by the Supreme Court of Minnesota. White v. Jefferson, 110 Minn. 276, 124 N. W. 374, 125 N. W. 262, 32 L. R. A. (N. S.) 778, 784, presents a case directly in point. One Allie Hewitt owned "lots 23 and 24, Hewitt's outlots, First division, according to the recorded plat thereof." This ownership carried title to the center of an adjacent street. This street was vacated by the city council. Thereafter the defendants acquired title under a deed containing the foregoing description. Answering defendants' claim that the vacated strip, which was still owned by the grantor at the time of the conveyance, passed with the deed to the lots, the court says:

"On principle the answer is clear. In the first case at the time of the transfer, the lots would front on a street; in the second case, they would not front on a street. A conveyance according to a plat is a conveyance by recorded metes and bounds, except where the lots front on a street."

The opinion in this case contains an exhaustive examination of the principle involved and the authorities on the subject, and quotes with approval the rule stated in Sanchez v. Grace M. E. Church, supra.

Other decisions favoring the same rule are Brown v. Taber, 103 Iowa, 1, 72 N. W. 416; Overland Machine Co. v. Alpenfels, 30 Colo. 171, 69 Pac. 574; Harris v. Elliott, 10 Pet. 25, 9 L. Ed. 333; Chicago Lumber Co. v. Driving Park, 97 Iowa, 25, 65 N. W. 1017.

The presumption that a conveyance of land abutting on a public street or highway carries to the middle of the street is founded evidently on a rule of public policy which discourages the separation of the title to the soil of highways from the adjacent tracts on account of the intimate use and association of such streets to the abutting owner. For many uses the abutting soil of the streets is of value to the adjacent owner, where it would be valueless to a separate proprietor of the fee while subject to the easement of a street. 4 R. C. L., pp. 7, 8; Norcross v. Griffiths, 65 Wis. 599, 27 N. W. 606, 56 Am. Rep. 642; 9 Corpus Juris, 197, § 84. None of these reasons of policy apply where the land is no longer part of a highway.

While there is an opposing line of authorities outside of California supporting the views of the majority opinion, I think the doctrine here contended for is more in harmony with reason and the fundamental rules governing title to real property.

No question is raised in the case before us as to continued rights of easement in these streets in behalf of adjacent owners, as are involved and the subject of discussion in Danielson v. Sykes, 157 Cal. 686, 109 Pac. 87, 28 L. R. A. (N. S.) 1024, and Eltinge v. Santos, 171 Cal. 278, 152 Pac. 915, Ann. Cas. 1917A, 1143, cited in Justice OLNEY'S opinion. Nor is there any element of estoppel, as there might be in case of a grant by reference to a map showing the lands abutting upon streets, where the grantee accepts conveyance in reliance upon such map and without knowledge that the street had been vacated. In this case the streets had been closed for upwards of 12 years, the proceedings vacating them were matters of record, and there is no pretense that the grantees were not aware of the fact at the time of their purchase.

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ISRAEL v. BRYAN et al.

(Civ. 3438, 3450.)

(District Court of Appeal, Second District, Division 1, California. March 26, 1921. Hearing Denied by Supreme Court May 23, 1921.)

1. Judgment ⟸525—Assumed to be rendered as of date.

In the absence of anything contained in the record inconsistent therewith, a recital in the judgment that it was rendered on a certain date must be accepted as true, though not filed by the clerk until later.

2. Judgment ⟸713(1)—Former determination in mandamus proceeding that court had jurisdiction to order substitution of parties held res adjudicata.

Where the District Court of Appeal, on application for writ of mandate against the superior court, determined that such court had jurisdiction to make and order a substitution of defendants in a pending action under Code Civ. Proc. § 386, such determination must be deemed res adjudicata as to such question on a subsequent appeal in the action proper by the applicant for the writ of mandate.

3. Creditors' suit ⟸48—Finding held sufficient to show that levy of execution was made.

In the absence of any evidence showing how a levy under an execution was made, the find-

ing of the trial court that execution was served upon the person having money of judgment debtor in his possession implies that it was duly served in compliance with Code Civ. Proc. § 542, subd. 5, and section 688.

4. Creditors' suit ⟸28—No action against debtor without proof of return of execution unsatisfied or levy of attachment, but substitution of judgment creditor proper in action by third party claiming fund.

A judgment creditor cannot maintain an action at law against a debtor of his debtor without the issuance and levy of a writ of attachment, and cannot maintain a creditors' bill to subject property to the payment of the judgment without alleging and proving that an execution has been returned unsatisfied, but such rules did not apply to a judgment creditor attempting to levy execution on money deposited with a justice of the peace by the debtor, and in suit by a third person against the justice of the peace to recover the money, the judgment creditor was properly substituted as defendant on application by the justice under Code Civ. Proc. § 386, as the creditor's only course was by answer to set forth its right to the suit, and, as between itself and plaintiff as other claimant, submit the question to the determination of the court.

5. Appeal and error ⟸1170(1)—No reversal where justice was done.

Even though there were irregularities in substituting parties, judgment rendered must be affirmed under Const. art. 6, § 4½, where it was a just and righteous disposition of the case.

On Hearing in Supreme Court.

6. Sheriffs and constables ⟸134 — Sheriff proper party in action to recover fund attached.

In an action against a justice of the peace to recover a deposit, where a judgment creditor of another person was substituted as party defendant, a sheriff, who had served notice of attachment on the money in the hands of the justice under a claim by the judgment creditor that the fund belonged to the judgment debtor, was properly made a defendant, where he had made no return upon the writ of attachment.

7. Sheriffs and constables ⟸130—Sheriff has right to defend title of attachment defendant.

A sheriff who has attached property has the right to defend the title of the attachment defendant thereto so as to protect his writ, at least until he has made return so that the plaintiff in the action may make his defense thereto.

8. Interpleader ⟸19—All persons having right or interest properly made parties.

The proceeding in interpleader is one in equity, and all persons having any right or interest to protect may properly be made parties.

9. Appeal and error ⟸935(1)—Assumed that amendment of judgment was made under authority of certain statute.

Where there was no notice of entry of judgment, which was entered on June 9th, an amendment dated August 6th and filed August 9th must be assumed to have been made under the authority of Code Civ. Proc. § 663a, and it must be assumed that notice of motion to amend was made within the limit prescribed.

Appeals from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by F. Israel against Solon Bryan. James C. Byers, Sheriff, and others were substituted as defendants. Judgment for defendants, and plaintiff appeals. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

See, also, 185 Pac. 682.

E. J. Henning and W. H. Wylie, both of San Diego, for appellant.

Eugene Daney and Heskett & Sample, all of San Diego, for respondents.

SHAW, J. In an opinion filed on December 20, 1920, the judgment herein was reversed upon the sole ground that the court erred in making an order that upon defendant Bryan depositing in court the fund in controversy he be discharged from liability, and other defendants, who were asserting claim to the money, substituted in his place. The decision was based upon the fact that, as shown by the record then presented, Bryan had an answer on file in the action, and hence the order made was in violation of the provisions of section 386, Code of Civil Procedure, which requires that in such cases it be made before answer filed. The case involves two appeals, both of which are based upon the judgment roll alone.

The history of the matter, as appears from the findings and record as corrected by diminution thereof allowed by the court after the making of the order granting the rehearing, is as follows: It is alleged in the complaint, filed on April 8, 1918, that plaintiff, on February 11, 1918, deposited with Solon Bryan, justice of the peace, the sum of $3,000 cash bail to secure the appearance of F. M. Couden at a preliminary hearing upon a criminal charge filed against him; that at said hearing, held on February 21, 1918, Couden was discharged, and on February 26th following, plaintiff demanded that Bryan return and redeliver to him the $3,000 so deposited, which demand was refused; wherefore plaintiff prayed judgment against defendant Bryan for the sum of $3,000 and interest from the date of the demand. To this complaint Bryan, on May 15, 1918, filed an answer, wherein he admitted the making of the deposit by plaintiff for the purpose stated in the complaint, but, on information and belief, denied that the same was the property of plaintiff, and alleged that in truth and in fact the same belonged to and was the property of F. M. Couden, who was entitled to the same; that on February 21st,

after the release of Couden and the dismissal of the criminal charge, the sheriff of San Diego county served upon him an execution issued out of the superior court of San Diego county upon a judgment rendered against the defendant in the case of the First National Bank against F. M. Couden, and, asserting that the said sum of $3,000 in his possession was the property of Couden, demanded that defendant Bryan deliver the same to the sheriff, but that defendant Bryan refused to deliver the money to the sheriff upon said writ of execution or otherwise, or to deliver the same to plaintiff until the question as to which of said claimants was entitled to the same was determined by the court; followed by a prayer that the court determine and adjudge to whom said fund belongs.

Upon the application of Bryan he was permitted to withdraw this answer, and granted five days within which to answer the complaint. Thereafter, and within the time so fixed for filing an answer, Bryan, purporting to act under the provisions of section 386, Code of Civil Procedure, and pursuant to notice given, made a motion for an order substituting James C. Byers as sheriff of San Diego county and the First National Bank of San Diego as defendants in the action, and that upon his depositing in court the said sum of $3,000 he be discharged from liability to any of said parties on account of said deposit so made with him by plaintiff. This motion was supported by an affidavit setting forth in substance the facts contained in the answer filed by Bryan to the complaint herein. Thereupon, on May 24, 1918, the court made an order granting his motion, and substituted as defendants in said action James C. Byers as sheriff and the First National Bank of San Diego, Cal., and thereafter made its order, reciting that Bryan had complied with its direction with reference to the deposit in court of said sum of money, and ordered, adjudged, and decreed that Bryan be fully discharged and released from any liability whatsoever to any of the parties in the action, and dismissed him as a defendant therein.

The sheriff and First National Bank, as substituted defendants, filed their joint answer, alleging the money upon which the execution had been levied to satisfy the judgment entered against defendant in the case of the bank against Couden was the property of the latter, and praying that the same be applied in payment of said judgment. Upon the issues so joined, the court, among other adverse findings to plaintiff, found that the sum of money so deposited with Bryan was the property of Couden, and, on June 9, 1919, rendered and entered a judgment that plaintiff take nothing, and "defendants do have and recover of and from said plaintiff the sum of $———, costs and disbursements incurred in this action," thus leaving the subject of the litigation, in so far as concerned the rights of the bank thereto, undetermined. On August 7, 1919, plaintiff gave notice of appeal from this judgment. After the rendition thereof and as recited therein, the court, on August 6th, rendered an amended judgment, dated August 6th, indorsed "Filed August 9, 1919, J. B. McLees, Clerk," whereby the First National Bank was awarded the amount due on its judgment against Couden. Thereafter plaintiff filed a notice of appeal from the judgment as so amended. As ground for the reversal thereof counsel for appellant insists that it was rendered on August 9th, two days after the appeal had been taken on August 7th from the original judgment theretofore rendered on June 9th, by reason of which, if in fact the judgment was rendered on August 9th, the effect thereof, as claimed by appellant, was to remove the case from the jurisdiction of the superior court.

[1] The amended judgment, however, contains the recital that—

> "On the 6th day of August, 1919, pursuant to due notice regularly given, the plaintiff having in open court moved that said judgment be amended by including therein a final disposition of the funds now impounded by this court, to wit, the sum of $3,000, heretofore deposited with the court by the former defendant herein, Solon Bryan, pursuant to the order of the court heretofore made herein, and the motion of the said plaintiff being now granted, wherefore, by reason of the law and the premises, it is hereby ordered, adjudged, and decreed that," etc.

Conceding that jurisdiction to render this amended judgment could not be conferred by the fact that the action of the court was on plaintiff's motion (Kinard v. Jordan, 175 Cal. 13, 164 Pac. 894; Parkside, etc., Co. v. MacDonald, 167 Cal. 346, 139 Pac. 805), nevertheless, in the absence of anything contained in the record inconsistent therewith, the recital that the judgment was rendered on August 6th must be accepted as true. Hence we must assume the judgment, though not filed by the clerk or entered until August 9th, was rendered as stated therein on August 6, 1919, and prior to the appeal, at which time the court had jurisdiction to amend the judgment theretofore entered. Takekawa v. Hole, 170 Cal. 323, 149 Pac. 593; City & County v. Brown, 153 Cal. 644, 96 Pac. 281.

[2] As to the original judgment rendered on June 9, 1919, and so amended, as stated, by order of court on August 6th, appellant's chief contention is that, by reason of the fact that Bryan had filed an answer in said action so brought by plaintiff against him, the court had no power under the provisions of section 386, Code of Civil Procedure, to make the order releasing him from liability as a defendant, and substituting the bank as de-

fendant in said action. In an application made by plaintiff for a writ of mandate against the superior court, he made the same contention, based, as now, upon the ground that, notwithstanding the fact that Bryan had no answer on file when the order of substitution of defendants was made, the court had no jurisdiction to make it, and in deciding the question the court, in Israel v. Superior Court, 185 Pac. 682, said:

"That the court, in permitting the defendant Bryan to withdraw his answer, was acting within its jurisdiction, is not, and, in our opinion cannot be, questioned in this proceeding. Miles et al. v. Danforth, 37 Ill. 157; Rowan v. Kirkpatrick, 14 Ill. 1; Bash v. Evans, 40 Ind. 256. The order permitting the withdrawal of the answer and granting leave to file another was made at the same time; hence the answer on file protected defendant from default to a time when the order granting five days within which to file another answer became operative and in effect, prior to the expiration of which time the fund was deposited in court and the order made releasing Bryan from liability. In effect the situation was the same as though defendant, instead of filing the answer so withdrawn, had asked and obtained from the court an extension of time, not exceeding 30 days, within which to answer, as provided in section 1054, Code of Civil Procedure. Hence we are of the opinion that the court in the exercise of its discretion, and acting within its jurisdiction, had power to permit the answer to be withdrawn and to grant defendant time, not exceeding 30 days in addition to that allowed by the Code (section 1054, supra) within which to file an answer. This being true [and there being no answer], it must follow that the proceedings had and taken pursuant to the provisions of section 386, Code of Civil Procedure, under which Bryan deposited the fund in controversy in court and the substitution of the parties defendant was made, were within the power of the court."

Having, in Israel v. Superior Court, supra, held the court had jurisdiction to make the order, the decision there made must be deemed res adjudicata as to the question now again presented.

[3] The court in express terms found that the writ of execution was served upon Bryan, and "that on the 26th day of February, 1918, the said Solon Bryan made his return as demanded, * * * in which he reported that he had possession of and was holding said sum of $3,000." Appellant insists that such finding is insufficient to show that the levy was made in the manner provided by statute upon the money so deposited with Bryan. Section 688, Code of Civil Procedure, under title of "What Shall be Liable to be Seized in Execution," provides that all moneys of the judgment debtor are liable to execution, and where, as here, held by one other than the judgment debtor, it "may be levied upon * * * in like manner as like property may be attached." And subdivision 5 of section 542, Code of Civil Procedure, provides how such property shall be levied upon under a writ of attachment, namely, by leaving with the person having possession or control of the money a notice as therein prescribed. It is a well-settled rule that findings of fact made by a trial court are to receive such construction as will uphold rather than defeat the judgment based thereon. In the absence of any evidence showing how the levy was made, the finding of the court that the execution was served upon Bryan implies that it was duly served in full compliance with the provisions of the statute.

[4] We may concede that, as claimed by appellant, a judgment creditor cannot maintain an action at law against a debtor of his debtor without the issuance and levy of a writ of attachment, and that no proceeding therefor was had in this action, and likewise concede that plaintiff cannot maintain a creditors' bill to subject property to the payment of a judgment without alleging and proving that an execution has been returned unsatisfied. Matteson, etc., Co. v. Conley, 144 Cal. 483, 77 Pac. 1042; Herrlich v. Kaufmann, 99 Cal. 271, 33 Pac. 857, 37 Am. St. Rep. 50. But the First National Bank, as judgment creditor of Couden, was not seeking to recover from either Israel or Bryan as a debtor of Couden, but by virtue of its judgment against the latter it caused the levy of execution to be made upon the fund in the hands of Bryan, claiming that the same was the property of Couden. By reason of Bryan depositing the money in court and his release from liability, the bank could not proceed upon supplementary proceedings to have the money applied in satisfaction of the execution. As a substituted party, its only course was by answer to set forth its right to the fund, and, as between itself and plaintiff as other claimant, submit the question to the determination of the court.

[5] That the fund so deposited by plaintiff with Solon Bryan and upon which the execution was levied was at all times in question the property of Couden conclusively appears from the finding made by the court upon the trial of the issue as to ownership thereof, and that the action of the court, in the custody of which the money was by its order deposited, in applying the same to the payment of a valid judgment rendered in favor of the bank and against Couden, was a just and righteous disposition of the same, cannot be questioned. Under these circumstances, even though conceding there were irregularities in the proceedings, nevertheless the judgment, in accordance with the provisions of section 4½ of article 6 of the Constitution should be affirmed.

The objection that the sheriff was by the order improperly made a defendant is well founded. Sublette v. Melhado, 1 Cal. 104;

Brummagim v. Boucher, 6 Cal. 16. In no event, however, could plaintiff have been prejudiced thereby.

The judgment is affirmed.

I concur: JAMES, J.

CONREY, P. J. I concur in the judgment. I do not agree that the court, on this record, had jurisdiction to render and enter the amended judgment, except under the authority conferred by section 663 and 663a, Code of Civil Procedure. But since there does not appear to have been any notice of entry of the judgment that was entered on June 9th, the notice of motion to amend was apparently made within the time limit prescribed by section 663a.

Opinion of Supreme Court, In Bank, Denying Hearing.

PER CURIAM. The petition for rehearing in the Supreme Court is denied.

[6-8] We are not in accord with the statement in the opinion of the District Court of Appeal that "the sheriff was improperly made a defendant" in the proceeding for an interpleader by the defendant in the superior court. The sheriff had served a notice of attachment of the money in the hands of Bryan belonging to Couden, and the sheriff had a sufficient interest to entitle him to appear and show the true title to the money in behalf of his principal, the plaintiff in the action in which the judgment was issued, unless prior to the filing of the interpleader he had made return upon the writ of attachment. This fact does not appear. A sheriff who has attached property has the right to defend the title of the attachment defendant thereto so as to protect his writ, at least until he has made return so that the plaintiff in the action may make his defense thereto. The cases cited in the opinion merely hold that the sheriff cannot recover the money from the attachment defendant, and that the court in the attachment proceeding should not order it to be paid to the sheriff prior to the final disposition of the case in which the levy was made. The proceeding in interpleader is a proceeding in equity, and all persons having any right or interest to protect may properly be made parties to such proceeding.

[9] We are also of the opinion that the amendment of the judgment made on August 6th can only be upheld on the theory that, as no notice of the entry of the judgment had been given, it must be assumed that, in effect, the amendment was made under the authority of section 663a of the Code of Civil Procedure, as indicated in the concurring opinion of Presiding Justice CONREY.

All concur.

51 Cal. App. 451

SCHWARTZ v. DIBBLEE et al. (Civ. 3437.)

(District Court of Appeal, Second District, Division 1, California. Feb. 17, 1921. Hearing Denied by Supreme Court April 18, 1921.)

1. Public lands ⊂=28—Last-accepted survey before patent controls.

Before patent the government may make as many surveys of public land as the Land Department desires, and the last-accepted survey will control.

2. Public lands ⊂=27—Survey of one township held not controlling with conflicting prior survey of another township.

A survey, purporting to be a survey of public lands in township 30, did not control over an accepted survey and subdivisional survey of lands in township 29, in an action involving the south boundary of section 33, the surveys being conflicting, in that, the surveyor of township 29 having dropped a tally of 10 chains in his survey, the surveyor of township 30 attempted to correct the error by establishing the north line of township 30 some distance south of the south line of township 29.

Appeal from Superior Court, San Luis Obispo County; Gavin W. Craig, Judge.

Action by S. L. Schwartz against Wm. H. C. Dibblee and another. From a judgment for defendants, plaintiff appeals. Affirmed.

A. H. Ricketts, of San Francisco, for appellant.

C. P. Kaetzel, of San Luis Obispo, for respondents.

CONREY, P. J. Appellant brought this action to recover possession and the issues and profits of lot 14, in section 33, township 29 south, range 12 east, M. D. M., in San Luis Obispo county, alleged to have been unlawfully withheld by the defendants. Judgment was entered in favor of the defendants, and plaintiff appeals therefrom.

Appellant is the owner of an undivided three-quarters, and defendant Arata is the owner of an undivided one-quarter of the land described in the complaint. They became such owners through mesne conveyances from an owner to whom the land was patented by the United States government by patent of date September 28, 1904. The patent conveyed the land "according to the final plat of the survey of the said land returned to the General Land Office by the Surveyor General." Respondents are in possession of a chrome mining property called the "London Mine," from which they are alleged to have taken a large amount of valuable ore. If that mine is located on said lot 14, plaintiff has established a cause of action. If, as claimed by respondents, the mine is located south of lot 14, the judgment should be affirmed. While township 29 was government

land, several surveys of the township or parts of it were made, the last of which was that made by J. R. Glover, unless, as claimed by appellant, the Glover survey was superseded by a later survey of government land made by one Bardwell, which survey was approved and filed in the General Land Office in 1889. The Glover survey was approved and filed in 1880. The judgment herein rests upon the Glover survey, which was received in evidence over the appellant's objections, based upon his contention that it had been superseded by the Bardwell survey.

[1] It is conceded to be the law that, before patent, the government may make as many surveys of a tract of public land as the Land Department desires, and that the last-accepted survey will control. The question here to be determined is whether or not the Bardwell survey is the last-accepted survey of the land in question prior to the date of the patent. The record shows that the Glover survey was made as a survey of lands in township 29, whereas the Bardwell survey purports and was intended to be a survey of lands in township 30, which lies immediately south of township 29. Bardwell assumed, in accordance with the correct theory and practice, that the north line of sections 1 to 6 in township 30, being the north line of the same township, should coincide with the south line of township 29. The notes of his survey show that in his search for the previously established monuments of surveys he discovered that Glover had erroneously dropped a tally of 10 chains in his survey. Concluding therefore, that this error should be corrected in his own survey, he established the north line of township 30 some distance south of the south line of township 29, as shown on the Glover survey. If the acceptance of the Bardwell survey thus made had the effect to move township 29 and the subdivisions therein south so as to coincide with the north line of township 30 as established by Bardwell, it will result that the mining property in question is located on plaintiff's land. If that result does not follow, then the defendants have not infringed upon the plaintiff's property.

[2] We must revert to the language of the patent which conveyed to the patentee, through whom plaintiff's title is derived (besides other property), lot 14, of section 33, in township 29 south, etc., "according to the final plat of the survey of the said land returned to the General Land Office by the Surveyor General." Both parties to this appeal have referred to Kimball v. McKee, 149 Cal. 435, 86 Pac. 1089, as the leading case bearing upon the question at issue. The Supreme Court there said:

"We also take judicial notice that under the laws of the United States and the regulations of the Land Office no sales of public lands are made until the plat and field notes of the subdivisional survey of the township in which they lie have been returned and approved, and that the patents issued to purchasers describe the lands patented as they are delineated on the approved plat, which remains a public record in the office of the Surveyor General, and copies of which, officially certified, are deposited in the local land office."

We do not understand that the particular question upon which the present decision must turn was decided in that case, and we doubt whether any case cited by counsel does decide this question. Perhaps the nearest expression of opinion applicable to the case in point is that found in Commissioner, etc., v. Beebe, 61 Mich. 1, 27 N. W. 713, where the court was discussing a question relating to the line between section 31 of one township and section 36 of the adjoining township, and no survey had been made except the east line of section 36. This survey the court said was in fact "as much a survey of the west line of 31 as it was of the east line of 36." While that might well have been assumed to be true and in accordance with the government theory of surveying in a case where only one survey had been made, it does not touch a situation arising out of conflicting surveys as here presented. We have reached the conclusion that since the Bardwell survey did not purport to be a survey of any lands in township 29, and since the accepted Glover survey was a survey, and a subdivisional survey, of lands in township 29, that the "final plat of the survey of the said land" referred to in said patent was the Glover survey, which was the last-accepted survey of that land.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

51 Cal. App. 437

PEOPLE v. DESCHENEAU. (Cr. 743.)

(District Court of Appeal, Second District, Division 1, California. Feb. 17, 1921.)

1. Burglary ⟸41(1)—Evidence held sufficient to sustain conviction.

In a prosecution for burglary under Pen. Code, § 459, in that defendant unlawfully entered a warehouse with intent to commit larceny, evidence *held* sufficient to sustain conviction.

2. Burglary ⟸15 — Person entering warehouse in trunk with knowledge of manager held guilty of burglary.

One who concealed himself in a trunk, and had a confederate store it in the vault of a warehouse, with intent to commit larceny, was guilty of burglary under Pen. Code, § 459, even though a detective received information that he would be concealed in the trunk and communicated such information to the manager of

the warehouse, and such manager assisted in putting the trunk in the vault, at which time it was opened by an officer.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Charles Descheneau was convicted of burglary, and he appeals. Affirmed.

J. Morgan Marmaduke, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

SHAW, J. By information filed, the defendant was charged with the crime of burglary, in that he unlawfully entered a warehouse with the intent to commit larceny. The trial resulted in his conviction, as charged, after which, upon a denial of his motion for a new trial, he appealed from the judgment pronounced against him.

[1] It appears from the evidence, in which there is little conflict, that defendant prepared a trunk arranged so that it could be unlocked and the lid opened from the inside, in which, at his room, he concealed himself, and, pursuant to an agreement made by his confederate, Earl Wilson, for the storage thereof in the vault of the Hollywood Fire Proof Storage Company, the trunk, with defendant therein, was by Wilson transported to the warehouse of the storage company, where it was unloaded upon the receiving platform and received by the employees of the company, who placed it upon a truck and conveyed it to the door of the vault, where Mr. Leonard, the manager, assisted in putting it into the vault. Thereupon an officer who was present opened the trunk, and, finding the defendant therein, took him into custody.

[2] Section 459 of the Penal Code defines burglary as follows:

"Every person who enters any * * * warehouse, * * * or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary."

Notwithstanding defendant's testimony to the contrary, the evidence is amply sufficient to show, as found by the jury, that the act of defendant in thus gaining entrance to the warehouse was accompanied with the intent to commit larceny by freeing himself from the trunk while it was left in the vault and, during the night following its deposit, take goods and articles from the shelves therein, and, after placing them in the trunk, return to his hiding place therein and await the return of Wilson, who, according to the arrangement, was to call for the trunk and contents the next morning. Indeed, we do not understand appellant to question the sufficiency of the evidence to justify such conclusion of the jury. The contention of his counsel is that, since it is made to appear that a detective had from some private source received information that defendant would be concealed in the trunk so delivered by Wilson for storage and communicated such information to the manager of the warehouse, defendant's entry in the manner stated was with the permission and consent on the part of the owner, and hence, having knowledge that he was concealed in the trunk and knowingly permitting him to so enter the vault, the act, whatever his intent, did not constitute burglary. In support of this contention a number of common-law authorities, together with decisions from other states, are cited. These authorities, however, have no application to the crime of burglary as defined by the section of the Penal Code above quoted. In the case of People v. Barry, 94 Cal. 481, 29 Pac. 1026, it is said that common-law burglary and statutory burglary in this state have but few elements in common, and the plain language of our statute must control as to the acts which constitute the crime. In that case the crime, the commission of which was sustained by the court, was based upon the fact that the defendant entered a grocery store during business hours and attempted to commit larceny therein. In People v. Brittain, 142 Cal. 8, 75 Pac. 314, 100 Am. St. Rep. 95, the defendant entered a store in the nighttime, but during business hours and while the store was open to the public, and because such entry was with the intent to commit larceny the act was held to constitute the offense of burglary. The court there said:

"No words are found in the statute qualifying the character, kind, time, or manner of the entry, save that such entry must be accompanied with a certain intent."

One may, during business hours when a store is open to the public, enter therein with a view to purchasing goods, and if, after he enters, he concludes to steal, such act would constitute larceny only; but if when he entered he intended to commit larceny, his act, under the statute of this state, constitutes burglary, even though the proprietor of the store, having knowledge of his purpose in entering, does nothing to prevent it.

While, according to defendant's testimony, he did not intend to commit larceny, but caused himself to be so transported to the vault with the intention to be found engaged in a game of solitaire when the employees of the warehouse opened the door, and thus create surprise and consternation on their part, with a view of attracting the attention of proprietors engaged in the moving picture business and thus obtain employment, the jury, as shown by their verdict, did not believe the story, but were satisfied from other sufficient evidence that his intent was to

steal the property in possession of the owners of the warehouse, and to have himself, together with the stolen goods, transported therefrom the next day.

We find no merit in the appeal.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

51 Cal. App. 399

BORGES v. HILLMAN et al. (Civ. 2217.)

(District Court of Appeal, Third District, California. Feb. 14, 1921.)

1. Limitation of actions ⊂=47(3)—Action on undertaking on appeal brought 31 days after original judgment became final held not barred.

Since an action against sureties on an undertaking for costs on appeal will not lie until the original judgment becomes final, where suit on the undertaking is brought 31 days thereafter there can be no merit in the claim that the action is barred by the statute of limitations.

2. Appeal and error ⊂=1246—Whether attorney of deceased tenant's administrator had found rent receipts held proper inquiry in action on undertaking covering receipt of rents and profits.

In an action on an undertaking on appeal in an action for rents and profits, whereby the sureties made themselves liable for such rents and profits, and it appeared that the original defendant's tenant died while residing on the place covered by the lease, it was proper to inquire of the administrator's attorney if he had found any receipts for rent from such defendant as bearing on rents received.

3. Appeal and error ⊂=1246 — Evidence sustaining finding of giving of rent receipt in action on undertaking covering rents and profits.

In an action on an undertaking on appeal covering rents and profits, evidence *held* sufficient to sustain a finding that receipts for rents by the original defendant to a deceased tenant had been given, but had been lost, as bearing on the question of the amount of rents received.

4. Appeal and error ⊂=1246—In action on undertaking covering rents and profits, lease held admissible to show amount of rent collected.

In an action on an undertaking on appeal of a suit for rents and profits, a lease from the original defendant's tenant *held* admissible to show how much rent had been collected.

5. Appeal and error ⊂=1246 — In action on undertaking covering rents and profits, evidence of amount of rent received held admissible, although landlord not a party.

In an action on an undertaking on appeal in a suit for rents and profits, evidence as to how much rent had been collected by defendant of the original suit *held* admissible, although such defendant not a party.

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by Joseph F. Borges against E. C. Hillman and others upon an undertaking for costs. Judgment for plaintiff, and defendants appeal. Affirmed.

E. L. Webber, of Napa, for appellants.

Clarence N. Riggins, of Napa, for respondent.

BURNETT, J. The suit was upon an undertaking executed by defendants. Therein they guaranteed the payment of the costs on appeal from an order appointing a receiver in an action brought by Joseph F. Borges against Ida J. Dunham to have it decreed that said plaintiff was the owner of a certain tract of land comprising 170 acres, and that said defendant held the same in trust for the use and benefit of said Borges, and to recover the rents and profits of said land. In said undertaking the sureties also made themselves liable for the payment by said Dunham of said rents and profits, limiting, however, their responsibility for both purposes to the sum of $1,000. The judgment was in favor of plaintiff for the sum of $839, from which the appeal has been taken. A similar action was brought in 1915, and it was claimed by defendants, among other things, that it was premature, since the judgment in the original action had not become final. This view was adopted by the trial court, and the judgment was affirmed herein. The said original judgment became final, by virtue of the action of the Supreme Court in dismissing the appeal October 13, 1919. Thirty-one days thereafter this action was brought and resulted as we have stated. The facts are fully set forth and the validity of said undertaking upheld in the decision of this court, speaking through Justice Hart, in Borges v. Hillman, 29 Cal. App. 144, 154 Pac. 1075. That decision is virtually determinative of this appeal, and only brief consideration is required of two or three additional points made by appellants.

[1] The contention that the action is barred by the statute of limitations is virtually answered by said decision of this court. It being held therein that the action against the sureties would not lie until the original judgment became final, and this suit having been brought in 31 days thereafter, manifestly there is no merit in this claim.

It appears that the only issue of fact involved in the trial was as to the amount of rent received from the tenant by Ida J. Dunham. As to this the evidence was abundantly sufficient to support the finding of the trial court. Specific attention is called to said testimony in the brief of respondent and no reply is made thereto by appellants.

[2, 3] However, complaint is made of the action of the court in overruling an objec-

tion to some of the evidence offered to show the amount collected. It seems that one Panizza, who was the tenant of the premises, died while still living on the place covered by the lease, and the attorney for the administrator was asked if he made any search among the papers of the deceased to ascertain if there were therein any receipts for rent from the said Ida J. Dunham. The inquiry was entirely proper. If he had found any such purported receipt, the evidence would have been followed, no doubt, by a showing or an attempt to show that it was executed by said Dunham. This, of course, would have been evidence that she had received the money. The witness answered that he diligently searched among the effects of the deceased but found no such paper. His answer was thereupon used as furnishing the foundation for testimony on the part of the attorney for plaintiff that he had seen in the possession of said tenant a receipt from said Ida J. Dunham for the sum of $300. The trial court was justified in concluding that said receipt was given but had been lost. Indeed, the explanation of said attorney for plaintiff in giving his testimony made it clear why no particular effort was made to preserve said receipt.

[4] There seems to be no valid objection to the action of the court in admitting the lease in evidence. It was for the purpose of showing what was due from the tenant. This would constitute a circumstance tending to show how much rent was collected. The most that could be said against it is that it was unnecessary, but assuredly it could not have prejudiced the defendants.

[5] Appellants seem to be of the opinion that the evidence as to how much rent was collected by the said Ida J. Dunham was not admissible, since she was not a party to this action. But it is apparent that the obligation of defendants rested upon that circumstance, and it is difficult to understand how the extent of the liability of appellants could have been determined without evidence of said collection.

We find no substantial merit in the appeal. In fact, our former decision leaves little to be said.

The judgment is affirmed.

We concur: PREWETT, Presiding Judge pro tem.; HART, J.

51 Cal. App. 454

PEOPLE v. MUSUMECI. (Cr. 886.)

(District Court of Appeal, First District, Division 1, California. Feb. 18, 1921.)

1. Criminal law ⟸1159(2, 4)—Weight of testimony, credibility of witnesses, and deductions to be drawn are matters for jury.

The weight of the testimony, the credibility of the witnesses, and the deductions to be drawn from the evidence are matters addressed to the consideration of the jurors, and not to the appellate court.

2. Homicide ⟸276 — Self-defense issue held for jury.

In a homicide prosecution, the question of self-defense *held* for the jury.

3. Criminal law ⟸825(1) — Court's reference to instructions as those requested by defendant not error.

Action of court in referring to instructions as those having been offered by the defendant *held* not error as against contention that the jury might have inferred therefrom that the defendant's instructions were of inferior importance to those given by the court, in absence of request by defendant for instruction that the jury were bound by such instructions and were required to accept them as the law in the case.

4. Homicide ⟸297—Instruction on justifiable homicide sufficient.

In homicide prosecution, where defendant requested that jury be instructed under Pen. Code, § 199, that "the homicide appearing to be justifiable or excusable the person indicted must upon his trial be fully acquitted and discharged," the court's omission of the words "upon his trial" from the instruction as given *held* not ground for reversal.

5. Criminal law ⟸806(3) — Omission from part of instructions of admonition as to reasonable doubt not ground for reversal.

In a homicide prosecution, court's elimination from some of the instructions requested by the defendant of admonition that, if there was a reasonable doubt as to the existence of facts, it was its duty to find defendant not guilty, *held* not ground for reversal.

6. Criminal law ⟸807(1)—Argumentative instructions properly refused.

Instructions which are argumentative and in the nature of special pleas may correctly be refused.

7. Criminal law ⟸782(16) — Instruction on proof of self-defense held sufficient.

In homicide prosecution, instruction as to sufficiency of proof of self-defense *held* sufficient.

8. Criminal law ⟸778(4) — Instruction as to presumption of innocence held sufficient.

In homicide prosecution, instruction as to presumption of innocence under Pen. Code, § 1096, *held* sufficient.

9. Criminal law ⟸806(1)—Substance of given instructions need not be repeated.

Instructions given in substance need not be repeated.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Luigi Musumeci was convicted of manslaughter, and from order denying motion for new trial and judgment of imprisonment, he appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WASTE, P. J. Defendant was charged by information with the murder of one E. A. Weber. The jury returned a verdict finding him guilty of the crime of manslaughter. He appeals from the order of the trial court denying his motion for a new trial and from the judgment of imprisonment in the state prison.

Weber, the deceased, was employed as a conductor on one of the street cars on the Union Street branch of the Municipal Railway system in San Francisco. On the night of April 20, 1919, at about 10:30 o'clock, defendant, Musumeci, together with his sister and brother-in-law and their three children, were passengers on his car. A controversy arose between Weber and the defendant over the payment of fares. During the altercation which followed Musumeci drew a revolver and shot the conductor three times, inflicting woulds from which Weber died shortly after. Defendant jumped from the car and fled. Some of the passengers on the car and a police officer pursued him and placed him under arrest. When questioned by the police officer the defendant made a statement concerning the shooting, which, being then and there reduced to writing, the defendant signed. In it he stated that both he and his brother-in-law, La Rocca, had paid the conductor fares for the party; that upon discovering this fact he had demanded return of the money, and was told that it would be necessary for him to go to the office and make his claim; that he insisted upon being paid then and there, and the conductor told him to get off the car, and upon his refusal Weber struck him in the face; that he (defendant) got excited and "lost his head," pulled the gun from his back pocket, and shot him (the conductor) three times; that, when he shot Weber, the conductor had his hand drawn back to strike him a second time.

[1, 2] At the trial defendant claimed that in shooting Weber he acted in self-defense. The jury rejected his plea and found him guilty of manslaughter. In view of the nature of the charge against defendant and the serious consequences attending his conviction, we have carefully read the testimony in the case. There is evidence in the record which, if believed by the jury, as it evidently was, amply supports the verdict. In fact, we are of the opinion that the defendant may well consider himself extremely lucky that the verdict did not pronounce him guilty of the more serious offense with which he was charged. It is unnecessary for us to review the testimony here, for its weight, the credibility of the witnesses testifying at the trial, and the necessary deductions to be drawn from the evidence were all matters addressed to the consideration of the jurors. The disputed questions as to whether or not his plea of self-defense was sound, or was corroborated, were likewise for the jury to determine. People v. Hecker, 109 Cal. 451, 458, 42 Pac. 307, 30 L. R. A. 403.

Appellant's contention upon this appeal appears to be more directly addressed to the charge that the judge misdirected the jury. He first complains that the court identified and segregated the instructions offered by the defendant to such an extent and in such a way as to advise the jury to give less weight to them than to the instructions given by the court of his own volition. His complaint arises from the fact that, after reading the information and informing the jury as to the nature of the charge, and giving a number of instructions defining murder, and the necessary elements entering into that crime, the court said:

"At this time I will read to you the following offered instructions. You are to accept them as statements of law bearing upon the case, and as such they are entitled to your consideration."

The court then gave the instructions offered by the defendant with such modifications as were proper, ending with the statement:

"That concludes the reading of the instructions offered by the defendants."

The rest of the charge followed. There was no other segregation or reference to the defendant's proposed instructions.

[3] We are unable to agree with the appellant that this action on the part of the trial court was in any way prejudicial to his interests. The jurors were correctly instructed that they must accept the instructions "as statements of law bearing upon the case," and that as such they must consider them. As modified by the court, they appear to be correct statements of the law. Appellant's counsel in his brief says:

"The instructions proposed by the defendant are of equal dignity, and to him of vastly greater importance than those given by the court. They are entitled to more than consideration by the jury. They are the law of the particular case. The jury is absolutely bound by them."

It is equally true that the jury is bound to accept every instruction given by the court as the law of the case. We think the jury well understood the court's admonitions to give due consideration to the charge. If the defendant had desired an instruction to the effect that the jury were bound by the instructions of the court, and must accept them as the law in the case, or if he desired any other instruction of like import, it was his duty to prepare and submit it to the trial judge with the request that it be given.

Not only was that his rightful privilege, but in the instant case he was asked by the court at the conclusion of the charge if there were any other or further instructions that he desired to be given. No error appears to us from this incident of the trial and none will be presumed.

[4] Defendant offered as one of his instructions section 199 of the Penal Code, which reads as follows:

"The homicide appearing to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged."

Appellant complains that the court modified the instruction by leaving out the words "upon his trial." No harm was done by the modification. Under the circumstances, the defendant then being actually on trial before a jury sworn to try him, the sense and meaning of the section was not thereby materially changed.

[5, 6] The defendant offered a large number of correct instructions on the law, based on certain facts in evidence, concluding each with a statement to the effect that, if the jury found these facts, or if there was a reasonable doubt that such facts existed, it was then its duty to find the defendant not guilty. In a number of instances the court eliminated this admonition from the instruction. "These excisions," it is claimed by the appellant, had the effect of depriving the defendant of his "right to emphasize" a correctly stated proposition of law, and had the effect of "devitalizing and emasculating" the propositions of law presented in the instructions. He relies upon the decision in People v. Hecker, supra, in which case the same course was pursued by the trial court as in this. It was held in that case that to eliminate the admonition to "find the defendant not guilty," in case of a reasonable doubt, from one of the instructions was not error; yet the practice was criticized as being unwise. We do not feel that any stronger criticism need be made in the instant case; for, while the court did strike the admonition from several of the instructions, it was allowed to remain in a number of others. Instructions which are argumentative and in the nature of special pleas may correctly be refused. People v. Allen, 144 Cal. 298, 302, 77 Pac. 948; People v. Barney, 114 Cal. 554, 557, 47 Pac. 41.

There was no error in striking from the eighth instruction, requested by defendant, the concluding admonition that the jury should "accept his (defendant's) explanation"; for the court, in the instruction, properly told the jury that it was the right of the defendant to explain his conduct before and after the death of Weber, and, if his explanation created any reasonable doubt in their minds, it was their duty to resolve that reasonable doubt favorably to the defendant.

[7] The defendant requested the court to charge the jury as follows:

"You are instructed that defendant is not bound to prove to your satisfaction beyond all reasonable doubt that he acted in his own defense, nor is it the law that he must prove that he acted in his defense by a preponderance, or greater weight, or amount of the evidence. He is only bound to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged, and in the case at bar, if you find that the defendant, Luigi Musumeci, has raised or created in your minds a reasonable doubt as to his guilt of the offense charged, it is your duty to resolve such doubt in favor of the defendant *and find him not guilty, even though you may not be entirely satisfied beyond a reasonable doubt or even satisfied by a preponderance of the evidence that he acted in his proper self-defense.*"

The court modified the instruction by striking out the portion italicized. It would have been proper to give the entire instruction, but we think it was sufficiently complete without the portion omitted to carry its full import to the jury, and therefore no injury was done to defendant's cause.

[8, 9] The eleventh and twelfth instructions offered by the defendant related, respectively, to the burden of proof and the presumption of innocence. The trial court did not read them in its charge, but noted on each that they were "given in substance." Appellant contends that this is not true, but we find he is mistaken. The court, of its own motion, however, charged the jury that on arraignment the defendant had pleaded not guilty, thus putting in issue every material allegation contained in the information, and then gave the following instructions:

"The determination of a jury in a criminal case involves the proof of two distinct propositions: First, that the crime charged was committed; and, second, that it was committed by the person accused thereof and on trial therefor. These two propositions, and every essential and material fact necessary to them, or either of them, must be established by the people to a moral certainty and beyond a reasonable doubt. * * * In every criminal proceeding under our system, the defendant is presumed to be innocent until the contrary is proven, and in case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal at your hands."

The court's reference to the presumption of innocence follows the plain letter of the statute. Pen. Code, § 1096. This instruction was followed by the simple and approved definition of the term "reasonable doubt." People v. Paulsell, 115 Cal. 6, 11, 46 Pac. 734. In other portions of the charge the jurors were instructed that they could return a verdict against the defendant only when they should be satisfied beyond a reasonable doubt that he was guilty under the information; that, if they had any reasonable doubt

upon the question as to whether the defendant shot the decedent in self-defense, it would be their duty to find him not guilty; that, if they had any reasonable doubt upon the question of the defendant's flight, it was their duty to resolve that doubt in favor of the defendant; that, if they had any reasonable doubt as to the explanation given by the defendant as to the statements or conduct in connection with the killing of the deceased, it was their duty to resolve that doubt in favor of the defendant. One other instruction has already been quoted by us in full in another connection. Viewed as a whole, we think the charge sufficiently informed the jury on the law of the burden of proof and the presumption of innocence. It is not incumbent upon the trial court in such cases to include in its charge instructions which amount to a reiteration of the points already covered. The rule is well settled that instructions given in substance need not be repeated. People v. Elliott, 119 Cal. 593, 594, 51 Pac. 955.

"The trial judge should take care to give to the jury once and in clear language every principle of law applicable to the particular case. When he has done this, he is not required to repeat any of them, no matter how many separate instructions are asked which may include them. Such continual repetition tends to give undue emphasis to the particular point to which they may relate, and operates to confuse the jury in their consideration of the evidence." People v. Bickerstaff (Sup.) 190 Pac. 661.

Appellant requested the court to give many instructions bearing upon the law of self-defense. A number were given, some were refused, and others were modified. Further instructions bearing on the same subject were given by the court of his own volition. Appellant contends the court committed error in this regard. Reading these instructions as a whole, we think the law of self-defense was correctly stated and the subject sufficiently covered. People v. Hecker, supra, 109 Cal. 463, 464, 42 Pac. 307, 30 L. R. A. 403.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

51 Cal. App. 412

ROSS v. GOINS et al. (Civ. 2228.)

(District Court of Appeal, Third District, California. Feb. 16, 1921. Hearing Denied by Supreme Court April 14, 1921.)

1. Landlord and tenant ⟹180(3)—Tenant's complaint alleging unlawful removal by force held insufficient.

Tenant's complaint, alleging that landlords, through their agent, removed tenant from premises "by force and violence and against his will and without due process of law and more particularly as follows," and reciting as particulars that defendants entered the premises by force and violence, ransacked the house, removed tenant's personal property therefrom, destroyed portions of his property therein, and struck tenant, knocking him to the floor, knocking out several of his teeth and causing other injuries, *held* not to state a cause of action against the landlords, since the allegation as to removal is in itself incomplete, and since the acts recited in particularization constituted no part of the act of removal.

2. Action ⟹45(1)—Causes for unlawful removal of tenant, injuries to person and property, conversion of personal property, and trespass upon real property, held improperly united.

Tenant's complaint against landlords and their agent, charging that the landlords by the agent removed tenant from premises by force and violence without due process of law, removed tenant's personal property therefrom, and destroyed portions thereof and struck tenant, knocking him down and injuring him, *held* bad for misjoinder.

3. Landlord and tenant ⟹180(3)—Tenant's complaint against landlords charging criminal acts by agent without alleging landlord's authorization insufficient.

Tenant's complaint, alleging that landlords through their agent removed tenant from premises by force and violence, removed tenant's property from premises, destroyed portions thereof, and struck tenant, knocking him down and injuring him, without alleging that the landlords authorized, directed, or commanded such acts on the part of the agent, *held* insufficient to state a cause of action against the landlords in view of Civ. Code, §§ 2338, 2339; a general allegation of agency being insufficient to charge principal with liability for the agent's wanton and malicious acts.

4. Pleading ⟹218(3) — Inadvertent order overruling demurrer on certain grounds after having sustained it on other grounds properly set aside.

Where court, after sustaining demurrer as to certain grounds, some months later inadvertently entered an order purporting to overrule it on other grounds, the court had a right, on discovery that it had previously sustained demurrer to set aside the inadvertent order.

5. Pleading ⟹223—Demurrer sustained, if at all, in its entirety.

When a demurrer is sustained, it is sustained for all purposes and upon every issue and in its entirety as to the count toward which it is directed.

6. Pleading ⟹192(2)—Tenant's complaint against landlords and landlords' agent held demurrable for uncertainty and ambiguity.

Tenant's complaint against landlords and their agent, in which a cause of action for forcible removal without due process of law was improperly joined with other causes of action for destruction and conversion of tenant's

property and for striking and injuring tenant, which causes of action were not separately stated and some of which were against the landlords and the agent and others only against the agent, *held* demurrable on the ground of uncertainty and ambiguity.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by William Ross against John M. Goins, Amelia E. Podesta, Florence L. Podesta, and Adeline De Paoli. Judgment for the three last-named defendants on plaintiff's refusal to amend after demurrer to complaint was sustained, and plaintiff appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

George F. McNoble and W. G. Williams, both of Stockton, for respondents.

PREWETT, Presiding Justice pro tem. A demurrer to the second amended complaint was sustained by the trial court and the plaintiff declined further to amend. He appeals from the judgment following such refusal. The interests of defendant John M. Goins are not involved in this appeal. The grounds of demurrer are various. It is claimed that the complaint fails to state a cause of action; that it is unintelligible, uncertain, and ambiguous; and that several causes of action have been improperly united. The portions of the complaint material to this inquiry read as follows:

"That on the said 2d day of February, 1918, plaintiff was rightfully in possession of said premises and occupying the same as the tenant thereof under the aforesaid owners and their said agent John M. Goins.

"That on and prior to the said 2d day of February, 1918, defendant John M. Goins was the duly authorized agent, servant, and employee of the above-named owners of said real property, for all purposes connected with the leasing and collecting of rents on the premises above described, and in securing tenants therefor and in discharging and ejecting tenants therefrom.

"That on the said 2d day of February, 1918, the said defendant owners by and through their said agent, servant, and employee, John M. Goins, undertook to remove and did remove the plaintiff herein from said building and premises by force and violence and against his will and without due process of law and more particularly as follows."

Then follows a long array of events, all of which relate back to said introductory words, "more particularly as follows," and none of which in any way or degree show or tend to show any removal or attempted removal of the plaintiff.

Said long array of events comprises an allegation that the defendants entered by force and violence and ransacked the house, removed plaintiff's personal property therefrom, destroyed portions of his machinery therein, broke open and destroyed a case of dyes, carried away three suits of clothing, knocked the plaintiff to the floor with great force and violence, sat upon his body, struck plaintiff in the face, knocked out several of his teeth, gagged him, and hurt and bruised him about the chest, right shoulder, left leg, and left foot, to his damage in the sum of $10,000.

[1] Many of these events, if standing alone and tendered as independent averments, would doubtless state causes of action, but when averred as a particularization of the act of removal of the plaintiff from the premises, they fail to have any meaning. Each one of them shows upon its face that it constitutes no part of the act of removal, yet it is only for the purpose of particularizing the alleged removal that they are offered.

Nor does the paragraph which alleges the removal state a cause of action. By its own terms it is incomplete, since it is limited and particularized by the closing clause thereof, which reads, "and more particularly as follows," but the parts that follow do not relate to the matter of removal. It does not therefore, in its present shape, state a cause of action. It would perhaps state a cause of action if we excised therefrom the particularization clause, but it is unnecessary to consider the point.

[2] If we disregard the language and purpose of the complaint in attempting to make this long array of events a part of the paragraph charging an unlawful removal of the plaintiff from the premises, and make an effort to consider them each as an independent averment, we encounter various difficulties. Considering them as applicable to all the defendants, we find that they are improperly joined in the same complaint with a cause of action for unlawful removal; that allegations charging injuries to person and property are improperly joined with a cause of action for conversion of personal property; and that all these are joined with a cause of action for trespass upon real property.

[3] There is no allegation that the unlawful removal is a part of the same general series of torts stated in the following paragraph. The allegations charging crimes are quite insufficient to show that the respondents authorized, directed or commanded the criminal acts. Fogel v. Schmalz, 92 Cal. 412, 28 Pac. 444; Mendelsohn v. Anaheim, etc., 40 Cal. 657. In the Mendelsohn Case the court said:

"It is well settled that though the principal is liable for the actual damage caused by the act of his agent done in the usual course of his employment, he is not responsible for wanton and malicious damage done by the agent without the consent, approval or subsequent ratification of the principal."

Sections 2338 and 2339 of the Civil Code are conclusive on this point. The allegation

of the complaint as to the agency of Goins in the commission of the assault is:

"John M. Goins, as such agent, servant and employee of said owners and while acting in their behalf, then and there knocked the plaintiff," etc.

A general allegation of agency is wholly insufficient to charge a principal with liability for the agent's wanton and malicious acts, but it must be averred that the principal "authorized or ratified them." Section 2339, supra. The rule holding carriers liable for the torts of their conductors and brakemen in no way conflicts with this principle. A cause of action for assault is stated against defendant Goins and not against the respondents, and therefore this cause of action is improperly joined with causes of action against respondents.

[4] The trial court sustained the demurrer as to certain grounds, and some months later inadvertently entered an order purporting to overrule it on certain other grounds. On discovering this it set aside this inadvertent order, as it had a lawful right to do.

[5] When the court sustained the demurrer it was deemed to be sustained on any and every tenable ground, whether general or special. Under our practice a demurrer sustained is sustained for all purposes and upon every issue and in its entirety, so far as involves the count toward which it is directed. Sechrist v. Rialto, etc., 129 Cal. 640, 62 Pac. 261.

[6] The complaint does not state a cause of action against the respondents; the cause of action for removal is improperly joined with other causes of action; a number of causes of action are not separately stated; some are against all the defendants and some against only defendant Goins; and the demurrer was properly sustained on the ground of uncertainty and ambiguity.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

51 Cal. App. 263

GRAHAM v. ALCHIAN. (Civ. 3499, S. F. 9478.)

(District Court of Appeal, First District, Division 2, California. Feb. 4, 1921. Rehearing Denied March 5, 1921. Hearing Denied by Supreme Court April 5, 1921.)

On Hearing in Supreme Court.

Appeal and error ⊂⊃164—Plaintiff, enforcing judgment in his favor, cannot appeal from judgment.

A plaintiff who has obtained a judgment in his favor in an action to recover personal property, and has taken out a writ of execution and satisfied the judgment in the trial court, is not entitled to have his appeal from the judgment considered on its merits, and the appeal will be dismissed; plaintiff having taken the appeal because he was not awarded damages for detention, and trial court having found that there was no damage resulting from any act of the defendant that would not be recompensed by the money judgment given for the value of the property.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by George G. Graham against A. H. Alchian. Judgment for only part of relief prayed for, and plaintiff appeals. Motion to dismiss appeal granted in the District Court of Appeal, and hearing denied in Supreme Court.

See, also, Alchian v. MacDonald, 40 Cal. App. 505, 181 Pac. 77.

Geo. Graham and H. F. Neal, both of Fresno, for appellant.

C. K. Bonestell and Harry Sarkisan, both of Fresno, for respondent.

STURTEVANT, J. The plaintiff, hereinafter called the appellant, commenced an action against the defendant, hereinafter called the respondent, to recover a certain automobile, or its value, alleged to be $700. Judgment went in favor of the appellant in the sum of $700 and interest at 7 per cent. from the date of his demand made on the respondent for possession. Because he was not awarded damages for detention, the appellant appealed under section 953a of the Code of Civil Procedure from that part of the judgment that denied him such additional damages. Thereafter the respondent appeared in this court and moved to dismiss the appeal. In support of his motion the respondent showed this court that the judgment appealed from was entered April 14, 1920; that the appellant appealed April 15, 1920; that on September 13, 1920, the appellant took out a writ of execution, and on October 1, 1920, the appellant satisfied the judgment in the trial court.

The appeal from the judgment and the motion to dismiss have both been submitted, and both are before us for our consideration.

In view of the conclusions which we have reached concerning the merits of the motion, it will not be necessary for us to determine the merits of the appeal from the judgment.

If the defendant, the losing party in the trial court, had taken the appeal, and had involuntarily paid the judgment entered against him, it is settled law that such payment would not affect his right to have the appeal heard on its merits. Patterson v. Keeney, 165 Cal. 465, 132 Pac. 1043, Ann. Cas. 1914D, 232. But a party cannot accept

the benefit or advantage given him by an order and then seek to have the order or judgment reviewed. County of San Bernardino v. County of Riverside, 135 Cal. 618, 67 Pac. 1047; Estate of Shaver, 131 Cal. 219, 63 Pac. 340; Patterson v. Keeney, 165 Cal. 465, 467, 132 Pac. 1043, Ann. Cas. 1914D, 232.

The motion to dismiss the appeal is granted.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The opinion of the District Court of Appeal of the First Appellate District, Division 2, does not perhaps clearly show certain facts which make it obvious that the decision of such court dismissing the appeal is correct.

The trial court expressly found, in disposing of the issues made by the pleadings, that—

"In the month of June, 1918, the defendant sold the same [automobile], and converted the same and the proceeds thereof to his own use," and "that the plaintiff has been damaged by the taking and detention and conversion of the said automobile as herein found in the sum of $700, the value thereof, with legal interest from June 30, 1918, and no more."

This was the disposition by the trial court of all the claims of the plaintiff with relation to value and damages, including a conclusion that there was no damage resulting from any act of the defendant that would not be recompensed by a judgment for $700, with legal interest from June 30, 1918, to the day of the judgment. Judgment was given accordingly. As was said by the District Court of Appeal, the plaintiff could not accept the award so made him by the judgment and further prosecute his appeal.

The application for hearing in this court after decision by the District Court of Appeal is denied.

All concur, except SLOANE, J., absent.

51 Cal. App. 464

PEOPLE v. JOHNSON. (Cr. 745.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1921.)

1. Criminal law ⟸369(8)—Acts and conduct other than charged admissible to show propensity.

In a prosecution for rape, acts and conduct other than the one charged may be shown to develop defendant's disposition as to propensity involved.

2. Rape ⟸40(3)—Testimony of birth of child to prosecutrix admissible.

In a prosecution for rape, testimony as to the birth of a child to prosecutrix one month after the act charged was competent, where it was the consistent claim of prosecutrix that she had no relations with any man other than defendant.

3. Witnesses ⟸379(2)—Testimony as to contradictory statement admissible to impeach defendant's witness.

In a prosecution for rape, where prosecutrix testified that many of the offenses were committed in defendant's room, and a witness for defendant who had roomed for some time in an adjoining room with opportunity to observe conditions testified that he had never observed prosecutrix in a compromising position, testimony as to a conversation with such witness wherein the latter had stated he observed the girl in bed with defendant, etc., was admissible for purposes of impeachment.

4. Criminal law ⟸543(2)—Showing of diligence to obtain witness sufficient to permit reading of testimony on former trial.

In a prosecution for rape, showing by the district attorney of diligence to obtain the attendance of a medical witness *held* sufficient to permit the district attorney to read in evidence the testimony of such physician given at a former trial.

5. Criminal law ⟸406(1), 1169(12)—Rape ⟸46, 57(1)—Whether character, conduct, and statements of defendant admissible and incriminating a jury question; admission of evidence held harmless.

In a prosecution for rape, testimony of a medical witness on former trial, read in evidence on the present trial, that when defendant had visited the physician in company with his wife and had learned of the pregnant condition of prosecutrix, he had inquired what disposition might be made of the girl and of her child, and testimony in attempted explanation that once he had left the girl at home in company with a man, made it a question for the jury to say as to whether the words or conduct of defendant as heard and observed by the physician were incriminating; if they amounted to an admission or appeared sufficient to warrant belief that defendant was trying to cover up his own crime, they were competent, while, if the jury did not so view them, the proof was harmless to defendant.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Fred Johnson was convicted of rape, and he appeals. Affirmed.

E. J. Emmons and Walter Osborn, both of Bakersfield, for appellant.

J. R. Dorsey, of Bakersfield, for the People.

JAMES, J. Defendant was convicted of the crime of rape and sentenced to be imprisoned in the state prison. He has taken this appeal from the judgment entered against him. Conviction was had after sev-

eral mistrials. In the presentation of this appeal we have not been aided by briefs, although counsel for the appellant did by oral argument point to several matters in support of the claim that error had been committed in the lower court by reason of which defendant had been deprived of his right to a fair trial. The record is quite voluminous. We have, however, made a very close examination of it in order to determine whether the contentions of appellant are of sufficient merit to warrant a reversal.

[1] At the time the alleged offense was committed, the date being the 27th day of March, 1919, according to the charge contained in the information, the prosecutrix was a child of the age of 15 years. She was a daughter of a sister of the wife of the defendant. She went to live in the household of the defendant about the year 1916. This household at that time consisted of the defendant and his wife, and a minor child of the two latter. The family first lived at Sawtelle. Later, in the year 1918, they resided for a time in Tulare county (that being in July of the year referred to), and subsequently took up their residence in the oil fields in Kern county. It was while they were residing in the latter county that the act complained of was alleged to have been committed. So far as the particular act referred to in the information is concerned, there was no testimony concerning the happening other than that given by the child. This girl, the prosecutrix, was shown to have given birth to a child in April, 1919, approximately one month after the commission of the unlawful act charged in the information. The prosecuting attorney, commencing at a time prior to that when the defendant and his family removed to Tulare county, offered evidence which was received by the court showing a continuous course of lascivious conduct by the defendant toward the prosecutrix, and a series of illicit acts, the number or circumstances of which it is unnecessary to detail. These various acts and conduct were established by the testimony of the prosecutrix, which was, so far as we can judge from the printed page, given unhesitatingly and with considerable exactness of detail. This testimony was offered under the familiar rule which permits other acts and conduct than the one charged to be shown in a case of this nature, in order that the disposition of a defendant as to the propensity involved may be made apparent. That such testimony is highly dangerous and damaging to a defendant's case must be conceded, for the reason that a jury, in considering the tender age of such a prosecutrix, is prone, under the influence of prejudice, to allow the aggregate proof of acts other than the one charged to overcome any uncertainty that it may feel as to the sufficiency of the proof as to the particular act referred to in the information. Hence it has often been said in the decisions that trial courts cannot be too careful in cautioning juries against unwittingly allowing their personal bias and prejudice, which is naturally aroused against a defendant in the presence of such an accusation, to cause them to deviate from their sworn duty. That testimony of the kind and character to which we have referred is competent, relevant, and material for the limited purpose adverted to, has long been established. People v. Koller, 142 Cal. 621, 76 Pac. 500; People v. Slaughter, 33 Cal. App. 365, 165 Pac. 44; People v. Elgar, 36 Cal. App. 114, 171 Pac. 697; People v. Wademan, 38 Cal. App. 116, 175 Pac. 791.

[2] So also was the testimony as to the birth of the child competent to be introduced before the jury, where it was the consistent claim of the prosecutrix that she had had no relations with any other man. Her credibility was of course a matter which the jury had the right to determine, in view of all the circumstances of the case. There was, in addition to the evidence which is particularly referred to herein, testimony of the marked familiarity in the demeanor and conduct of appellant toward the prosecutrix, which was observable in the daily life of the household. It may be remarked further that the young girl seems to have been influenced throughout the course of the whole sordid relationship by a feeling of reciprocal regard for the man. A part of the evidence was, in substance, that during the residence of defendant and his family in Kern county the wife would arise early in the morning, in order to do the cooking for the family and several boarders, and that the husband would remain in bed, that the young girl frequently slept in the same bed with the husband and wife, and that after the wife had left the room in the morning, many of the acts referred to had been committed. This evidence, as we have before stated, came from the lips of the prosecutrix. The wife of the defendant denied many of the things which the young girl had testified about, and made statements which, if true, showed a condition of affairs where it would have been impossible for the things which the young girl charged to have actually occurred. This situation again presented a question for the jury upon which its decision is final as to the facts. One person, a witness Thompson, testifying for the defendant, testified that he had roomed for some time in an adjoining room to that occupied by the defendant, his wife, and the prosecutrix, that he had opportunity to observe the conditions referred to and to hear even small noises which might have proceeded from that room, and that he had never observed the young girl in the bed occupied by Johnson and his wife. By way of impeachment, and after laying a sufficient foundation, the district attorney produced a witness who testified to a conversation had with Thompson wherein Thompson had stat-

ed that he had observed the young girl in the bed with defendant and proceeded to give some additional details in connection therewith.

[3] We think, notwithstanding the contention of appellant to the contrary, that the testimony was properly admitted as impeaching evidence. The court was careful to caution the jury as to the purpose of the impeaching testimony and as to the limited use which they might make of it in the consideration of the case. Another point urged by appellant is that the court improperly allowed the district attorney to read in evidence the testimony of a physician given at a former trial. The objection urged to this testimony is twofold: First, that it was not sufficiently shown that the physician was beyond the reach of a subpœna; and secondly, that the evidence was, in part at least, incompetent and prejudicial.

[4] We are unable to conclude that the testimony was read without a sufficient showing as to the absence of the witness. On the contrary, we think the district attorney made a very complete showing upon which to base his offer. He showed that he had issued subpœnas to practically every sheriff in the state, many of which had been returned, and that on the day or the day preceding the trial a further search had been made in the immediate locality of the county seat of Kern county, and that this search was unavailing, and that the witness was not to be found. In addition to this, there was the testimony of one of the judges who had presided in a former trial of the case, and other witnesses, that the physician had at the prior trial stated it as being his intention to leave the state of California soon for the purpose of pursuing a course of study in an Eastern college. The particular portion of the testimony to which the further objection is urged that it was incompetent was that defendant had visited the physician in company with his wife, and after he had learned of the then pregnant condition of the prosecutrix had inquired of the physician what disposition might be made of the girl and also of the child to be born; also the further statement, in attempted explanation for the condition of the girl, that at one time he had left the girl at home in company with a man who was at that time stopping there, and that the act must have occurred at that time.

[5] It was for the jury to say as to whether the words or conduct of the defendant, as heard and observed by the physician, were incriminating. If they in fact amounted to an admission, or if they appeared sufficient to warrant the belief that the defendant was endeavoring only to cover up his own crime, they were competent. If the jury did not so view them, then proof of the same was without prejudice. There was some evidence to the point, and in fact it was admitted by the prosecutrix, that upon its being learned that she was in a pregnant condition the prosecutrix at first denied that Johnson was the cause of that condition. In explanation of those assertions, however, she told the jury that Johnson had advised her to make no admissions involving him in the matter, as it would make trouble for herself and he would have to go to jail. Following the making of this admission the defense sought to show that another man working about the oil wells had paid close attention to the child and had desired to marry her. This testimony was furnished by the immediate family of the defendant. It fell short, however, of showing that illicit relations had ever occurred between the child and the "other man." It is quite apparent that all of these matters involved in this feature of the defense presented questions as to which the decision of the jury was final. To be sure, the case was one which warranted and called for the closest scrutiny on the part of the jury in determining the credibility of the witnesses and particularly that of the prosecutrix. The case in its main features is not at all unlike that considered in People v. Wademan, supra. Many of the questions herein adverted to were there presented and determined adversely to the contention of that defendant. We have considered carefully the charge as given by the court to the jury, and find that it sufficiently guarded all of the defendant's rights. All of the particular questions touching the purposes for which the special evidence was introduced in support of the main charge were carefully covered by the instructions of the court. We find no error sufficient to justify the claim of the defendant that the judgment should be reversed, and that he should have a new trial.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

51 Cal. App. 483

LOBREE v. L. E. WHITE LUMBER CO. et al. (Civ. 3706.)

(District Court of Appeal, First District, Division 2, California. Feb. 23, 1921. Hearing Denied by Supreme Court April 19, 1921.)

1. Appeal and error ⊂=117—Order refusing to settle bill of exceptions not appealable.

An order denying an application for settlement of a bill of exceptions is not appealable.

2. Appeal and error ⊂=956(2)—Exceptions, bill of ⊂=43(1)—Application for relief from default in presenting bill of exceptions committed to court's discretion.

An application under Code Civ. Proc. § 473, for relief from the applicant's default in presenting its bill of exceptions for settlement is committed to the discretion of the trial court, and its order denying the application can only be set aside on a showing of a clear abuse of such discretion.

3. Exceptions, bill of ⊂=43(2)—Appellant not entitled to relief from default in presenting for settlement.

Appellant *held* not entitled to relief under Code Civ. Proc. § 473, from its default in presenting its bill of exceptions for settlement because of the sickness and absence from the office of some of its attorneys and a part of their office force, on the showing made.

4. Exceptions, bill of ⊂=43(2)—Delay in presenting not excused by reliance on void extension order.

Delay in presenting a bill of exceptions for settlement cannot be excused by counsel's reliance on a void order of the court extending the time for preparing the bill beyond the latest date to which the court had power to extend it.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Phil Lobree against the L. E. White Lumber Company and another. From an order denying an application for settlement of its bill of exceptions, the defendant named appeals. Affirmed.

Metson, Drew & Mackenzie, of San Francisco (R. G. Hudson, of San Francisco, of counsel), for appellant.

Robert Duncan, of Ukiah, for respondent.

NOURSE, J. Judgment was entered in favor of plaintiff and against the defendants in the superior court of Mendocino county on the 28th of October, 1918, and notice thereof was served on the same day. Thereafter from time to time the defendant L. E. White Lumber Company obtained from the judge of the superior court orders extending its time to serve its bill of exceptions. These extensions ran to the 20th day of December, 1918, which was several days beyond the time which the court had jurisdiction to grant under the provisions of section 1054, Code of Civil Procedure. On the said 20th day of December counsel for the lumber company requested an additional extension, but it does not appear that the request was either granted or refused. In any event, on the following day a proposed bill was served upon counsel for plaintiff. On January 28, 1919, counsel for plaintiff served upon the defendant lumber company his objections to the proposed bill of exceptions, based upon the failure of said defendant to serve the bill within the time prescribed by law. On the 7th day of February following the proposed bill and plaintiff's objections to the settlement thereof were presented to the judge of the trial court with an application that they be settled and allowed. In support of said application counsel for said defendant offered and filed an affidavit setting forth the circumstances under which the bill was prepared. It was therein alleged that the failure to make service within the time required was due to the fact that counsel for said defendant did not receive the reporter's transcript of the testimony taken at the trial until a few days before the bill was prepared and served, and to the further fact that some of the members of the staff of said counsel located in San Francisco were absent from their offices on account of illness. A counter affidavit was filed by counsel for plaintiff, and it was thereupon stipulated and agreed in open court that all objections to the effect that no notice had been given of an application to be relieved under section 473, Code of Civil Procedure, from a default for failure to serve the bill within time were waived, and that such application might be submitted to the court at said time. After argument said application was ordered submitted by the court with leave to file affidavits and authorities. On the same day an affidavit was filed on behalf of counsel for plaintiff designated a "counter affidavit on application to settle bill of exceptions," in which it was recited on information and belief that the court reporter who took the testimony of the proceedings completed the transcript early in the month of November and notified counsel for said defendant that the same would be delivered to them when paid for, also that a similar notification was given to the associate counsel of said defendant having their offices in the city of Ukiah. On February 11th a counter affidavit was filed on behalf of said defendant, wherein it was stated that "affiant makes this affidavit in answer to the counter affidavit of Robert Duncan filed in opposition to the application of defendant L. E. White Lumber Company for a settlement of its said bill of exceptions."

The matter comes to this court upon a notice of appeal which reads:

"You and each of you will please take notice that defendant L. E. White Lumber Company hereby appeals * * * from the order of the above-entitled court denying the application of this defendant L. E. White Lumber Company for settlement of its bill of exceptions on appeal from the judgment. * * *"

A bill of exceptions in support of this notice of appeal was presented, allowed, and settled and is incorporated in the transcript. From this bill it appears that some time after the 11th of February, 1919, when the last affidavit was filed on behalf of appellant, the court made and entered an order denying the application of said defendant for settlement of its bill of exceptions and denying the application of said defendant to be relieved from its default under section 473, Code of Civil Procedure. The transcript does not contain a copy of the order stated to have been made by the court as required by section 951, Code of Civil Procedure, or a copy of the motion or application for relief under section 473. The notice of appeal specifically designates the order denying application for settlement and makes no mention of the order denying application for relief from default.

[1, 2] Preliminary objection is made to a consideration of the appeal on the ground that the order refusing to settle is not an appealable order. This objection is well taken. Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773; Brode v. Goslin, 158 Cal. 699, 112 Pac. 280; Murhpy v. Stelling, 138 Cal. 641, 72 Pac. 176. Appellant concedes the soundness of this objection, but argues that the notice of appeal is open to the construction that it was intended to apply to the order denying relief under section 473, citing Off v. Crump, 40 Cal. App. 173, 180 Pac. 360. However, in view of our conclusion on the merits of the appeal, it is unnecessary to determine the effect of the notice. Assuming that the appeal is properly before us, the order must be affirmed upon the well-established rule that, it being a matter committed to the discretion of the trial court, it can be set aside only upon a showing of a clear abuse of that discretion. Howell v. Pedersen, 181 Pac. 674; Smith v. Riverside, etc., Co., 19 Cal. App. 165, 167, 124 Pac. 870.

[3, 4] That the trial court did not abuse the discretion thus committed to it is apparent from the following facts disclosed by the record. The court announced its decision from the bench October 2, 1918. A written notice of decision was served October 28, 1918. The appellant was represented by the law firm of Metson, Drew & Mackenzie, at San Francisco, and by Preston & Preston, at Ukiah, the place of trial. How many attorneys and how many other attachés were connected with the San Francisco office does not appear. The record does not show the date on which a transcript was ordered, but it does show that Metson, Drew & Mackenzie were advised on November 21, 1918, that the transcript was ready. The record shows that Mr. Drew was absent on account of sickness November 21, 1918, "and did not return until some days thereafter"; that during the month of December, 1918, one-half the force at San Francisco was absent sick, but how many were sick and how many were in attendance does not appear; that a member of the firm was absent until December 23, 1918, but when he absented himself does not appear. It appears that Mr. Hudson had charge of preparing the bill and that he was present at his desk all the time. It does not appear that that half of the office force which was present could not have done the work of preparing the bill. It does not appear why the reporter's letter stating that the transcript was ready was placed on Mr. Drew's desk or that there was no one present who had the right to reply to it or why Mr. Hudson could not have done so. Every member of the firm, it can properly be argued, had an abundance of time to prepare the bill. It does not appear why the firm of Preston & Preston did not prepare the bill other than that they acted in an advisory capacity and did not prepare any of the papers in the case. Furthermore, the record plainly discloses that some one connected with appellant's case procured orders from the trial judge extending its time to prepare the bill beyond December 7th, the last extension which the judge had power to grant. Reliance of counsel upon a void order of the court cannot excuse the delay. The case is within the rule of Williamson v. Cummings, etc., Co., 95 Cal. 652, 30 Pac. 762, and similar authorities.

The order is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

51 Cal. App. 487

CUNNINGHAM v. INTERNATIONAL COMMITTEE OF YOUNG MEN'S CHRISTIAN ASS'NS. (Civ. 3534.)

(District Court of Appeal, First District, Division 2, California. Feb. 23, 1921.)

Bailment ⊂=12—Bailee held released by receipt check from liability for loss of suit case.

Where an enlisted man in the navy checked his suit case with the army and navy branch of the Y. M. C. A., the check given him providing that the article was left with the Association at the owner's risk, subject to storage rates and rules, and might be disposed of when storage was due six months, such enlisted man released the Association from all liability for loss of his suit case not caused by negligence.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Frank E. Cunningham against the International Committee of Young Men's Christian Associations, a corporation. From judgment for plaintiff, defendant appeals. Reversed.

T. G. Crothers, E. L. Chloupek, and C. A. S. Frost, all of San Francisco, for appellant.

Hugo K. Asher, of San Francisco (Philip S. Ehrlich, of San Francisco, of counsel), for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment upon a verdict against it for $500 in an action in which the plaintiff sought to recover $931, the alleged value of a suit case and contents left with the defendant in storage. The testimony showed that on or about November 15, 1918 (when it is alleged the suit case was checked with the defendant), the plaintiff was an enlisted man in the United States navy. He claims to have checked his suit case with the army and navy branch of the Y. M. C. A., at 266 Embarcadero, San Francisco, and this claim is sustained by his own testimony and by a paper check produced by him at the trial, bearing a number and, among other things, the printed words:

"The article checked on this check is left with the Association at owner's risk, subject to storage rates and rules, and may be disposed of when storage is due six months."

When plaintiff presented his check to secure the return of his suit case it could not be found, and defendant refused to compensate plaintiff for the loss thereof. The suit case, according to the testimony, was an "accordeon pleated" or extension leather suit case, containing everything owned by the plaintiff and collected by him during several years of his foreign travels with the United States navy.

Defendant answered that it was a charitable corporation existing for the purpose of establishing and assisting Young Men's Christian Associations, and to promote the spiritual, intellectual, physical, and moral well-being of young men in accordance with the aims and methods of Young Men's Christian Associations and that it was not organized and did not exist for the purpose of profit; that it maintained in San Francisco a branch Young Men's Christian Association for enlisted men of the army and navy of the United States, generally known as the "Army and Navy Young Men's Christian Association"; that it employed various clerks and employees to manage and control said branch association; that defendant used due diligence in the selection of those said clerks and employees, to see that each of them was honest and competent to perform his respective duties; denied any knowledge of plaintiff's ever having had or checked the suit case and contents with defendant as alleged, and on that ground denied that plaintiff delivered said suit case and contents to defendant or left same with defendant. Defendant also alleged that if plaintiff checked for storage, delivered to, or left with defendant the articles mentioned, same were so left with defendant at the risk of plaintiff; also, that if deposited, as alleged by plaintiff, said chattels had been lost, destroyed, or stolen before demand, and without carelessness, negligence, or fault of defendant; also, that in the event said goods were checked with defendant, defendant used due care and diligence for the preservation thereof, and employed proper agents and employees to care for and preserve the same. Defendant also answered that, if it received said goods or chattels for storage, they were so received for the accommodation of plaintiff, not for hire or reward or profit to defendant, but as a part of defendant's charitable work.

At the close of the testimony, counsel requested the court to direct a verdict for the defendant upon the ground that the facts bring the case within the operation of the rule laid down in the case of Thomas v. German General Benevolent Society, 168 Cal. 188, 141 Pac. 1186, which is stated to be: Where one accepts the benefit of a public or a private charity, he exempts by implied contract the benefactor from liability for the negligence of its servants in administering the charity, if the benefactor has used due care in the selection of its servants. The motion was made upon the further ground that it appears without conflict that plaintiff received from the defendant, at the time of the alleged deposit of said suit case and contents, a tag bearing in plain writing the statement, "The article checked on this check is left with the Association at owner's risk * * *;" that he had plenty opportunity t:

take note of such statement, and it was his duty to do so, and he is presumed to have done so, no evidence to the contrary being offered or admissible; and that plaintiff is held, therefore, to have assented and agreed to the terms and conditions of said printed statement.

With reference to the first ground of this motion, appellant contends that the facts proven establish, as a matter of law, the claim that the defendant was a "charitable corporation," within the language of the decisions defining such corporations. In this we are inclined to agree with the appellant. Furthermore, plaintiff, in availing himself of the checking facilities of the defendant, placed himself in the status of "one who accepts the benefit of a charity," under the ruling in Burdell v. St. Luke's Hospital, 37 Cal. App. 312, 173 Pac. 1008. The only other question in connection with the rule of law relied upon in this ground of defendant's motion was whether or not the defendant had used due care in the selection of its servants employed in administering its charity. Defendant offered considerable evidence as to its method of checking suit cases and other articles, and of the precautions taken by it to avoid error. No evidence, however, was offered by either party upon the question of whether or not defendant had used due care or diligence in the selection of its servants, but the defendant relied upon the presumption of the Code of Civil Procedure that it is presumed to have taken ordinary care of its own concerns, and asked the court to give an instruction applying this presumption to the selection of defendant's servants. The instruction was refused. Defendant contends that, in the absence of evidence to the contrary, this presumption was sufficient to decide the question in favor of defendants. We need not decide this matter here. It becomes immaterial to a determination of this appeal, because, regardless of whether or not the defendant was exempted from liability by implied contract with the plaintiff, we think it was exempted from such liability by the express terms of the contract introduced in evidence by the plaintiff in support of his case, and to which he is presumed to have assented. This is the point raised in the trial court by defendant's second ground of his motion for a directed verdict.

A great number of contracts are made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. If the form is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, regardless of whether he reads the document, or otherwise informs himself of its contents. There is no testimony that plaintiff did not read this receipt and have actual knowledge of its contents. He testified that he "accepted the check and then went out of the building." If he did not read it, he was under the necessity of satisfactorily explaining his failure to do what the law required him to do. In order to avoid the effect of this express contract, it would be necessary for him to bring himself within one of the recognized exceptions to the well-established rule holding him bound by its terms. It was said in the case of Taussig v. Bode & Haslett, 134 Cal. 265, 266, 66 Pac. 259, 260 (54 L. R. A. 774, 86 Am. St. Rep. 250):

"We think it clear that the notice is a part of the contract. It was printed plainly on the face of the receipt. The whole paper is extremely brief. It was the duty of respondents to take note of its contents, if they had the opportunity, and their opportunity was ample. The presumption, therefore, is that they did read it. Against this presumption there is no evidence, and none, we think, would have been admissible, to show that the respondents had failed to do what their duty required them to do. Assuming, then, that they read the receipt, and, whether they did or not, that they are chargeable with knowledge of its contents, they had fair warning that any loss by leakage was at their risk, or in other words, that the appellant declined all responsibility for loss by leakage. Their acceptance of the receipt and storage of the goods with knowledge of this condition made it binding upon them as one of the terms of the contract. The cases cited by counsel in which it has been held that notices printed or stamped on bills of lading, but not signed by the consignors, do not exempt common carriers from their common-law liability are not in point. They rest upon the peculiar nature of the public duties of common carriers, and the public policy of preventing them from limiting their liability by mere notices not expressly assented to by the shippers. * * * The case of warehousemen is entirely different. * * * They are not bound to receive articles offered for storage, and may make such terms as they choose to impose as conditions of their contract."

Defendant's motion should have been granted, then, upon the ground that the plaintiff had, by express contract, released the defendant from all liability for the loss of his suit case. Whether as a matter of public policy the defendant would be permitted to expressly contract to be released from the consequences of its own negligence is not involved in the present case, because there is no evidence in the record of any negligence on the part of the defendant.

In view of the conclusion we have reached, it also becomes unnecessary for us to discuss appellant's contention that the judgment is excessive, for the reason that much of the contents of the suit case was such that a bailee could not be made responsible

therefor without notice of the nature of the same.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

51 Cal. App. 479

L. W. BLINN LUMBER CO. v. AMERICAN CEMENT PRODUCTS CO. et al.

UNION HARDWARE & METAL CO. v. SAME.

(Civ. 3218.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1921. Hearing Denied by Supreme Court April 19, 1921.)

1. Mechanics' liens ⟹83—Sellers to materialmen not entitled to liens.

Persons who occupy the position of vendors of materials to a materialman, and who are only such vendors, are not entitled to liens for the materials sold and delivered.

2. Mechanics' liens ⟹132(1) — Materialman required to file claims within time prescribed.

In order for materialmen to enforce their rights of lien, it was necessary for them to file their claims within the time prescribed by Code Civ. Proc. § 1187, as amended in 1911.

3. Mechanics' liens ⟹132(13) — Materialman who furnished materials to owner must file lien within 30 days.

Where the buildings for which plaintiff furnished materials were not constructed by or under any contract between the owner and a contractor, but constructively by the owner himself, regardless of the fact the owner did not file any notice of completion of the building, plaintiff materialman comes within the class of lien creditors who have available to them under the statute but a single course to pursue to preserve their remedy by lien, that is, to file their liens within 30 days after they have ceased to labor upon or furnished material for the work to be done.

4. Appeal and error ⟹173(16)—Incurable defects, as late filing of mechanics' lien claims, will be recognized on appeal, though objection not made below.

Where material and incurable defects exist in the cause of action, as that plaintiffs' lien claims were filed too late, and appear on the face of the record, courts of appeal will not generally refuse to recognize such ground of appeal, even if the objection was not made in the court below.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Actions by the L. W. Blinn Lumber Company, a corporation, against the American Cement Products Company, a corporation, and another, and by the Union Hardware & Metal Company, a corporation, against the American Cement Products Company, a corporation, and another. From judgment for plaintiffs, defendants appeal. Reversed.

S. F. Macfarlane, Heney & Carr, and W. W. Butler, all of Los Angeles, for appellants.

E. S. Williams, of Los Angeles, for respondents.

CONREY, P. J. [1] This is an appeal by the defendants American Cement Products Company and Henry Braun from an adverse judgment in consolidated lien suits for materials furnished and used in the construction of certain additions to a building. Braun is the owner of the land upon which the building was placed. The American Cement Products Company, as lessee of the land, caused the work to be done. In the complaints, which are identical in form, it was alleged that the American Cement Products Company entered into a contract with the California-Arizona Construction Company, whereby the latter company was to "perform certain improvement work in the way of an addition to the frame and corrugated iron building located upon said property." But it was further alleged that no contract or bond relative to said work was ever filed or recorded. The court found that these allegations were true. It further appeared, and was so found by the court, that the only construction work agreed to be done, or which was done, by the construction company consisted in the laying of cement floors; that all of the construction work other than said floors was done by and under the direct supervision of the products company; that by reason of a course of commercial transactions, both present and prospective, between the products company and the construction company, both companies were interested in having said building additions made in order the better to develop these business enterprises; that under and by reason of these circumstances an agreement was made that the materials entering into the construction of these building additions would be furnished to the products company by the construction company and paid for in merchandise sold by the products company to the construction company; that pursuant to these arrangements the materials were ordered from the plaintiffs by the construction company and were by the plaintiffs delivered on the leased premises, where they were used in the construction of said building additions. The materials furnished by the plaintiffs consisted of lumber from the lumber company and iron and steel materials from the hardware and metal company. We need not detail more fully the facts proved by the evidence and found by the court. The defendants contended that upon the facts proved it was established that the construction company was the materialman who furnished to the owner the materials used in the building;

that the plaintiffs were merchants who sold these materials to the materialman (the construction company); and that therefore the plaintiffs acquired no right of lien against the improved property on account of materials furnished by them. The plaintiffs, on the other hand, claimed that the circumstances, as shown by the evidence and stated in the findings, were such that it should be held that these materials were in reality furnished directly to the owner; that it was a part of the plan and intention of the agreement made between the products company and the construction company for the furnishing of said materials that the construction company should order the materials from the plaintiffs for delivery to the products company; that therefore, at least for the purpose of determining the right of lien of the plaintiffs as materialmen, the construction company should be regarded merely as an agent who, by authority of the products company, procured the materials to be furnished. Thus it is seen that the defendants relied upon the rule, which seems to be well established in this state, that persons who occupy the position of vendors of materials to a materialman, and who are only such vendors, are not entitled to liens for the materials sold and delivered. Roebling's Sons Co. v. Humboldt, etc., Co., 112 Cal. 288, 44 Pac. 568. Since the judgment must be reversed for another reason hereinafter stated, it becomes unnecessary to undertake a more complete study and analysis of the facts and the law which would be essential to a determination of the question whether or not the respondents occupy the actual position of materialmen toward appellants herein.

[2, 3] For the purpose of considering the next proposition, let it be assumed that respondents were materialmen within the meaning of the law governing liens of mechanics and materialmen. In order to enforce such right of lien, it was necessary to file their claims of lien within the time prescribed by section 1187, Code of Civil Procedure, as amended in 1911. In each of the instances of lien claims shown by the record in this action, the claim of lien was filed in the recorder's office more than 30 days after the last date of delivery by the claimant of the materials covered by the claim. In Irwin v. Silva, 40 Cal. App. 135, 145, 180 Pac. 361, it was held by the Third District Court of Appeal that where the buildings for which the plaintiff furnished materials were not constructed by or under any contract between the owner and a contractor, but constructively by the owner himself (and regardless of the fact that the owner did not file any notice of completion of the building), the materialman "comes within that class of lien claimants who have available to them under the statute but a single course to pursue to preserve their remedy by lien, viz., to file their liens within 30 days after they have ceased to labor upon or furnish material for the work to be done." The reasons for this conclusion are very fully set forth in the cited case. In Ferger v. Gearhart, 186 Pac. 376, the First District Court of Appeal announced the same rule on the authority of Irwin v. Silva. In each of these cases applications for rehearing were made to the Supreme Court and were denied. We therefore consider this question settled, notwithstanding the earnest argument presented here, in which it is urged that those cases were erroneously decided.

[4] Counsel for respondent urges that appellants should not, on this appeal, be permitted to make the defense that the lien claims were filed too late, when the record shows that this defense was not made in the trial court. There are numerous cases in which it has been held that points not made in the trial of actions will not be reviewed on appeal. Far the greater number of these instances related to errors which might have been corrected at the time if they had been suggested before the trial court. Some cases go further and apply the rule to matters of objection, which, if made at the proper time, apparently would have been decisive of the controversy. It is in the interest of justice that numerous questions incidental to litigation should be definitely and finally decided as rapidly as possible during the progress of the action. There are many questions, such as those relating to procedure and the admission of evidence, which, when once passed without objection, should not be further reviewed. But where material and incurable defects exist in a cause of action, and appear on the face of the record, courts of appeal will not generally refuse to recognize such ground of appeal, even if the objection was not made in the court below. Thus, "it cannot be said that the right to complain of an error appearing on the record is lost by a failure to call specific attention to it in presenting a motion for a new trial." Mass. Bonding & Ins. Co. v. Los Angeles R. Corp. (Sup.) 190 Pac. 161. In the case at bar the dates when the last materials were furnished by the claimants, and the dates when the claims of lien were filed for record as well as the circumstance that the work was not being done by a contractor, all appear in the judgment roll. Under the decisions to which we have referred, it results that the findings do not sustain the judgment.

It is ordered that the judgment be, and the same is hereby, reversed.

We concur: SHAW, J.; JAMES, J.

51 Cal. App. 476

PEOPLE v. LOPEZ. (Cr. 753.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1921.)

1. Criminal law ⟸1153(2)—Competency of child as witness is within discretion of trial court reviewable only for abuse.

Under Code Civ. Proc. § 1880, subd. 2, making children under 10 years of age who appear incapable of receiving just impressions or of relating them truly incompetent as witnesses, the disability of a child 6 years old to testify is a question addressed to the discretion of the trial court, whose determination will be reviewed only for abuse of discretion, taking into consideration the fact that the court which had the witness before it can form a better idea of her competency than the appellate court can form from the record.

2. Criminal law ⟸1159(2) — Testimony of child given same weight on appeal as that of adult.

On appeal from a conviction of a crime, where the trial court in a proper exercise of its discretion permitted a 6 year old child to testify for the prosecution, the testimony of such child is to be considered like the testimony of an adult in determining whether the evidence was sufficient to justify the verdict.

3. Criminal law ⟸885—Recommendation to mercy shows jury was not actuated by passion or prejudice.

The fact that the jury recommended defendant to the mercy of the court shows that it was not, in rendering its verdict, actuated by passion or prejudice against defendant.

4. Criminal law ⟸942(1)—New evidence of offer of money to child witness held not to require new trial.

Newly discovered evidence that an uncle of the child who was the prosecuting witness against defendant had offered to give the child money if she spoke well does not show an attempt to corrupt the witness and does not establish abuse of the trial court's discretion in overruling the motion for new trial.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Marin Lopez was convicted of lewd and lascivious conduct with a child, and he appeals from the judgment and from the order denying his motion for new trial. Affirmed.

E. L. Johnson, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was charged with committing the offense designated in section 288 of the Penal Code, and upon conviction thereof appealed from the judgment of imprisonment which followed.

The prosecuting witness was a female child six years of age and the stepdaughter of defendant, with whom and her mother she was accustomed to occupy the same bed. The act with which defendant is charged is alleged to have occurred about a month prior to the filing of the information. The verdict is based largely upon the child's testimony, given through an interpreter, to the reception of which evidence, on account of her tender years and lack of intelligence, counsel for defendant unsuccessfully urged objections.

[1] Subdivision 2 of section 1880, Code of Civil Procedure, provides that "children under 10 years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," cannot be witnesses. It thus appears that the disability is applicable alone to such children as appear incapable of receiving just impressions of facts, and, when objection is made to the competency of a child under 10 years of age to testify, it becomes a question addressed to the sound discretion of the trial court, and an appellate court will not interfere with its ruling unless there be a clear abuse of discretion apparent from the record. People v. Harden, 24 Cal. App. 523, 141 Pac. 1075, and cases therein cited. In People v. Craig, 111 Cal. 469, 44 Pac. 188, it is said:

> "The burden is upon the person who objects to the child being a witness to show that he is incapable, and the determination of the judge upon such objection, and an examination of the child, is not a matter of review, any more than is his ruling upon the capacity of an adult who may be offered as a witness."

The trial judge, having the witness before him, is better able to determine his capability or incapability than an appellate court, whose judgment must be based wholly upon the record, from an examination of which in the instant case we cannot say there was an abuse of discretion in permitting the child to appear as a witness against the defendant.

[2] It is next urged that the evidence was insufficient to justify the verdict. No purpose could be served by a detailed statement of the testimony relating to the commission of the acts with which defendant is charged. Suffice it to say that, if the jury, whose province it was to determine the weight of the child's testimony, believed her statements to be true, they could not have rendered a verdict other than that of guilty. Conceding that her testimony was subject to the criticism that discrepancies existed therein, and that it did not in every detail correspond with her statements made at the preliminary hearing of defendant, nevertheless, since the court instructed the jury that owing to the nature of the case they should examine it with caution, we can-

not on review, by reason of her immature age, consider it otherwise than like testimony given by an adult; and therefore, as said in People v. Horn, 25 Cal. App. 587, 144 Pac. 643, "it was peculiarly a function of the jury to decide the question whether the inconsistencies developed in her testimony were sufficient to impeach the integrity of her declaration" that defendant committed the act of which he was accused. Moreover, some corroboration of her testimony may be attributed to the fact that some two weeks after the act complained of an examination of the child disclosed a condition indicating that she had been subjected to abuse.

[3] While the evidence is meager, it is nevertheless positive and direct as to the commission of the acts charged against defendant, and it is apparent from the fact that the jury recommended defendant to the mercy of the court that it was not, in rendering its verdict, actuated by passion or prejudice against defendant.

[4] Defendant also appeals from an order of court denying his motion for a new trial based upon the ground of newly discovered evidence, in support of which defendant presented an affidavit to the effect that prior to the trial the prosecuting witness stated to another child:

"Monday we are going to court, and Camacho is going to give me a dollar for me to speak well; he gave me already two bits."

Another affidavit consisted of purely hearsay matter which in no event would be admissible as evidence. Conceding that the uncle did state to the child that he would give her a dollar if she talked well, it cannot be said that it was intended or that she understood it to be with the view of influencing her testimony; indeed, the natural inference would be that it was intended to encourage her to talk intelligently and truthfully. There was no abuse of discretion on the part of the court in denying the motion.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

51 Cal. App. 552

PHILLIPS et al. v. MORTENSEN et al.

(Civ. 3245.)

(District Court of Appeal, First District, Division 1, California. Feb. 24, 1921.)

1. Boundaries ⊜37(5)—Evidence held to warrant conclusion that acts and omissions precluded plaintiffs from claiming line marked by fence and ditch was not true boundary.

In an action to quiet title to a strip of land 30 feet in width, having for its real object the determination of the boundary line between plaintiffs and defendants, evidence *held* to warrant the conclusion of the trial court that the acts and omissions of the parties and their predecessor had been such as to preclude plaintiffs from saying that the line marked by a fence and ditch was not the true boundary line.

2. Boundaries ⊜43—Judgment subject to vacation for uncertainty.

In an action to quiet title to a strip of land 30 feet in width, having for its real object determination of boundary line, judgment as entered *held* subject to vacation on account of uncertainty, being so vague in its definition of the line that it could serve no purpose except to lead to confusion and controversy.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by F. M. Phillips and another against Morten Mortensen and another. From judgment for defendants, plaintiffs appeal. Reversed, and cause remanded, with directions.

Julius Hansen, of Fresno, for appellants.
W. D. Crichton, of Fresno, for respondents.

BARDIN, Justice pro tem. This action, brought to quiet title to a strip of land 30 feet in width, has for its real object the determination of the boundary line between certain lands severally owned by the plaintiffs and an adjacent tract owned by the defendants. The lands referred to are all in the same quarter section in Fresno county. The appeal is from the judgment entered in favor of the defendants.

It is admitted that plaintiff Stratton owns the north half of the northeast quarter of the northwest quarter of the section, that Phillips owns the south half of the northeast quarter of the northwest quarter thereof, and that the defendants own the east half of the northwest quarter of the northwest quarter. The boundary line in controversy marks the east boundary of the Mortensen property and the west boundary of the lands of Stratton and Phillips, respectively. It is alleged in plaintiffs' complaint that a line precisely described therein by courses and distances is the true location of the disputed line, which line had been surveyed and marked on the ground by monuments about one year before the present action was begun. The defendants, on the other hand, claim that the true boundary line between the lands referred to is a line located 30 feet east of the one claimed as correct by the plaintiffs. Defendants' claim as to the true location of said boundary line is apparently founded upon two theories, namely: (1) That the boundary line claimed as the true one by defendants had been determined and located by an express agreement of coterminous owners, and (2) that the plaintiffs, by reason of having acquiesced through

a long period of time in the acts of the defendants and their predecessors, were each estopped from denying that the east boundary of the defendants' land extended to the line claimed as the correct one by the defendants.

It is true that these claims of the defendants were not set out with commendable clearness or precision in their answer, but a fair interpretation thereof leads us to the conclusion that these were the grounds upon which the defendants rested their case.

The trial court found, in effect, that the true boundary line was the line claimed as such by the defendants, and that it had been located and marked upon the ground by agreement of former grantors and predecessors in title of the respective parties to the action more than 25 years before the filing of the complaint.

It is unnecessary to discuss whether the essentials required to fix and determine the boundary line, which it is claimed has been established by direct agreement, ever existed, for the reason that the record is barren of any evidence, direct or indirect, showing that such an agreement had ever been actually entered into. In fact when, or in what manner, the purported boundary line claimed as correct by the defendants came into existence does not appear from the record.

But the court found to the effect (and there was ample testimony adduced to sustain the finding) that for more than 25 years before the action was brought the defendants and their predecessors in title, under the belief that it was their property, had occupied, farmed, and planted and maintained vineyards upon the disputed strip of land, up to the line claimed as correct by the defendants and marked during said period by an irrigating ditch and fence, and with the acquiescence of the plaintiffs and their predecessors in interest.

The defendants acquired title to their lands by gift deed from their father about two years before the filing of the complaint. The elder Mortensen purchased the property in 1902. Relying upon the purported east boundary as marked by a ditch and fence as correct, and without any objection or hindrance, and at a considerable expense, he made excavations upon and leveled the strip of land in controversy, cultivated it continuously after acquiring title, and planted it to a vineyard now about ten years old. The predecessor in title of the older Mortensen had cultivated, or caused to be cultivated, the strip of land in controversy, under the supposition that it was a portion of the tract referred to as the Mortensen property, for several years before Mortensen acquired title. As early as 1887 a predecessor in title of the plaintiffs had considered the ditch and fence referred to as marking the west boundary of the plaintiff's lands. Succeeding grantees, other than the plaintiffs, likewise continuously acquiesced in the purported boundary line and in the adverse acts of the occupants of the Mortensen property, and when the plaintiffs both acquired title to their respective holdings in 1908 they, too, ostensibly accepted the disputed line as correct and continued to treat it as such for several years, acquiescing meanwhile, as their predecessors had done, in the hostile acts of the defendants and their predecessors, and permitting them, without objection, to continue the intensive development and improvement of the disputed strip of land.

About two years before the complaint in this action was filed the plaintiffs caused their land to be surveyed, with the result that since that time plaintiffs have claimed the boundary line to be as described in their complaint. Some indefinite and vague question, however, had arisen between Mortensen, Sr., and Phillips, two or three years—possibly more—before the survey was made, as to the correctness of the purported boundary line, but it was not until the survey was made that the present claims of the plaintiffs became tangible and certain. The uncertainty as to the boundary line in dispute seems to have arisen because of some irregularity or shortage in the original government survey of the section.

[1] We believe the facts to be such as to warrant and sustain the conclusion of the trial court that the acts and the omissions of the parties and their respective predecessors have been such as to preclude the plaintiffs from now saying that the line marked by the fence and ditch referred to was not the true boundary line. Columbet v. Pacheco, 48 Cal. 395; Burris v. Fitch, 76 Cal. 395, 18 Pac. 864; Sneed v. Osborn, 25 Cal. 619; 9 C. J. 238.

The court found that the true boundary line between the coterminus owners referred to was the line claimed as correct by the defendants in their answer, which line was marked by a fence and ditch 30 feet east of the line claimed by the plaintiffs. We are foreclosed from a discussion of the facts disclosed by the evidence touching this subject of the case by reason of the unintelligible conditions of the record. A blackboard diagram was used for illustrative purposes at the trial, which was repeatedly referred to by all the witnesses, but no copy of such diagram came up with the record. Counsel for both parties showed a singular lack of concern for the state of the record, and continually propounded questions and accepted answers without objection or protest that, with reference to the boundary line in dispute, had to do with "here," "there," "down this way," "over yonder," and other like indefinite words and phrases, which, while meaningless to us, were, nevertheless,

probably clear to the trial court. The trial judge, with the diagram before him, was in a position to give the testimony of the witnesses a correct interpretation, and we must conclude that he did so, and that the evidence relative to the location of the ditch and fence was such as to properly support the finding of the court thereon. The duty of presenting an accurate and intelligent record on appeal of the evidence adduced at the trial, covering the points wherein it is claimed the findings are not sustained by the evidence, devolved upon the appellants. And since they have not presented such a record for our review, they must suffer any disadvantage now arising because of such failure.

Since it is nowhere claimed by the defendants that they have acquired title to the disputed strip of land by adverse possession, it is unnecessary to discuss that subject.

[2] The judgment as entered should, however, be vacated on account of uncertainty. It is so vague in its definition of the boundary line in controversy that it could serve no purpose so well as to lead to further dispute and controversy. For some reason, unknown to us, the precise description of the boundary line established by the findings was ignored in the judgment, and a line therein described which lacks the definiteness and certainty required of such a judgment. 9 C. J. 293. No land title man, or any one else, accustomed to consider matters of title, could properly accept the definition of the controverted line as sufficiently precise or certain, nor could a land surveyor, or an executive officer of the court charged with the duty of serving a writ of possession, locate the boundary line from or with the aid of anything contained in the judgment. The judgment as entered leaves the parties for all practical purposes, where they started from at the inception of the controversy. It recites, in effect, that the true dividing line between the lands of the coterminus owners is that located by the predecessors in title of the plaintiffs and defendants over 25 years before the filing of the complaint, and marked and located upon the ground by building a ditch and a fence thereon. But where the ditch or fence are now, or were, located, does not accurately appear from the judgment, nor can it be ascertained therefrom.

The judgment is reversed and the cause remanded, with directions to the court below to frame and enter a new judgment, precisely describing by courses and distances the common boundary line between the lands of the parties to the action and as set out in the findings of the court.

We concur: WASTE, P. J.; RICHARDS, J.

(51 Cal. App. 433)

LAMB v. OTTO. (Civ. 3592.)

(District Court of Appeal, First District, Division 2, California. Feb. 17, 1921.)

1. Evidence ⊂⊃441(9) — In action for breach of warranty, parol testimony held inadmissible to vary written contract.

In an action for breach of warranty on sale of a secondhand automobile, where it was not claimed that the contract contained a latent ambiguity, it was error to resort to parol testimony to show accessories sold with the car, or to show express warranties of quality or character other than stated in the written contract.

2. Sales ⊂⊃266 — No implied warranty upon sale of secondhand automobile.

Under Civ. Code, § 1767, relating to implied warranties, there is no implied warranty upon the sale of a secondhand automobile.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Nora E. Lamb against F. W. Otto. Judgment of nonsuit, and plaintiff appeals. Affirmed.

George G. Graham, of Fresno, for appellant.

Everts & Ewing, J. R. Fitch, Ernest Walling, and Louis C. Levy, all of Fresno, for respondent.

STURTEVANT, J. The plaintiff brought this action against the defendant to recover damages for an alleged breach of warranty. A trial was had in the lower court, and at the end of the plaintiff's case the defendant moved for a nonsuit. The motion was granted, judgment was entered for the defendant, and the plaintiff appealed under section 953a of the Code of Civil Procedure. At the time the motion was granted the trial court had received considerable parol evidence on the issue as to what warranties, if any, were made. Such evidence was introduced over the objection and exception of the respondent. If the oral evidence was admissible, the lower court erred in granting the nonsuit. If the evidence was inadmissible, the lower court erred in receiving the evidence, but cured the error by granting the nonsuit.

[1] In the first place, we will therefore examine into the question as to the admissibility of the evidence which was tendered and received. The appellant had bought a secondhand automobile from the respondent. The purchase was evidenced by a formal written transfer, which was signed by the buyer and by the seller. The subject of the sale is described as: "One Reo Automobile Motor No. ———. Touring body ——— with complete equipment. Serial No. 9935." The writing contains nothing as to condition. On the trial the appellant introduced oral

testimony that the respondent had, just prior to the sale, represented that the sale was to include "one Reo automobile with complete equipment," and also two used casings for extras and three or four used tubes all in first-class A-1 condition. The respondent also introduced oral testimony that the property as delivered was not in first-class A-1 condition and that the extra tubes and casings were not delivered at all. At all times the respondent objected that the oral representations, as to the articles covered by the sale and as to the condition of the same, were incompetent, and that the whole subject was covered by the written contract.

The appellant contends that the evidence was properly received, and in support of her contention she cites Maxson v. Llewelyn, 122 Cal. 195, 54 Pac. 732, Muller v. Palmer, 144 Cal. 305, 77 Pac. 954, Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351, Troy Laundry Machinery Co. v. Drivers' Independent Laundry Co., 14 Cal. App. 152, 111 Pac. 121, Jones v. Grieve, 15 Cal. App. 561, 115 Pac. 333, and Luitweiler Pumping Engine Co. v. Water Co., 16 Cal. App. 198, 116 Pac. 707, 712. All of those cases involved unilateral contracts such as a deed, a bill of sale, a guaranty, an order for merchandise, etc., or contracts resting in parol. She could have cited some cases of the same general nature, and which are still later. Myers v. Lowery, 189 Pac. 793, and Crouch v. Wilson (Sup.) 191 Pac. 916. The respondent contends that the evidence was improperly received, and the trial court did not err by ignoring the evidence and treating it as though it were not before the court. In this behalf the respondent cites cases which involved bilateral formal written contracts. Peterson v. Chaix, 5 Cal. App. 525, 90 Pac. 948; Tockstein v. Pac. Kissel Kar Branch, 33 Cal. App. 262, 164 Pac. 906; Munn v. Earle C. Anthony, Inc., 36 Cal. App. 312, 171 Pac. 1082; Yuba Mfg. Co. v. Stone, 179 Pac. 418, and Case Threshing Mach. Co. v. Copren Bros., 187 Pac. 772. As it was not claimed that the written contract contained a latent ambiguity, it was error to resort to parol testimony for the purpose of showing that respondent sold appellant "2 casings and 3 or 4 tubes," although the same were not mentioned in the contract. Peterson v. Chaix, supra. For the same reason it was not competent to show, under the facts of this case, any express warranties as to the quality or character of the automobile other than as stated in the written contract. Munn v. Earle C. Anthony, Inc., supra. If it be said that the formal contract between the parties was silent as to quality, and therefore the evidence was admissible, the answer is that the same rule applies. Germain Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319; United Iron Works v. Outer Harbor Co., 168 Cal. 81, 85, 141 Pac. 917; Electric Storage Battery Co. v. W. C. F. & N. Ry. Co., 138 Iowa, 369, 116 N. W. 144, 19 L. R. A. (N. S.) 1183.

[2] The appellant cites section 1767 of the Civil Code, and contends that an implied warranty exists under the facts of this case. The undisputed facts show, among other things, that the seller was not the manufacturer of the machine in question; that he had for some time been using it; that it was a secondhand car; that it was present during nearly all of the negotiations; and that the seller stated to the buyer that she could have it examined by any mechanic, but that she did not do so. The record does not show that it was at any time claimed, or that it is now claimed, that the seller occupied any position of trust or confidence toward the buyer. In Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 116, 3 Sup. Ct. 537, 542 (28 L. Ed. 86), the court says:

"According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely, and necessarily relied, on the judgment of the seller, and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case, any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently, the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment."

To the same effect are Barnard v. Kellogg, 10 Wall. (77 U. S.) 383, 19 L. Ed. 987; Hurley-Mason Co. v. Stebbins, Walker & Spinning, 79 Wash. 366, 140 Pac. 381, L. R. A. 1915B, 1131, and notes, Ann. Cas. 1916A, 948; Byrne v. Jansen, 50 Cal. 624, 627; Moore v. McKinlay, 5 Cal. 471; Kenney v. Grogan, 17 Cal. App. 527, 532, 120 Pac. 433; Colchord Machinery Co. v. Loy-Wilson Foundry Co., 131 Mo. App. 540, 547, 110 S. W. 630. In the text, 35 Cyc. 408, it is stated:

"On a sale of machinery there is in general an implied warranty that the machine is reasonably adapted to the purpose for which it is purchased. No such warranty is implied, however, on the sale of a secondhand machine."

The same rule is stated and followed in Ramming v. Caldwell, 43 Ill. App. 175, 179; Perine Co. v. Buck, 90 Wash. 344, 156 Pac. 20, 22, Ann. Cas. 1917C, 341; Bayer v. Winton Motor Car Co., 194 Mich. 222, 160 N. W. 642, 644; Johnson v. Carden, 187 Ala. 142, 65 South. 813.

Excluding from our consideration the oral testimony that was introduced over the objection and exception of the respondent, there was no evidence of a breach of any

express warranty, nor of the breach of any implied warranty. The trial court did not err, therefore, in granting the motion.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

51 Cal. App. 461

WRIGHT v. ROBINSON et al. (Civ. 3754.)

(District Court of Appeal, First District, Division 1, California. Feb. 19, 1921.)

1. Partnership ⊂⊃83—Firm member not entitled to compensation for services.

As a general rule one partner is not entitled to any compensation for services rendered by him to the partnership, in absence of an agreement to that effect (Civ. Code, § 2413).

2. Partnership ⊂⊃83—Evidence insufficient to show partner entitled to salary.

In a suit for an accounting between partners in a saloon, evidence *held* insufficient to show that a partner was entitled to an allowance by way of salary for services in the management and conduct of the business.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Mabel Wright, also known as Mrs. E. H. Wright, against Seymour H. Robinson and others. From judgment for defendants, plaintiff appeals. Reversed.

John D. Willard, of San Francisco, for appellant.

William B. Beaizley, of Bakersfield, for respondents.

KERRIGAN, J. This is an appeal from a judgment rendered on a partnership accounting.

The main question presented for consideration is the right of one partner to a salary for the management and conduct of the business. By its judgment the trial court awarded defendant Hulihan an allowance for such services, and it is the claim of the appellant that the evidence does not support the findings and judgment in this particular.

[1, 2] As a general rule one partner is not entitled to any compensation for services rendered by him to the partnership, in the absence of an agreement to that effect. Civ. Code, § 2413; Nevills v. Moore Mining Co., 135 Cal. 561, 67 Pac. 1054. Respondent concedes this to be the rule, but claims that there was an implied agreement that the salary here claimed and allowed should be paid. The evidence does not support this contention. It appears therefrom that the plaintiff and defendant Robinson were owners and partners in a certain saloon situated in this state at Taft, Kern county, and that they conducted the same as such partners from about April, 1911, to February 16, 1916, and during such time were equal owners and equally entitled to the profits thereof. Plaintiff, Wright, who resided in San Francisco, had contributed the entire capital, and Robinson managed the business. On the date last mentioned Robinson, without the knowledge or consent of plaintiff, made an agreement in writing with defendant Sill by the terms of which he agreed to convey and deliver to the latter a one-half interest in the business and property. At this time the business was indebted in the sum of about $12,000, and Robinson claimed to be the sole owner thereof. Under the terms of the agreement Sill was to pay off the indebtedness. Sill had acquired this interest for defendant Hulihan, whom he forthwith put in possession under his agreement with Robinson. Hulihan was to have complete management and control of the business, and was to receive the interest acquired by Sill from Robinson when all money advanced and procured by Sill in liquidation of the debts of the business were repaid to him. By express agreement both Robinson and Hulihan were to receive salaries for their labor and services until such debts were paid, when the salaries were to cease, and thereafter the partners were to divide the profits between themselves share and share alike. The debts were paid, and Hulihan acquired the interest agreed upon. Mrs. Wright, who knew nothing of this transaction, went to Taft some time thereafter for the purpose of investigating her business, as she had not received any profits therefrom or heard from Robinson, her partner, for several months. She then learned for the first time of the actions of Robinson from Hulihan. After negotiations between the parties Mrs. Wright agreed that Hulihan should retain his one-half interest, and she further agreed with Robinson that they would own the remaining one-half in the business between them. The evidence discloses the fact that defendants Hulihan and Sill acted in entire good faith in the transaction and knew nothing about Mrs. Wright's interest in the business and property, as the same stood of record in Robinson's name alone. After the agreement between the parties to become partners, as above indicated, Hulihan continued to manage the business until July 1, 1918, when by operation of law it ceased to exist. At the time of the new arrangement and when plaintiff was recognized as a partner by Hulihan nothing was said between the parties as to the payment of a salary to any one, and there is no evidence from which the existence of any such agreement can be inferred; the agreement simply being that Mrs. Wright thereafter was to receive one-quarter of the profits of the business. This

being so, the case falls within the rule that in the absence of an agreement a partner is not entitled to compensation for services rendered to the partnership. Defendant Hulihan, having custody of the partnership assets, is accountable to plaintiff for her full share in the same, freed from any deductions on account of his claims for services.

For the reasons given, the judgment is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

51 Cal. App. 600

ROOT v. KUHN. (Civ. 3498.)

(District Court of Appeal, Second District, Division 1, California. March 1, 1921.)

1. Trusts ⟸86 — Presumption of resulting trust arose where plaintiff paid for lots and caused title to be conveyed to defendant.

Where plaintiff, out of her own funds, paid the entire purchase price of lots, and caused title to be conveyed to defendant, under Civ. Code, § 853, the property, at the instant the title passed, is presumed to have been impressed with a trust in favor of plaintiff, who, in the absence of other showing, would be entitled to a conveyance thereof in accordance with the prayer of her complaint; the presumption as to title being, however, disputable.

2. Trusts ⟸88—Parol evidence of verbal understanding inadmissible in suit to establish resulting trust.

In suit to establish a resulting trust in favor of plaintiff as to lots for which she paid, but caused to be conveyed to defendant, under Civ. Code, § 852, the court erred in permitting defendant, under her answer, to give oral testimony of a verbal understanding between the parties that the lots would be held by defendant for the use and benefit of both parties during their joint lives.

3. Trusts ⟸89(4)—Evidence insufficient to establish allegations of answer in suit to establish resulting trust.

In suit to establish a resulting trust in lots paid for by plaintiff but caused to be conveyed to defendant, evidence *held* insufficient to establish the allegations of defendant's answer that there was a verbal understanding between the parties that during their joint lives defendant was to hold the property for the use and benefit of both.

4. Trusts ⟸21(2)—Documents must show fact of trust and extent to which property held.

Though no particular formality is required in the creation of a trust, and all the conditions need not be expressed in a single paper, the documents must clearly show, not only the existence of the trust, but the extent to which the property is held in trust.

5. Trusts ⟸89(4)—Letters insufficient to support finding as to truth of allegations of answer in suit to establish resulting trust.

Certain letters written by plaintiff suing to establish a resulting trust over lots paid for by her but conveyed to defendant *held* insufficient to support the trial court's finding that the allegations of defendant's answer that the lots were to be held by her for the joint benefit of both parties during their joint lives were true.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Isabel H. Root against Belle H. Kuhn. From judgment for defendant, plaintiff appeals. Reversed.

Porter & Sutton, of Los Angeles (Hugh J. McClearn, of Duluth, Minn., of counsel), for appellant.

Haas & Dunnigan, of Los Angeles, for respondent.

SHAW, J. Upon the theory that certain lots of real estate, title to which had been vested in defendant, were the subject of a resulting trust in favor of plaintiff, she brought this action to compel a conveyance thereof. Judgment went for defendant, from which plaintiff has appealed.

Section 853, Civil Code, provides that—

"When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

[1] It is conceded that on May 14, 1909, plaintiff, out of her own funds, paid the entire purchase price of the lots and, by a simple grant deed, caused title to the same to be conveyed to defendant; and hence, under the provisions of the statute quoted, the property, at the instant the title passed, is presumed to have been impressed with a trust in favor of plaintiff, who, in the absence of other showing, would be entitled to a conveyance thereof in accordance with the prayer of the complaint. Hellman v. Messmer, 75 Cal. 166, 16 Pac. 766; 39 Cyc. 106. The presumption, however, is a disputable one, and, to overcome its effect, defendant in her answer alleged facts which, if properly established, would have created an express trust for the use and benefit of both parties. As alleged, these facts, in substance, are:

That it was at the time of the conveyance verbally understood between the parties that during the life of plaintiff the defendant was to hold the property for the use and benefit of plaintiff and defendant, so that either, if desired, could reside thereon, and that upon the death of plaintiff the title should vest absolute in defendant, if then living; otherwise, in her heirs; that it was further verbally understood that, while plaintiff was to provide all moneys required for the care of the property and payment of

taxes, defendant was to look after and care for the same without charge for the services rendered, and that defendant did, in accordance with said understanding, take charge of the property, and did, without making any charge therefor and out of moneys obtained from the rental thereof, or supplied by plaintiff, care for the property and pay taxes and assessments levied thereon; "that from time to time subsequent to the said 14th day of May, 1909, the said plaintiff, both verbally and in writing, did reiterate the said agreement and did reiterate her statement that the said premises should be employed as a home for plaintiff and this defendant at such times when either plaintiff or this defendant desired to so occupy the same, either jointly or severally, and that the same should be and constitute the property of this defendant in fee simple absolute upon the demise of said plaintiff, * * * and continued to so do up to the filing of the complaint herein; that said plaintiff did likewise from time to time, both verbally and in writing, give instructions to this defendant to do with said premises as she thought best and to incur such charges and expenses against the same as she thought necessary or fit; that the said plaintiff did at all times state that her purpose and object in acquiring the said premises and in causing the title thereto to be vested in this defendant was for the benefit and protection of this defendant, saving and reserving to said plaintiff only the use of said premises during her natural life at such times as she intended to use the same."

[2] The judgment rests upon findings made in accordance with the allegations of the answer, in support of which defendant, over plaintiff's objection, was permitted to give oral testimony. In our opinion, the court erred in such ruling. The resulting trust in favor of plaintiff arose from the facts concededly established, in resistance of which defendant, by her answer, alleged an express trust based upon a "verbal understanding" and contrary to the provisions of section 852, Civil Code, which provides:

"No trust in relation to real property is valid unless created or declared: (1) By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing; (2) by the instrument under which the trustee claims the estate affected; or (3) by operation of law."

She sought by parol testimony to establish the existence of the same. Under the provisions of the law just quoted, the operation of the resulting trust could not be abridged or otherwise affected by parol testimony which tended to show the existence of an express trust the terms of which are wholly inconsistent with the former, and from which, if the alleged facts were properly established, it must follow that the property, subject to a restricted right of use during her lifetime, was intended to be a gift made by plaintiff to a stranger. Plass v. Plass, 122 Cal. 3, 54 Pac. 372. In Burling v. Newlands, 112 Cal. 496, 44 Pac. 816, it is said:

"The fact that a trust of lands is created must not only be manifested and proved by a writing properly executed, but it must also be manifested and proved by such a writing what the trust is." Pomeroy's Equity Jurisp. § 1009.

[3] We may say, however, that even if parol evidence was admissible, the testimony adduced falls far short of establishing the allegations of the answer. It appears therefrom that plaintiff and defendant were old friends, the former residing in Duluth, Minn., and the latter residing in Los Angeles county, where she owned some lots in Sierra Madre, adjoining which were located the lots in question. The only testimony touching the subject of the purchase, as disclosed by the record, is that of defendant, who, in response to the question as to what was said between her and plaintiff with reference to the purchase of the lots, stated:

"I don't remember any more than we both loved it there, and she wanted to come out here and live after she finished her business in the East; and I wanted she should come and live with us—I have always cared very much for her."

And to the question, "What was said, if anything, between you and Mrs. Root relative to the occupancy of the property, if she should buy it?" she answered, "I don't remember now." Further questions and answers were as follows:

"Q. Was anything said about who was to live on it? A. Well, we were—she was going to build a cottage and thought we might live together on it. We were always speaking of the beauties of the place, and how happy we would be when we had something we could keep.

"Q. Do you know any reason, other than you have stated, why the title was put in your name when the purchase was made? A. No, nothing further was said other than that we were to live on the place together.

"Q. What I want to get at there is, how did the subject of her buying these lots first arise—who suggested it? How did it first come up? A. She liked them, and she wanted to get them so as to live there."

It further appears that the parties were not related, and that plaintiff was under no obligations to defendant in a pecuniary way, and that during all of the time subsequent to the purchase of the property defendant had paid all assessments, taxes, and expenditures in the care and upkeep of the property. It is apparent, we think, from this testimony that, even though it were conceded to be competent for the purpose, it is wholly insufficient to establish the allegations of the answer which the court found to be true.

[4, 5] In addition to such parol testimony, there were received in evidence, over plaintiff's objection, several letters written by plaintiff to defendant, the first of which was under date of April 17, 1910, and the last under date of August 13, 1912. Conceding the insufficiency of the parol testimony to

impress the land with a trust in favor of defendant, her counsel insists that the letters constitute written evidence thereof. While it is true that no particular formality is required in the creation of a trust, nor need all the conditions of the trust be expressed in a single paper (Tenney v. Simpson, 37 Kan. 579, 15 Pac. 512), nevertheless, the documents must clearly show, not only the existence of the trust, but also the extent to which the property is held in trust. As said by Mr. Pomeroy in his work on Equity Jurisprudence, § 1009:

"The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter of property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail." Wittfield v. Forster, 124 Cal. 419, 57 Pac. 219.

Measured by the rule thus announced, the letters, written long after the conveyance of the property to defendant, and at which time the resulting trust arose, are wholly insufficient to support the finding of the court that the allegations of the answer are true. They were apparently written in reply to letters from defendant, in the absence of which their meaning is not clear. However, there is nothing in the letters to either indicate that an express trust was created, or, if created, that its purposes were within the provisions of section 857, Civil Code, which authorizes the creation of trusts for the purposes therein designated. All that can be gleaned from the letters is that plaintiff, on account of her friendship for defendant, who owned lots adjoining those in question, was desirous of handling the property in a manner which would not be detrimental to the latter, and that while the title was vested in defendant, plaintiff nevertheless recognized her obligation to pay all charges against the property and did so pay them. Referring to a street improvement bond existing against the property, plaintiff, in a letter dated December 5, 1910, said: "If anything should happen to me, you would have that added to the load you are carrying." In a letter following, she said: "Don't think I ever worried over the lots. I bought them more because you wanted them than anything else, and when I do build will still keep the property in your name, so when anything happens to me there will be no question as to who owns it." Another contains the statement: "I want you to handle the lots in any way that would help you." And under date of March 18, 1912, she, in reply to a letter from defendant wherein she refers to a prospective sale of Los Angeles property owned by the latter, asks: "If you sell, will that clean up all there is against the Los Angeles place?" And later, on August 13, 1912, she, in writing to defendant, said: "If you can sell the lots instead (of your own property), do so, and I will let you have the money." It is apparent from these letters that they were written in response to letters from defendant wherein she had disclosed her financial troubles to plaintiff, and, on account of her friendship, the latter in her replies manifested a desire to encourage and help her through her difficulties, even to the extent, as she states, of selling the lots and letting defendant have the proceeds. Whether considered singly or all together, the casual statements in relation to the property are wholly insufficient to support the findings to the effect that an express trust in the property was created for the benefit of defendant. The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

185 Cal. 464

FRASER'S MILLION DOLLAR PIER CO. v. OCEAN PARK PIER CO. et al.
(L. A. 6023.)

(Supreme Court of California. April 1, 1921.)

1. Landlord and tenant ⊂=291(8)—Complaint held sufficient to allege that taxes were levied against leased premises.

Where leased premises were assessed for taxation in connection with other property of the lessor, a complaint in unlawful detainer, alleging that the taxes amounted to $2,892.22 for a particular year and that $970.50 was the proportional part of the taxes chargeable against the leased premises, sufficiently alleged that $970.50 of the taxes was levied against the leased premises.

2. Evidence ⊂=413—Testimony as to assessor's valuation of property assessed with other property not inadmissible as contradicting assessment roll.

Where premises on which a lessee was to pay the taxes was assessed with other property of the lessor, the testimony of the assessors as to the valuations placed by them on the leased property which valuations were included in the total valuations, was admissible over the objection that it varied or contradicted the assessment roll.

3. Landlord and tenant ⊂=149—Premises including pier presumed worth more in proportion to frontage than property extending only to high-tide line.

Where a lessor's ocean frontage not covered by a lease extended only to mean high-tide line, while leased property which included a pier extended several hundred feet into the ocean, in an action involving taxes to be paid by the parties, the leased property was of greater value in proportion to frontage than the other property.

4. Landlord and tenant ⊂=148(2)—Lease held to require payment of taxes on right of way by lessee.

Where a lease required the lessee to pay all taxes levied on the property and provided that the lessee should maintain a right of way at its own expense until a building was erected on the lessor's property not included in the lease after which the expense should be equitably divided, the burden was on the lessee to pay the taxes on the entire value of the right of way where no buildings had been constructed on the unleased property.

5. Appeal and error ⊂=1011(1)—Finding on conflicting evidence conclusive.

A finding on conflicting evidence is conclusive in the appellate court.

6. Landlord and tenant ⊂=149—Lessee's payment of part of taxes without objection held admission that an apportionment was fair.

Where leased premises on which the lessee was to pay taxes was assessed for taxation with other property of the lessor and it had been the custom for the lessor to make up a statement of the taxes chargeable to the lessee, and such a statement was rendered to the lessee in a particular year, the payment of the first installment of the tax without objection was an admission that the amount charged was fair and just.

7. Municipal corporations ⊂=23 — Navigable waters ⊂=37(4)—Rights of adjoining owners or municipalities in waters or jurisdiction thereunder governed by line drawn perpendicular to shore line.

The rights of adjoining owners of land bordering on navigable or tide waters, or the bounds of jurisdiction over such waters of adjoining municipalities, is not fixed by extending the boundary line into the waters in the direction of its last course, but by a line drawn perpendicular to the shore line, or, if the shore line is circular, perpendicular to a tangent drawn on the circle at the point of intersection.

8. Landlord and tenant ⊂=149—Acceptance of rent without insisting on payment of taxes held not to estop landlord.

Where a lease required the lessee to pay taxes and provided that if it failed to pay them the lessor might do so and that the lessee would repay the lessor on the first rental day thereafter, the acceptance by the lessor of rent on the day it was due without insisting on payment of taxes which had been paid by it did not postpone payment until the next rent day or waive the default in payment or estop the lessor from enforcing a forfeiture because of such default.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Fraser's Million Dollar Pier Company against the Ocean Park Pier Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Milton K. Young, Davis, Kemp & Post, and Kemp & Clewett, all of Los Angeles, for appellants.

Goudge, Robinson & Hughes, of Los Angeles, for respondent.

SHAW, J. This is an action in unlawful detainer. The plaintiff recovered judgment, and the defendants appeal.

The complaint alleged an unlawful holding over after a default upon a covenant by the lessee to pay the taxes assessed against the leased premises, followed by a notice to pay the same or quit within three days. The defendants failed to make payment within the three days and shortly afterward this action was brought.

The plaintiff was the owner of lots 176 and 177 of the Crescent Bay Tract in Santa Monica. These lots extended from a walk along the ocean front southwesterly to the line of ordinary high tide. Upon lot 176 it had erected a large pier extending some 250 feet along the water front and into the ocean beyond the line of ordinary high tide several hundred feet. The land end of this pier was situated on the upland about 50 feet from

the line of ordinary high tide as it existed at the time of making the lease. The lease embraced a strip approximately 50 feet wide leading from the walk aforesaid to another strip extending across the said lot substantially parallel with the ocean front, both of which strips were to be used in common by the lessor and the lessee and the public as means of access to said pier. It also included the whole of said pier, all of which, except a small portion of the inner end thereof situated above high tide, was built upon piles driven into the ocean bed below high-water mark.

The lease was executed by the plaintiff to the Ocean Park Pier Company. It was for the term of 14 years, beginning February 1, 1914, with an option to extend the same, if desired, for the further period of 36 years. It contained a covenant that in addition to the rentals mentioned therein the lessee should "pay all taxes which may be levied upon said property during the term of this lease." It provided that the failure of the lessee to pay such taxes when they became due, or before they became delinquent, should terminate the lease; that if the lessee failed to pay such taxes the lessor at its option might pay the same; and that the taxes so paid by the lessor should be repaid to it by the lessee on the first rental day thereafter, together with interest. The rental day was the first day of each month during the term. It was provided also that if any default should be made in any of the covenants of the lease by the lessee the lease should cease and terminate and it should be lawful for the lessor to enter upon the demised premises and to remove all parties therefrom. The complaint set forth these portions of the lease, and further alleged that the taxes levied and assessed against the property of the plaintiff, including the leased premises, for the second half of the fiscal year 1917–18 amounted to $2,892.22, and that the proportional part thereof chargeable to the leased premises amounted to $970.50; that the latter sum was not paid by the lessee, and would have become delinquent on April 30, 1918; that upon April 29, 1918, plaintiff paid all the taxes assessed against its property aforesaid, including the aforesaid amount chargeable to the leased premises, and thereupon, on April 29, 1918, demanded the same from the lessee; that the first rental day following that day was May 1, 1918; that the defendants did not repay said amount on May 1, 1918, nor at all; that on May 9, 1918, demand in writing was made by plaintiff upon the defendants herein for the payment of said sum of $970.50, or that the defendants surrender possession of the premises within three days, and that the defendants refused to pay the same or to quit possession of the premises, and ever since have unlawfully held possession thereof. The defendants other than the Ocean Park Pier Company are sublessees of said company under the aforesaid lease.

[1] The defendants contend that the complaint does not state facts sufficient to constitute a cause of action because, as they say, while the lease provided that the defendant Ocean Park Pier Company should pay all taxes levied upon the leased premises during the term of the lease, there is no allegation that any tax was ever levied upon said leased premises. We think this claim is based upon an entirely too narrow view of the effect of the language of the complaint. It alleges that the second installment of the taxes levied against the property of the plaintiff was $2,892.22 for the year 1917–18, and that $970.50 was the proportional part of said taxes chargeable against the leased premises. As is customary, all the taxes were assessed to the plaintiff as the owner thereof in connection with its other property. Graciosa O. Co. v. Santa Barbara Co., 155 Cal. 143, 99 Pac. 483, 20 L. R. A. (N. S.) 211. The complaint therefore clearly alleges that the assessment against its entire property was $2,892.22, and that of this, $970.50 was levied against the leased premises. There is no merit in this contention.

[2] The next claim of the defendants is that the court erred in allowing testimony in the case which they assert was an attempt to vary the terms of the assessment roll showing the assessment of the taxes in question. It appeared from the assessment roll that the plaintiff was assessed with the whole of lots 176 and 177 in said addition, and that upon lot 176 the assessment included $103,770 as the value of the lot, and $43,600 as the value of the improvements thereon. The leased premises, as we have shown, included only parts of lot 176. In order to show the proportion of the taxes properly chargeable to the leased premises, the plaintiff placed upon the stand the deputy county assessor who had made the assessment upon the property for the year 1917, and the city assessor of Santa Monica who had made the assessment for city purposes upon said property for that year. These two witnesses were able to recall the fact that they had placed certain valuations upon the improvements which were leased to the defendant Ocean Park Pier Company, and that said sums were included in the total valuation shown upon the assessment roll, and they so testified. It is this testimony which the defendants claim was a variation by parol of the terms of the assessment roll. We do not think it was contradictory or in conflict with the assessment roll, nor that it in any way came within the rule which forbids the introduction of parol testimony to vary or explain a writing or record. The covenant upon which the defendants were bound was to pay the taxes levied upon the leased premises. It chanced that the lessor owned other property and that it was all assessed togeth-

er, the leased property not being segregated so that the taxes levied thereon could be ascertained from the assessment roll. In order to carry out the terms of the lease it was therefore necessary to ascertain the proportion of the taxes properly chargeable upon the leased premises. To do this it was proper to find how much of the total assessed valuation of the property was given to the leased premises by the officials who made the valuations stated in the assessments. If the officials who made the assessment had not been at hand, the only way this could have been ascertained would be by calling other witnesses to testify to the respective values of the different parcels of the property included in the total, and assigning to the leased property its due proportion of the total, according to such valuations. This would be at best but an approximation of the actual taxes imposed upon the leased premises. But when the officers who made the assessment could testify as to the actual valuations they placed upon such property, which valuations became a part of the total valuation charged to the plaintiff, the calculation, instead of being an approximation, became exact. It did not in any respect change the assessment roll. It was merely a means, and the best and most appropriate means, of ascertaining the exact taxes levied against the leased property.

Defendants next contend that $970.50 is more than was due for the taxes assessed against the leased premises. This claim is based upon the testimony to the effect that in computing the proportional part of the taxes due from the lessee, the right of way extending through the lot to the pier was assumed to be 50 feet wide, whereas, according to the testimony of one of the witnesses for the plaintiff, it was only 47 feet wide at one end and 43 feet wide at the other. The map introduced in evidence showing the distances states that the right of way was 49.33 feet wide at one end and 47 feet wide at the other. They also claim that inasmuch as the right of way was to be used in common by the parties and by the public for access to and egress from the pier and other buildings on the lot, the lessee did not get absolute possession thereof and should not be charged with its entire value. The lease designated this right of way as a 50-foot entrance, and it provided that the lessee should maintain the same at its own expense until a building was erected upon those parts of the lessor's lots which were not included in the lease, after which the expense should be equitably divided between the two. It is claimed that the taxes would be a part of the expense of maintenance which should have been paid pro rata by each party.

[3-6] There are several answers to this objection. In the first place, the value of the land embraced in the lease was computed upon the front foot basis in apportioning the tax, The frontage of the lessee, as calculated, was 50 feet, being the assumed width of the right of way. The frontage of the lessor was 275.5 feet, being all of the remainder of the frontage of lot 176 and one foot which seems to have been situated in lot 177. The 275.5 feet of frontage charged to the lessor extended only to the mean high tide line, a distance of approximately 125 feet. The 50-foot strip extended to the mean high tide line and thence several hundred feet into the ocean, to the outer end of the pier. It was therefore presumably of greater value proportionally than the frontage of the lessor. Furthermore, we have been directed to no evidence indicating that at the time this assessment was made there were any buildings upon the portions of lot 176 not included in the lease, in which event, assuming that the expense of maintenance included taxes, the burden would be upon the lessee to pay such taxes upon the entire value of the right of way, under the terms of the lease. But there are other reasons which we think entirely satisfactory for upholding the finding of the trial court that $970.50 was a fair and just amount due from the defendants under the lease for the second half of the taxes of 1917. One is that the evidence was conflicting upon this subject, and, of course, a finding upon conflicting evidence is conclusive in the appellate court. Another reason is found in the following facts: From the beginning of the lease until and including the year 1917, it had been the custom of the lessor and lessee to settle the taxes in the following manner: As soon as the assessment roll was made out in the fall of each year the lessor would make up a statement of the amount of taxes properly chargeable to the lessee, and render such statement to the lessee showing the amount due for each installment of taxes. Thereupon, as the tax fell due, the lessee would pay the amount charged to it in said statement, and the matter would thus be settled. This occurred each year. In 1917 the statement was rendered by the lessor to the lessee in the fall as usual. It stated that the amount properly chargeable to the lessee for that year's taxes was $970.50 for the first installment and $970.50 for the second installment. It was in the nature of a stated account. No objection whatever was made thereto, and in pursuance thereof the lessee paid $970.50 for the first installment of the taxes of that year, which fell due in November. No objection to the amount was ever made, nor was any objection to the amount demanded for the second installment made at any time, until after the beginning of this action. Under these circumstances we think the rendition of the statement, the payment of the first installment in accordance therewith, and the failure to object to the amount thereof, must be taken as an admission by the lessee that the amount charged was fair and just, and, so

considered, it is sufficient to support the finding to that effect.

It is next contended that the assessment was wholly void and consequently that no claim could be made against the lessee on account thereof. This claim is based on the theory that upon the trial it was discovered that if the line dividing the two cities was extended in the same direction into the ocean a very small portion of the pier situated at the extreme end thereof, far out into the ocean, would be on the Venice side of that line. Upon this it is claimed that this part of the leased premises was not within the limits of the city of Santa Monica. Upon this point the court found that a small portion of the southwesterly corner of the pier would be intersected by an extension of the boundary line between Santa Monica and Venice beyond the line of mean high tide, but that if that portion of the pier southwesterly of said boundary line so extended was taken into consideration by the respective assessors in making the assessments upon the property as being within the city of Santa Monica, the amount which the lessor asked the lessee to pay as the proportional amount of taxes due for the second half of 1917 was not affected thereby in a substantial extent.

[7] This point is to some extent covered by the fact that a statement was duly rendered to the lessee showing the amount and no objection was made thereto, but the same was acted upon by the lessee in the payment of the first installment of taxes. There is, however, another answer, more complete and satisfactory. It will be observed that the court did not find expressly that any part of the pier was situated within the limits of the city of Venice. This finding was that part of it was situated southwesterly of the boundary line between the two cities if the same were extended beyond the mean high tide line out into the ocean. The discovery that this was the fact arose from the introduction in evidence of a plat made by a surveyor showing the subdivision of the Crescent Bay tract in Santa Monica, bordering upon the ocean and extending southeasterly to the division line between the two cities. The direction of this division line indicated that it might intersect the pier at its outer end, and thereupon the court elicited testimony from the surveyor to the effect that this would be its effect, if extended. All the parties appear to have assumed that the division line which marked the jurisdiction of the respective cities over the water beyond high tide line would be the line of the boundary extended into the water. It appears that this line is not perpendicular to the shore line at that point, but strikes it at an angle, less than 90 degrees on the Venice side and more than 90 degrees on the Santa Monica side. Under the law applicable to such matters it is not true that the rights of adjoining owners of land bordering upon tide water, or upon a navigable lake or stream, in the land under the water upon which both tracts abut are to be ascertained by extending the line of the boundary between them in its original direction into the water, to the center thereof in the case of a stream, or indefinitely in the case of the ocean. On the contrary, the rule is that the area over which such rights as each proprietor may have in the land under the water upon which his tract abuts, and to the use of the water covering the same, is not fixed by extending his boundary line into the water in the direction of the last course ending at the shore line, but is fixed by a line drawn into the water perpendicular to the shore line; that is, to the general course of the shore line at that point. Unless extraordinary conditions occur, this is the rule to be applied in defining the respective rights of such owners to the space in front, under, upon, and in the water. If accretions occur in front of the land the boundary line between them as to such accretions is a line extending into the water perpendicular to the original shore line in its general course and not by the line of the boundary extended in its original direction. If this were not the case, it will be seen that where the boundary line strikes the shore line at an acute angle the rights of one proprietor would extend in front of the land of the other so as to practically cut him off from the use of the water. The authorities are all to the effect that this is not the case. 3 Farnum on Waters, pp. 2476, 2477; Menasha, etc., Co. v. Lawson, 70 Wis. 600, 36 N. W. 412; People v. Schermerhorn, 19 Barb. (N. Y.) 540. The same rule, of course, applies, in the absence of any statute to the contrary, to the bounds of municipal jurisdiction over waters of the ocean. From this principle it follows that the line dividing the jurisdiction of Santa Monica and Venice over the ocean in front of each city is not the extension of the line of the final course of the division line terminating at the mean high tide line, but is a line drawn from the intersection of that boundary with the shore line into the ocean in a direction perpendicular to the general course of the shore line at that place. If the short line is circular it will be perpendicular to a tangent drawn on the circle at the point of such intersection. It follows that no part of the pier is within the jurisdictional limits of the city of Venice and that the objection is without foundation in fact.

[8] The Ocean Park Pier Company, on May 1, 1918, after the demand had been made upon it for the payment of its share of the taxes, paid to the lessor the rent of the premises falling due on that day. It is claimed that the acceptance of the rent then paid was a waiver of the default in the payment of the taxes, and that it estops the plaintiff from claiming such default and from enforcing the forfeiture of the lease by

reason of that breach of the covenant thereof. Appellant's brief states the point, but does not argue it, except to suggest that this acceptance of the rent without insisting on payment of the tax on that rent day, operated to postpone the time of payment of the taxes until the rent day in June. We can see no reason for the conclusion contended for. The terms of the lease are clear to the effect that in case the lessee fails to pay the taxes for any year or any installment thereof and the lessor thereupon pays them, the amount thereof chargeable to the lessee upon the leased premises must be paid to the lessor at the next rent day thereafter. The covenant to pay the taxes and the covenant to pay the rent are wholly separate and independent. The payment of one does not depend upon the payment of the other, nor does the acceptance of the rent operate as a waiver of the obligation to pay the taxes. The failure to pay the taxes was as much a breach of the lease as it would have been had there been also a failure to pay the rent and the acceptance of the rent in no wise satisfied the obligation to pay the taxes. There seems to be no foundation for any argument in favor of the asserted waiver and estoppel.

These comprise all the points made by the defendants in support of the appeal. Inasmuch as we find all of them to be without merit, it follows that the judgment must stand.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

185 Cal. 515

PACIFIC SEWER PIPE CO. v. UNITED STATES FIDELITY & GUARANTY CO. (L. A. 6557.)

(Supreme Court of California. April 4, 1921.)

1. Municipal corporations ⊜373(3)—One furnishing material to street contractor under Vrooman Act required to file claim within 30 days after acceptance by board of public works; "completed."

Under Vrooman Act, § 6½, providing that any materialman furnishing materials to be used in the performance of street work, whose claim has not been paid by the contractor, may, within 30 days from the time the improvement is "completed," file a verified statement with the superintendent of streets, etc., the word "completed" signifies the fulfillment of the contract to the satisfaction of the superintendent of streets, and a materialman was entitled to file claim within 30 days after the improvement was accepted by resolution of the board of public works of Los Angeles, which board, under Los Angeles City Charter, §§ 52a, 144, is the superintendent of streets.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Complete—Completion.]

2. Municipal corporations ⊜373(3) — Statute fixes time after which materialmen's claims cannot be filed.

The 30-day period after completion of street work, fixed by Vrooman Act, § 6½, fixes a time after which materialmen's claims cannot be filed.

3. Appeal and error ⊜845(2)—Incorrect conclusions from conceded facts disregarded.

Incorrect conclusions of the trial court from conceded facts are to be disregarded.

4. Appeal and error ⊜1176(3)—Correct judgment ordered on reversal, where agreed statement discloses all essential facts.

Where a case is determined on an agreed statement of facts, which discloses every fact essential to a correct judgment, and the trial court draws an incorrect conclusion therefrom, the correct judgment will be ordered on a reversal.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Pacific Sewer Pipe Company against the United States Fidelity & Guaranty Company. From judgment for defendant, plaintiff appeals. Reversed, with directions to enter judgment in favor of plaintiff.

Swanwick & Donnelly and Chas. E. Donnelly, all of Los Angeles, for appellant.

Lawler & Degnan, of Los Angeles, for respondent.

LENNON, J. Plaintiff herein is suing upon a contractor's bond for the purpose of recovering money for material furnished for use in certain street improvement work. The case was submitted upon stipulated facts which are as follows: Pursuant to the provisions of an act providing for work upon streets, etc., within municipalities, commonly known as the Vrooman Act (Gen. Laws 1915, p. 1714, Act 3930), the board of public works of the city of Los Angeles and the California-Arizona Construction Company entered into a contract for the performance by the latter of certain street work in the city of Los Angeles. The California-Arizona Construction Company, as principal, and defendant United States Fidelity & Guaranty Company, as surety, executed and delivered to said city the undertaking required by section 6½ of the Vrooman Act. The California-Arizona Construction Company entered upon the performance of the contract and some time in the month of December, 1916, plaintiff, Pacific Sewer Pipe

Company, furnished to the California-Arizona Construction Company, for use in said street improvement work, certain sewer pipe and sewer pipe fittings, of the value of $470.97, which sum has never been paid. The last actual work and labor required on said improvement was performed May 11, 1917, and thereafter, on May 19, 1917, the city engineer issued and filed with the board of public works of Los Angeles his certificate that the improvement was completed. On May 25, 1917, the board of public works adopted a resolution whereby the improvement in question was accepted as completed to the satisfaction of that board.

Section 6½ of the Vrooman Act provides:

"Any materialman * * * furnishing materials to be used in the performance of said work specified in said contract, * * * whose claim has not been paid by the said contractor, * * * to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim. * * *"

The filing of the claim in accordance with these conditions is a prerequisite to the commencement of an action on the bond. On June 23, 1917, plaintiff filed with the board of public works a verified statement of its claim for $470.97. It will be noted that this claim was filed more than 30 days after the performance of the last work required on said improvement, but that less than 30 days had elapsed between the adoption by the board of public works of the resolution accepting the work as completed and the filing of the plaintiff's claim. The trial court, after making findings in accordance with the stipulated facts, found that the work in question was completed on May 11, 1917, and rendered judgment in favor of defendant, upon the theory that more than 30 days had intervened between the completion of the work and the filing of plaintiff's claim. Plaintiff appeals from this judgment, claiming that the work was not completed until the passage of the resolution accepting the work, and therefore that its claim was filed within the 30-day period fixed by law.

"The verb 'to complete,' like many others, is used with some indefiniteness of signification; and the idea conveyed by it frequently depends upon the connection in which it is found, or the object to which it refers." Newell v. People, 7 N. Y. 9, 131.

We are of the opinion that the word "completed," as used in section 6½ of the Vrooman Act, permitting the filing of a claim "within thirty days from the time said improvement is completed," signifies the fulfillment of the contract to the satisfaction of the superintendent of streets, and therefore that plaintiff was entitled to file its claim within 30 days after the improvement was accepted by the resolution of the board of public works of Los Angeles, which board, by virtue of charter provisions, is the superintendent of streets of that city. Charter of City of Los Angeles, §§ 52a, 144.

[1] Section 6 of the aforesaid Vrooman Act requires that street improvement work provided for by the act be "done under the direction and to the satisfaction of the superintendent of streets, * * * and all contracts made therefor must contain a provision to that effect." Whether the work has been performed to the satisfaction of the superintendent of streets can only be determined by the acceptance of the same by the superintendent and, where the superintendent of streets is the board of public works, that act of acceptance ordinarily takes the form of a resolution of the board. This acceptance constitutes the determining factor as to completion. Until the superintendent of streets has determined that the work called for by the contract has been satisfactorily performed, there is an element of incompleteness and uncertainty as to whether or not more work remains to be done, for although the contractor may have deemed the improvement finished and ceased work thereon, the superintendent of streets may insist upon alterations or the performance of additional work. It is true that the acceptance of the work by the superintendant of streets in effect determines that the improvement was finished in so far as actual work was concerned, at a prior date, but that fact does not necessitate a retroactive effect as against materialmen and other claimants. Since the consummation of the work is a matter of conjecture until the actual acceptance thereof, only the approval of the authority whose acquiescence is required by statute can confer the stamp of finality.

[2] The 30-day period after completion fixes a time after which materialmen's claims cannot be filed. French v. Powell, 135 Cal. 636, 68 Pac. 92. Therefore that interpretation of "completion" is to be preferred which provides a definite means for ascertaining the precise period within which such action can be taken. The fact that the materialman may file his claim immediately after supplying the material does not impair his right to the entire period permitted by statute for the filing of such claim, and therefore presents no argument against the desirability of definiteness in the determination of the time from which the 30-day period begins to run. In referring to section 6½ of the Vrooman Act, in his work on California Street Law, p. 150, Page says:

"This section is not to be given the same strict construction which is applied to mechanic's lien statutes. It is a remedy regarded with favor by the courts and its provisions will be liberally construed."

The question now presented appears never to have been directly decided by this court,

but statements made in passing upon other questions indicate that the court has inclined to the interpretation herein adopted. Thus in California Portland Cement Co. v. Boone, 181 Cal. 35, 183 Pac. 447, in construing provisions of the Improvement Act of 1911 (St. 1911, p. 730), requiring the filing of a notice within 30 days after completion, the court says:

"When was the work completed? The fact that the contractor requested that the work be accepted piecemeal as provided in section 30, and that the board of trustees granted the request, cannot change the plain provisions of the act that 'the work must, in all cases, be done under the direction and to the satisfaction of the superintendent of streets' (section 18), and that he alone, therefore, has power to accept the work as completed."

In Hadley v. Dague, 130 Cal. 207, 62 Pac. 500, work had been accepted by the superintendent of streets within the time provided by the contract for the completion of the work but the city council, upon appeal, set aside the acceptance, after the time provided for completion had elapsed. The court was called upon to determine whether the work was "completed" within the time limited by the contract and, in deciding that it had been so completed, stated:

"The contract provided, in accordance with the express requirements of the statute, that the contractor would do and perform the work 'under the direction and to the satisfaction of the street superintendent.' The provision therein fixing two hundred and fifty days as the time for the completion of the work must refer to the completion of the work according to the terms of the contract—*that is, to the satisfaction of the street superintendent and under his direction.*" (Italics ours.)

[3, 4] The work in question was not "completed" so as to start the running of the 30-day period against materialmen and other claimants under section 6½ of the Vrooman Act until it was accepted as satisfactory by the superintendent of streets and it is conceded that plaintiff's claim was filed within 30 days after such acceptance. The trial court adopted and set forth in its findings the facts stipulated to by the parties, including the various dates upon which the different acts were performed, and these facts are sufficient to support a judgment in favor of plaintiff. The further findings of the trial court to the effect that the work was completed May 11, 1917, and that the claim was not filed within 30 days after the completion are incorrect conclusions from conceded facts and, consequently, are to be disregarded. Burnett v. Stearns, 33 Cal. 468; Carter v. Fox, 11 Cal. App. 67, 103 Pac. 910. Where a case is determined upon an agreed statement of facts which discloses every fact essential to a correct judgment, and the trial court draws an incorrect conclusion therefrom, the correct judgment will be ordered upon a reversal. Perkins v. Cowles, 157 Cal. 625, 634, 108 Pac. 711, 137 Am. St. Rep. 158.

The judgment in favor of defendant is reversed, with directions to the trial court to enter a judgment in favor of plaintiff.

We concur: SHAW, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

185 Cal. 509

CREDITORS' ADJUSTMENT CO. v. NEWMAN. (S. F. 9566.)

(Supreme Court of California. April 4, 1921.)

1. Execution ⟸161—Court may recall improperly issued execution.

The court has a right to recall the execution if issuance was improperly or inadvertently made, or authority therefor revoked.

2. Execution ⟸163—Motion to quash execution issued more than five years after entry of judgment held to invoke court's discretion.

Motion to quash execution issued more than five years after entry of judgment on judgment creditor's ex parte motion under Code Civ. Proc. § 685, and order on which it was based, on the ground that the court had no jurisdiction to order issuance of writ, that order was inadvertently made, that levy worked a hardship on defendant, that it was inequitable because of laches, that there was no consideration for the judgment, that defendant was not legally or morally indebted in excess of specified amount, that execution was granted for an amount in excess of that called for by judgment, that the court had no authority to direct payment of interest, that no notice of hearing was given, that order was not issued upon motion or upon supplemental proceedings, and that the order was an abuse of discretion, *held* sufficient, when the grounds are taken as a whole, to justify exercise of discretion by the court in determining whether the judgment should be enforced after the lapse of five years.

3. Execution ⟸73, 163—Defenses or circumstances leading up to judgment not considered on question of whether execution should issue more than five years after judgment.

On application for writ of execution more than five years after entry of judgment under Code Civ. Proc. § 685, or in proceedings to vacate writ issued on such application, the court cannot properly consider defenses to original action or circumstances leading up to the judgment, but may consider matters rendering the enforcement of the judgment inequitable.

4. Execution ⟸73—Execution may be ordered five years after entry of judgment on ex parte motion.

Order for issuance of execution more than five years after entry of judgment under Code

Civ. Proc. § 685, may be made on an ex parte motion, but is subject to review on motion to vacate the order and to recall the execution.

5. Execution ⊂=163—Order quashing writ conclusive on subsequent motion on same grounds.

Order vacating an order for a writ of execution made more than five years after entry of judgment under Code Civ. Proc. § 685, *held* res judicata on subsequent motion to vacate an execution to enforce such judgment based upon the same grounds.

In Bank.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by the Creditors' Adjustment Company against Mrs. F. C. Newman, otherwise known as Mrs. F. C. Haigh. Judgment for plaintiff, and from an order vacating an order for a writ of execution, and recalling the execution issued thereon and denying further process for the enforcement of the judgment, plaintiff appeals. Affirmed.

The following is the opinion of Hart, J., in the District Court of Appeal, Third District, rendered July 17, 1920, with which Nicol, Presiding Justice pro tem., and Burnett, J., concurred:

This is an appeal by the plaintiff from an order setting aside and vacating an order directing the issuance of execution and recalling said execution and directing the return of any property seized under said execution.

The facts are: On the 17th day of April, 1906, the defendant, who was then engaged in the retail millinery business in the city of Santa Rosa, received a shipment of merchandise from Muller, Raas & Co., wholesale dealers in millinery goods, the same having been delivered to her at her place of business in packages. These goods, with others, were destroyed by fire in the early morning of April 18, 1906. The defendant having defaulted in the matter of paying for the goods shipped to her, the plaintiff, to which the wholesale firm above named assigned its account against the defendant for said goods, on the 7th day of May, 1907, brought an action against the latter in the superior court of Sonoma county for the sum of $580.60, the value of the goods referred to. The defendant did not contest said action, but allowed judgment to be taken against her for the sum sued for. Five years later the plaintiff brought another action based upon the judgment obtained in May, 1907, and, the defendant having defaulted therein and failed to appear or answer, judgment was rendered in said action against her on April 9, 1912. On October 10, 1918, six years and six months after the rendition of the last-mentioned judgment, the superior court of the said county of Sonoma, in pursuance of section 685 of the Code of Civil Procedure, made an order for the issuance of an execution, for the purpose of satisfying said judgment. The execution was thereupon delivered into the hands of the sheriff of said county to be levied, and the same was by said officer levied upon property belonging to the defendant. On October 11, 1918, the defendant noticed a motion for an order setting aside the said order directing the issuance of the execution recalling the execution.

Among the grounds of the motion, as set forth in the notice, were these: That the order directing issuance of execution was "inadvertently made"; that the defendant "is not legally or morally indebted to said plaintiff in any sum in excess of $100"; that the sum as specified in said order and to satisfy which said execution was issued "is materially in excess of the amount declared to be due by said judgment"; "that no notice of the hearing of said application was ever given to the defendant"; "that it was an abuse of discretion of the court to issue said order." The said motion was supported by an affidavit of the defendant, in which, after setting forth the fact of the bringing of the two actions above referred to, and the fact that she did not contest the first action and defaulted in the second, as above stated, she alleged, stating the facts in substance: That she attempted through certain representatives of Muller, Raas & Co. to have her account with that firm adjusted, and that she was assured by said representatives that "the same would be equitably settled, and that said representatives informed her and she believes the fact to be that said Muller, Raas & Co. had said goods covered by policies of insurance and were paid by the insurers 90 cents on the dollar of the insured value thereof"; that her husband was at the time the said goods were bought and received at her place of business in Santa Rosa the real owner of said business and millinery store and the goods therein contained; that her said husband, subsequently to the receipt of said goods, died testate, and that she was thereafter duly appointed executrix of his last will; that the said sheriff, pursuant to said execution, had levied upon all the moneys of affiant held by her in a certain designated bank in Santa Rosa as said executrix; that the said Muller, Raas & Co. "have not sustained any loss by reason of their business dealings with this affiant and are not entitled to recover from her more than the sum of $100, which she has at all times been ready and willing, and is now ready and willing to pay in satisfaction of said demands."

Upon hearing the motion the court granted the same, an opinion giving the reasons and the ground upon which the motion was granted having been prepared and filed by the court on the 19th day of October, 1918, and the formal order having been filed on the 21st day of said month.

All the proceedings above referred to were had before Hon. Thos. C. Denny, a judge of the superior court in and for the said county of Sonoma. No appeal was taken from the order of October 21, 1918, vacating the order of October 10, 1918, directing execution to issue. On August 28, 1919, an application was made to the said superior court, in the department presided over by Hon. Emmet Seawell, for an order directing the issuance of an execution on the judgment in the action last tried—the action based upon the judgment in the first action—and upon hearing said application the court, acting through Judge Seawell,

granted the same and so ordered execution to issue. Thereafter, and on the 29th day of August, 1919, the defendant served and filed a notice of motion to set aside and vacate the order made by Judge Seawell on August 28, 1919, directing execution to issue and to have said execution recalled. The grounds of the said motion as specified in the notice were in all particulars substantially the same as those upon which the motion for the vacation of the original order directing issuance of execution was made, there being set up therein, however, an additional ground in the nature of a plea by way of estoppel or the plea that the former order vacating the order directing the issuance of execution and recalling the execution issued thereunder was, in its effect upon the like order last made, res adjudicata. The motion was supported by the affidavit of the defendant, in which she set out briefly the facts relating to the proceedings culminating in the order setting aside the first order directing issuance of execution, etc., alleged that the order made by Judge Seawell was obtained in the absence of a showing before and to said judge that the execution of October, 1918, had theretofore been recalled, that the execution so ordered to issue by Judge Seawell was delivered to the sheriff of Sonoma county, who thereafter and thereunder seized certain personal property belonging to the defendant, and was about to sell and would sell the same and apply the same in satisfaction of the "pretended judgment now held by said plaintiff," set up, in effect, the plea of estoppel, as above explained, and then referred to and made as a part of her affidavit the affidavit filed in support of the motion to vacate the first order directing execution to issue and to have same recalled. Counter affidavits were made and filed by certain officers of the assignor of the plaintiff and used in opposition and resistance to the motion to vacate the order of August 28, 1919, in which it was stated that the statement in the defendant's affidavit that plaintiff's assignor received from policies of insurance covering the goods in question 90 per cent. of the amount of the judgment rendered against her in the action for the recovery of the value of said goods is and was wholly untrue, and that the full amount of said judgment is still unsatisfied and due the plaintiff.

The court found that "each and every of the matters and things stated in the notice of motion to vacate and set aside said order of August 28, 1919, and to recall the execution issued thereunder, are true, and each and every of the matters and things stated in defendant's affidavit are true," and thereupon ordered that the said order of August 28, 1919, be "forever vacated, annulled, and set aside," and that the execution be recalled and "is forever annulled, vacated, and set aside; and it is further ordered, etc., that the sheriff of said county do forthwith return and deliver to said defendant any and all property of every kind, character, and description seized by him or levied by him on the said writ of execution." The order further proceeds: "It is further ordered, adjudged, and decreed that it is improper and inequitable to issue a writ of execution in said action or to compel the enforcement of or enforce said judgment in any manner or for any amount whatever; and it is hereby finally decreed that no writ of execution shall ever issue in said action to compel the enforcement or collection of said judgment; and it is further ordered that the order made herein October 19, 1918, directing the recall of and recalling a certain writ of execution issued upon said judgment is final and conclusive, and that no power exists in this Court to order any further writ of execution."

It is from the foregoing order that this appeal is prosecuted by the plaintiff.

The respondent contends that the order recalling the execution first directed to be issued and issued is res adjudicata, and therefore operates as an estoppel against the right of the plaintiff to a subsequent order directing the issuance of execution. In other words, the contention is that the order recalling the execution first issued is conclusive upon the question whether an execution should issue, and that, by reason of the said order, the "plaintiff is conclusively precluded from obtaining execution."

As above intimated, the authority for the issuance of an execution upon a judgment after the lapse of five years from the date of its entry is to be found in section 685 of the Code of Civil Procedure, which reads as follows: "In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act."

We think that it must be held that the order recalling the execution first issued is res adjudicata. There was, as we have seen, no appeal taken from said order, and it does not appear that any new right or matters or facts were brought out or introduced in the proceedings on the motion for the issuance of the writ heard and granted by Judge Seawell.

In Wheeler v. Eldred, 137 Cal. 37, 69 Pac. 619, an order was made denying a motion for an order, under section 685 of the Code of Civil Procedure, directing the issuance of execution. Thereafter another motion was made for a like order, and, the same having been denied, an appeal from the order denying the motion was taken to the Supreme Court. Affirming the order, the Supreme Court said: "The matter involved here is res adjudicata, and the application is barred by the judgment of the court on a previous similar motion made by appellant on January 4, 1896. That motion was denied, and on an appeal by appellant from the order denying the motion to this court the said order was by this court on May 21, 1898, affirmed. Wheeler v. Eldred, 121 Cal. 28. In the present proceeding no facts or right not existing at the time of the former motion are alleged. On the former motion appellant contended that the court had no discretion in the matter, and that he had the absolute right to an order directing the issuance of the execution. It is also contended by appellant that because on the first motion appellant did not aver that the judgment remained unsatisfied in whole or in part, while he does so aver on the second motion, therefore the former judgment is not

a bar; in other words, that the point involved was not adjudicated on the first motion because appellant did not then aver all that he should and could have averred. Under that view, after an adverse judgment, there would be no end to the number of suits which might be maintained on the cause of action already adjudicated. On the former motion the question to be adjudicated was whether appellant was entitled to an order for a writ of execution to issue; and that is the precise question involved in the case at bar. No facts not existing at the time of the former adjudication are averred. The contention of appellant is no stronger than would be the contention of a party that he ought to be allowed to maintain a second suit after judgment had been rendered against him in a former suit on the same cause of action, because on the trial of the first action he had not properly argued his case."

We think that the foregoing excerpt from the case named is decisive of the case at bar. If such motions could be made one after another, without averring or showing new matter or some different issue from that necessarily adjudicated in the proceeding on the first application for the order, there would be no end to such proceedings. So far as the adjudication in a proceeding arising under section 685 carries with it an estoppel, we can perceive no distinction between an order denying a motion for an order directing execution to be issued and an order annulling such an order already made and recalling the execution, as is the case here. It was within the jurisdiction and the discretion of the court to order the execution recalled, and, having exercised its discretion with respect to the first order directing execution to be issued by setting aside said order and recalling the execution issued thereunder, it must be presumed that the court exercised its discretion soundly or upon reasons legally sufficient to support its action.

The order is affirmed.

Henry G. W. Dinkelspiel, of San Francisco, and Casey & Lambert, Hiram E. Casey and L. R. Lambert, all of Santa Rosa, for appellant.

W. F. Cowan, of Santa Rosa, for respondent.

SLOANE, J. This appeal is from an order vacating an order for a writ of execution under section 685 of the Code of Civil Procedure, and recalling the execution issued thereon, and denying further process for the enforcement of the judgment.

The history of the litigation is unique and somewhat complicated. Originally, in 1907, the plaintiff, as assignee of a claim against defendant, obtained a judgment by default after personal service of summons in the superior court of Sonoma county for $580.60 and costs. Five years later, the judgment remaining unsatisfied, plaintiff brought action in the same court on the original judgment, in which defendant again defaulted, and a renewal of judgment was obtained for the original amount with accrued interest and costs. Nothing was collected on this judgment, and on October 10, 1918, after the lapse of over five years from date of entry of the last judgment, plaintiff obtained an ex parte order for the issuance of an execution pursuant to the provisions of section 685 of the Code of Civil Procedure, in department 1 of said superior court. Execution was issued and levied upon property of the defendant. Shortly thereafter the defendant, upon notice and affidavits, procured an order of court in department 2 thereof setting aside such former order, execution, and levy. Following this, in August, 1919, plaintiff made a second application in department 1 for issuance of another execution, which order was granted, and execution issued and levied on property of defendant. Defendant again applied in department 2 for an order vacating the order for execution, recalling the second writ and denying further relief under the judgment. This application was granted, and it is from this order that the appeal was taken.

[1] No appeal was taken by plaintiff from the order vacating the first writ of execution, and it is the contention of defendant that this order became final and res judicata in denial of plaintiff's right to enforce its judgment. If such was the result, it is conclusive of the issues on this appeal. The right of the court to recall the execution cannot be doubted if the issuance was improperly or inadvertently made or authority therefor revoked. Buell v. Buell, 92 Cal. 393, 28 Pac. 443; Dorland v. Hanson, 81 Cal. 203, 22 Pac. 552, 15 Am. St. Rep. 44; Francis v. Francis, 192 Mo. App. 710, 179 S. W. 975; Columbia B. L. & S. Ass'n v. Gregory, 129 Ky. 489, 112 S. W. 608.

It therefore becomes necessary to ascertain just what was involved in the first proceeding to quash the execution and the order on which it was based.

The grounds enumerated by defendant in support of this motion were: (1) That the court had no jurisdiction to make an order for issuance of the writ; (2) that the order was made inadavertently; (3) that the levy of the execution worked hardship on defendant; (4) that it was inequitable to permit enforcement because of laches of plaintiff; (5) that there was no consideration for the judgment; (6) that defendant is not legally or morally indebted to plaintiff in excess of the sum of $100; (7) that the amount for which execution is granted is materially in excess of the amount called for by the judgment; (8) that the court had no authority to direct the payment of interest; (9) that no notice of hearing of said application was given; (10) that said order was not issued upon motion or upon supplemental proceedings; (11) that the order was an abuse of discretion of the court.

[2] While some of the grounds given are not tenable as an objection to enforcing the judgment, and one of them contains an admission that some amount is due to plaintiff

and unpaid, they are, taken as a whole, sufficient to justify that exercise of discretion which the court undoubtedly has under section 685 in determining whether the judgment may be enforced at all after the lapse of five years. Wheeler v. Eldred, 121 Cal. 28, 53 Pac. 431, 66 Am. St. Rep. 20.

[3] It is true that on an application for such a writ of execution or in proceedings to vacate it the court cannot properly consider defenses to the original action or circumstances leading up to the judgment (Weldon v. Rogers, 159 Cal. 700, 115 Pac. 464), but on this motion matters were presented to the court which, if true, might render an enforcement of the judgment inequitable. The court made two orders on this motion—the first apparently a signed statement reciting the conclusions of the court as to the facts presented and ordering that the motion to set aside the execution be granted; the second, the formal order of the court vacating both the order that execution issue and the execution itself. In the first order, if it may be termed such, the court recites, among other matters, that the order for execution was inadvertently made; "that the judgment was obtained for a bill of millinery, which millinery was destroyed by the fire of April 18, 1906, and that the plaintiff's assignors—plaintiff being merely a collection agency—recovered 90 per cent. of the judgment through insurance"; that "defendant offers to pay $100, which amount is more than the remaining 10 per cent. of the judgment"; that "it would be unconscionable that the plaintiff should have its bill paid twice." The question of laches in enforcing the judgment was also before the court.

[4] The original application for the issuance of execution was made without notice, and the order therefor was apparently made without a showing of meritorious grounds for enforcement of the judgment. It is true that no showing is required under the terms of the statute, and the court had authority to grant the writ on an ex parte motion (Harrier v. Bassford, 145 Cal. 529, 78 Pac. 1038; Doehla v. Phillips, 151 Cal. 488, 91 Pac. 330), but such order was subject to review on motion to vacate the order and recall the execution (Harrier v. Bassford and Doehla v. Phillips, supra).

Such motion to vacate the order and quash the execution was duly made by defendant, on notice to plaintiff and service of affidavits supporting the motion. Plaintiff did not appear to contest the motion or file counter-affidavits.

[5] The order of the court granting this motion was a judgment on the merits as to plaintiff's right to enforce its judgment under the provisions of section 685, as to all grounds presented, or defense thereto open to the plaintiff on such hearing.

The question of plaintiff's right to an execution was clearly before the court on its merits, and, conceding that the court may have committed error in the admission of certain evidence and in considering certain grounds of objection to the original order, which would have called for reversal on appeal, it had jurisdiction to act in the premises, and, the judgment having become final, without appeal or other direct attack, it is conclusive, whether the matter was rightly or wrongly decided, as to all matters presented or which should have been presented on the hearing. Keech v. Beatty, 127 Cal. 177, 59 Pac. 837; Lamb v. Wahlenmaier, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66; Curtis v. Upton, 175 Cal. 332, 165 Pac. 935.

The proceedings on the second order granting writ of execution, and order vacating the same, from which latter order this appeal is taken, present no matters supporting plaintiff's right to enforce this judgment which were not or which might not have been presented in the first proceeding. One of the grounds upon which the court vacated this second order for execution, and the writ issued thereon, was that the rights of the plaintiff were concluded by the former proceeding. We think such was the effect of the judgment then made.

The doctrine of res judicata as applied here is set forth, under very similar conditions, in Wheeler v. Eldred, 137 Cal. 37, 69 Pac. 619, where upon a second application for execution under section 685, Code of Civil Procedure, after affirmance on appeal of order denying a previous application, the court says:

"The matter involved here is res adjudicata, and the application is barred by the judgment of the court on a previous similar motion made by appellant on January 4, 1896. That motion was denied, and on an appeal by appellant from the order denying the motion to this court the said order was by this court, on May 21, 1898, affirmed. Wheeler v. Eldred, 121 Cal. 28. In the present proceeding no facts or right not existing at the time of the former motion are alleged. On the former motion appellant contended that the court had no discretion in the matter, and that he had the absolute right to an order directing the issuance of the execution. It is also contended by appellant that because on the first motion appellant did not aver that the judgment remained unsatisfied in whole or in part, while he does so aver on the second motion, therefore the former judgment is not a bar; in other words, that the point involved was not adjudicated on the first motion because appellant did not then aver all that he should and could have averred. Under that view, after an adverse judgment, there would be no end to the number of suits which might be maintained on the cause of action already adjudicated. On the former motion the question to be adjudicated was whether appellant was entitled to an order for a writ of execution to issue; and that is the precise question involved in the case at bar. No facts not existing at the time of the former adjudication are averred. The contention of

appellant is no stronger than would be the contention of a party that he ought to be allowed to maintain a second suit after judgment had been rendered against him in a former suit on the same cause of action, because on the trial of the first action he had not properly argued his case."

In applying the doctrine laid down in the preceding citation it is not necessary to go to the extent suggested in that opinion of holding that the ruling on the first motion is an adjudication of all grounds of motion existing at the time such motion was made, since in this case no grounds are presented on the second motion which were not before the court on the first. We therefore merely hold in this instance that the first ruling was conclusive of the issues presented and necessarily involved therein.

A like conclusion was reached on the appeal before us by the appellate court of the Third appellate district, from which this case is before us for rehearing. We agree with the judgment there given.

The order appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

(185 Cal. 450)

KAST v. CALIFORNIA CORPORATION. (S. F. 9270.)

(Supreme Court of California. April 1, 1921.)

1. Attachment ⟸192—Undertaking to release enforceable as common-law bond.

Undertaking given for the release of an attachment *held* purely a contract between the parties independent of any statute, whereby the surety, for a sufficient consideration—that is, the release of the attachment by the plaintiff—agreed to pay to plaintiff the amount of any judgment that might be recovered by him in the action, being enforceable as a common-law bond.

2. Attachment ⟸192—Statutes held without effect on common-law bond given to secure release.

Neither Code Civ. Proc. § 946, declaring that an appeal does not continue an attachment in force unless an undertaking be executed and filed on the part of the appellant, etc., nor section 553, providing if defendant recovers judgment against plaintiff, and no appeal is perfected and undertaking executed and filed as provided in section 946, all property attached remaining in the sheriff's hands must be delivered to defendant, etc., have any application to or effect upon an undertaking or common-law bond given to secure release of attachment.

3. Attachment ⟸337—No failure of consideration supporting undertaking to release surety.

Where consideration for the giving of bond to release an attachment was the immediate release of defendant's property from the valid attachments previously levied, and in return therefor the property was released by plaintiff, and restored to the dominion and control of defendant, such consideration was fully executed, and there was no failure of consideration to release the surety on such bond or undertaking.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Marius J. Kast against the California Corporation, named Pacific Surety Company. From judgment for defendant, plaintiff appeals. Reversed, with directions.

Henry Eickhoff, of San Francisco, for appellant.

Cooley & Lachmund, of San Francisco, for respondent.

ANGELLOTTI, C. J. The facts in this matter were stated in the opinion of the District Court of Appeal of the First Appellate District, Division 1, as follows:

"This is an appeal from a judgment in favor of the defendant in an action brought by the plaintiff to recover upon an undertaking issued by the defendant, as surety, for the purpose of securing the release from attachment of certain property attached in an action entitled Allen v. Chatfield.

"The appeal is on the judgment roll alone; it being agreed that the findings precisely present the facts involved. Allen, as plaintiff, commenced an action in the superior court in and for the city and county of San Francisco, by filing a complaint against Chatfield, to recover the sum of $5,000 with interest and costs. At the time of issuing the summons, Allen procured certain property of Chatfield to be attached by the sheriff of the city and county of San Francisco, and by the sheriff of the county of Lake. Chatfield and Allen, by their attorneys, made and carried into effect a mutual agreement pursuant to which Chatfield procured from the Pacific Surety Company, the defendant and respondent in this action, the written undertaking sued on here. Allen, through his attorney, received and accepted the undertaking, and in consideration thereof released the attachment which had theretofore been levied.

"The bond issued by the surety company appears to be in the usual form. It was entitled in the court and cause, and, after reciting the commencement of the action and the issuance of the attachments, continues: 'And whereas the said defendant is desirous of having said property released from said attachment upon the acceptance by plaintiff of this undertaking, in lieu of the attachment effected as aforesaid: Now, therefore, the Pacific Surety Company, * * * in consideration of the release from said attachment of the property attached as above mentioned, does hereby undertake in the sum of six thousand (6,000) and no/100 dollars and promise that, in case the plaintiff recover judgment in the action, defendant will, on demand, pay to plaintiff the amount of whatever judgment may be recovered in said action,

together with a percentage or interest and costs.'

"This undertaking, as before stated, was delivered to the attorney for the plaintiff, Allen. It operated to secure the release of the property attached. In arranging for the bond all the steps followed were taken independently of the sheriffs. The whole matter was arranged and carried into effect by and between the parties to the action, through their respective attorneys, without intervention or instrumentality of the court or either of the attaching officers. The undertaking was not given to, or approved by, either of the sheriffs, nor was it received by them, and it was not filed in the action. The sheriffs were not given any information or notice relative to the undertaking until after it had been arranged for and given by the surety company to the plaintiff. Under the personal direction of Allen's attorney, written instructions for the release of the property attached were then delivered to the attorney for Chatfield and were by him delivered to the sheriffs.

"Judgment was thereafter rendered and entered in the action in favor of the defendant Chatfield. * * * Allen at once perfected an appeal to the Supreme Court. He failed, however, to comply with the requirement of section 946 of the Code of Civil Procedure, which provides that an appeal does not continue in force an attachment unless an undertaking be executed and filed on the part of the appellant for that purpose.

"On the appeal Allen was granted a new trial (Allen v. Chatfield, 172 Cal. 60, 156 Pac. 47), and upon the retrial of the action in the lower court judgment was entered in his favor and against Chatfield in the sum of $7,300.50. By various assignments, the plaintiff in this action became the owner of this judgment. He made written demand upon Chatfield and the surety company for payment of the same, which not having been made, and no writ of execution having been issued in the action, he brought this suit against the surety company to recover upon the undertaking.

"The trial court decided that the attachment issued in the action of Allen v. Chatfield was discharged, and the undertaking was released by the judgment in favor of the defendant in that action, and the failure of the plaintiff, Allen, to execute and file the undertaking provided in section 946 of the Code of Civil Procedure. It is the contention of the appellant that the bond in question was a common-law bond, executed directly to the plaintiff as a matter of first intention, and received by him in lieu of the property attached, and therefore not a statutory undertaking subject to the provisions of the Code. Respondent's position is that, regardless of the nature of the bond, whether 'statutory' or 'common-law,' it was an undertaking received in the action and as such released the attached property by operation of the Code sections."

[1] This is a correct summary of the facts and claims of the parties, except for the statement that the bond "appears to be in the usual form." The bond is not in all respects in the form of the statutory bond contemplated by section 540, Code of Civil Procedure, the only section which is claimed to be applicable here; it being obvious that the bond was not one given in pursuance of an order of court under sections 554 and 555, Code of Civil Procedure. Section 540, Code of Civil Procedure, contemplates only a bond given to a sheriff holding a writ of attachment (see Preston v. Hood, 64 Cal. 405, 407, 1 Pac. 487) to prevent a levy by him on property "within his county," or to procure a release of such property by him after levy, when tendered prior to his making a return on the writ (Hesser v. Rowley, 139 Cal. 410, 413, 73 Pac. 156). There is no such thing under section 540, Code of Civil Procedure, as a single bond or undertaking for the release of property situate in different counties, held under levy by different sheriffs, each acting under a writ directed to him alone. See Kanouse v. Brand, 11 Cal. App. 669, 106 Pac. 120. The bond on its face shows that such was the situation here. It further shows on its face that the attachment is to be released only "upon the acceptance by said plaintiff of this undertaking." The bond given to a sheriff under section 540, Code of Civil Procedure, requires no "acceptance" by the plaintiff. The sheriff must accept the same if it is in proper form and the sureties are sufficient, and refrain from making the levy if he has not already made it, or release the property from attachment if he has already made the levy. In the matter of such a bond the defendant is not dealing with the plaintiff at all, but with the officer holding the writ, and in the exercise of rights given him by the statute. The admitted facts, established by the findings, further show that the transaction was one solely between the parties to the action, altogether without reference to the respective sheriffs, and was one looking to the release by the plaintiff of his then existing attachment liens in consideration of the furnishing of security acceptable to him for the payment of whatever judgment might be recovered by him. According to the findings, the bond was procured by Chatfield and delivered by him to Allen "for the purpose of completing said agreement and arrangement between them." It was held in Passow, etc., v. United States, etc., 177 Cal. 40, 42, 170 Pac. 1124, that the mere fact that such a bond is delivered to a plaintiff instead of to the sheriff, and the property thereupon released from atttachment, would not prevent the bond being considered as one given in pursuance of section 540, Code of Civil Procedure, in view of the fact that such delivery may have been "for convenience only," and the property may have been "released by the sheriff in the usual way, as upon the giving of the undertaking provided in section 540," but, in the light of the facts we have stated and what is said in the opinion in the case last cited, it is clear that the undertaking here cannot be regarded as one authorized by or intended by the parties to be given in pursuance of that section. It is

conceded that it was not given in pursuance of any other statutory provision relative to attachments. Under these circumstances it must be regarded, in view of the authorities, purely as a contract between the parties entirely independent of any statute, by which the surety, for a sufficient consideration, viz. the release of the attachment by the plaintiff, agreed to pay to the plaintiff the amount of any judgment that might be recovered by him in the action (see Passow, etc., v. United States, etc., Co., supra), and is enforceable as a common-law bond.

This being the situation Allen was entitled to recover upon this bond, unless his right of action thereon was destroyed by his failure, when Chatfield prevailed upon the first trial of the action and he appealed, to give an undertaking for the purpose of continuing the attachment in force pending the appeal. That it was so destroyed is the main contention of defendant. This contention is based on the provision of section 946, Code of Civil Procedure, which declares that "an appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant," etc., conditioned that "the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained," and on section 553, Code of Civil Procedure, which provides that, "if the defendant recovers judgment against the plaintiff, and no appeal is perfected and undertaking executed and filed as provided in section nine hundred and forty-six of this Code, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent, the order of attachment be discharged, and the property released therefrom." Special reliance is placed upon the claim that the bond here was an "undertaking received in the action," and that by reason of the provision of section 553, Code of Civil Procedure, requiring that "any undertaking received in the action" must be delivered to the defendant under the circumstances therein stated, the undertaking given here was discharged. It is said that the trial court "found" that the bond "was received in said action," but this is not true, as there is no such finding of fact. The specific statement to that effect is contained in the trial court's conclusions of law, and properly so contained; the court having theretofore stated in its findings of fact all the specific facts upon which it based such conclusions of law. Assuming that the provision of section 553 referred to renders worthless "any undertaking received in the action" under the circumstances therein stated, the question whether the undertaking here was one "received in the action" within the meaning of the statute must be determined upon the specific facts found by the trial court.

[2] However liberally we construe the words "any undertaking received in the action," we are satisfied they must be confined to such undertakings as are intended to be given in pursuance of some statutory provision relative to attachments. We can see no good reason for the delivery to the defendant of any undertaking other than one given by the plaintiff as a condition precedent to the issuance of the writ of attachment, and the statute might well be construed as referring to this undertaking, but, however this may be, it certainly was not intended to prohibit the parties to an action from providing by contract between themselves for security for the payment of any judgment that might ultimately be given in an action, altogether regardless of the provisions of our laws relative to attachment. Such an intention to interfere with the right of private contract is not to be attributed to the Legislature in the absence of language clearly compelling it. To our minds the language used compels no such conclusion. The words "any undertaking received in the action" reasonably construed mean at most undertakings of the sort concerning which the Legislature was dealing in its provisions relative to attachment; in other words, undertakings for the giving of which it was making statutory provision. Those were the only undertakings that could be "received in the action," within the meaning of that phrase. It must be conceded, in view of our decisions, that various restrictions upon the right to maintain action upon bonds provided in the chapter of our Code of Civil Procedure relative to attachments have no application to bonds not purporting to be given pursuant to any provision of such statutes. See Smith v. Fargo, 57 Cal. 157; Kanouse v. Brand, 11 Cal. App. 669, 106 Pac. 120. See, also, Passow, etc., v. United States, etc., Co., 177 Cal. 31, 170 Pac. 1124. Such bonds, if based on a sufficient consideration, are valid common-law obligations for the payment of money in accordance with the conditions therein expressed, altogether without reference to and independent of the statutory provisions. Whether any liability exists thereon must be determined solely by reference to the provisions of the bond which constitutes the contract between the parties. We are satisfied that neither section 946, Code of Civil Procedure, nor section 553, Code of Civil Procedure, can fairly be held to have any application to or effect upon such a bond. So far as we can see, the expressions in various decisions and text-books relied on by learned counsel for respondent have reference solely to undertakings purporting to be given in pursuance of some statutory provision, and are not applicable under such facts as appear in this case.

[3] There was no failure of consideration.

The consideration for the giving of the bond was the immediate release of Chatfield's property from the valid attachments theretofore levied, and in return therefor the property was released by Allen and restored to the dominion and control of Chatfield. It is a case of a fully executed consideration, of which Chatfield had the full benefit.

In view of our conclusions upon the matters discussed, other points made by respondent are of no moment. Upon the facts found by the trial court plaintiff was entitled to judgment against defendant for the full amount of the bond, with interest thereon from the date of the demand, viz. April 19, 1918.

The judgment is reversed, with directions to the trial court to enter judgment upon the findings already made in favor of plaintiff and against defendant for the sum of $6,000, with interest at the legal rate thereon from April 19, 1918.

We concur: SHAW, J.; OLNEY, J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

185 Cal. 440

MILLER v. CITY OF LOS ANGELES et al. (RIDEOUT et al., Interveners). (L. A. 6517.)

(Supreme Court of California. April 1, 1921.)

1. Municipal corporations ⟸272—Under charter empowering city to purchase property necessary to furnish light, etc., city could purchase electric energy for distribution.

Los Angeles Charter, art. 1, § 2, subd. 7, empowering the city to acquire, by purchase or otherwise, all property necessary or convenient to furnish the city and its inhabitants with light, heat, and power, even if such provision is to be strictly construed, authorizes the city to make a contract for the purchase of electric energy sufficient to supply its inhabitants, though such energy is not, strictly speaking, property, especially in view of article 18, § 192, subd. (g), authorizing the acquisition of all property necessary for the maintenance of electric light system, and section 2, subd. 50, giving the city the powers which a municipal corporation might exercise under the state Constitution.

2. Electricity ⟸11—City held authorized to contract for sale of surplus electricity to corporation for distribution outside city.

Under Los Angeles Charter, art. 1, § 2, subd. 7, 17, 50, authorizing the city to sell electric current and all products of any public utility operated by it, the provision of subdivision 41, that no electric power shall be sold to a corporation for resale or distribution without the assent of the voters, is only a limitation upon the power, not a denial thereof, so that the city may sell its surplus electric current to a corporation for distribution outside the city, if the contract has been approved by the voters.

3. Municipal corporations ⟸867(2)—Contract to purchase electric distributing system without assuming indebtedness need not be submitted to voters.

Under Los Angeles Charter, § 2, subd. 7, par. (d), empowering the city to purchase public utility property, and in another sentence providing that it may acquire the utility subject to any outstanding indebtedness, but no such contract shall be valid unless approved by the electors, the requirement for approval applies only in case the contract assumes an existing indebtedness, so that the provision will not conflict with Const. art. 11, § 6, forbidding incurring of an indebtedness without such approval, especially when other later provisions of the same paragraph expressly stated that they referred to both kinds of contracts.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Abner Miller against the City of Los Angeles and others, in which Mary Rideout and Mary H. Morgan intervened and joined with plaintiff in seeking to enjoin the performance of a contract. Judgment for the defendants, and the intervener Mary H. Morgan appeals. Affirmed.

Overton, Lyman & Plumb and Wm. B. Himrod, all of Los Angeles, for appellant.

Gilroy & Little and H. C. Beach, all of Los Angeles, for respondent Miller.

Charles S. Burnell, City Atty., of Los Angeles, W. B. Mathews, Ray C. Eberhard, and Lewis E. Whitehead, all of Los Angeles, for respondents City of Los Angeles and others.

Edgar G. Pratt, of Los Angeles (Henry M. Willis, of Los Angeles, of counsel), for respondent Rideout.

SLOANE, J. This is an appeal from a judgment for defendants in a taxpayers' action against the city of Los Angeles to enjoin the carrying out of a contract of date May 26, 1919, between the Southern California Edison Company, a corporation, on the one part, and the city of Los Angeles, on the other.

The contract is one whereby, first, the California Edison Company agrees to sell to the city of Los Angeles, and the city agrees to buy, the entire electric distributing system of the company within the corporate limits of the city at a price of $11,000,000; secondly, the contract contains a further provision that the city shall purchase from the company during a period of 30 years all electric energy necessary for distribution to its consumers on the municipal system in excess of that produced by the power generating plants owned and operated by the city; and, thirdly, the contract contains a provision that the company shall have the right for a period of 15 years to purchase from the city all surplus electric power produced at the city's

generating plants and not necessary for distribution to the consumers on the city's distributing system, or for sale to the city of Pasadena for distribution and use within that city.

Other phrases of this contract were originally involved in the action, but the three propositions above referred to are all that remain in controversy on this appeal.

The moving parties to the action in the lower court were the plaintiff and two interveners, appearing separately as individual citizens and taxpayers, in opposition to the contract. Judgment was for the defendant as against plaintiff and both interveners. Only the intervener Mary H. Morgan has appealed, and her attack is upon the general provisions of the contract above stated and presents the following three grounds of opposition: First, that the city has no power to purchase electricity in bulk and resell and distribute the same to its inhabitants; second, that the city has no power to sell electricity to the Southern California Edison Company for resale and distribution by that company to consumers outside of the city of Los Angeles; third, the contract of purchase has never been approved by a majority of voters of the city of Los Angeles.

The provision of the contract against which the first objection is directed is contained in subdivision 7 thereof, as follows:

"Seventh. The company shall sell, furnish, and deliver to the city, and the city shall purchase and take from the company, * * * electric energy as follows, to wit:

"(a) All electric energy which the city shall require each year for and during the period of 10 years from and after the date of the transfer and delivery to the city of said properties of the company, * * * in order to supply consumers served by the city for use within the limits of the city, as aforesaid, in excess of the amount which the city shall generate at hydro-electric plants now or hereafter owned or controlled by it. * * *

"(b) All electric energy which the city shall require each year for and during a period of 20 years immediately succeeding the aforesaid 10-year period, in order to supply consumers served by it for use within the limits of the city, as aforesaid, in excess of the amount which the city shall generate at electric plants of any kind now or hereafter owned or controlled by it. * * *"

Appellant claims that while the city of Los Angeles, under certain provisions of its charter, has authority to acquire, by purchase or otherwise, the necessary plants, machinery, and equipment for manufacturing and distributing electric light and energy for the use of the municipality and its inhabitants, it is without power to purchase the manufactured article in quantity for such use and distribution.

It is contended by respondent that authority exists for such purchase of electric energy in bulk under subdivision 7, section 2, of article 1, of the Los Angeles city charter. That section provides that the city shall have the right and power—

"to acquire by purchase, condemnation, lease, gift, or otherwise, or to construct, extend, maintain, and operate, within or without the city limits, any and all plants and property necessary or convenient for furnishing the city and its inhabitants * * * with * * * light, heat, power, or any other public service."

Stripping this section of the charter of all expressions nonessential to the point in controversy, respondent would have it read thus:

The city shall have the right and power "to acquire by purchase * * * or otherwise * * * any and all property necessary or convenient to furnish the city and its inhabitants * * * with * * * light, heat, power."

In a broad analysis of the term it can hardly be disputed that electrical energy as manufactured and supplied for public and private use is property. Electricity is rather an intangible asset, and the word "property" is perhaps not the most apt word by which to describe the supply of electrical energy thus sought to be acquired for the use of the city. However, if it was a water supply to be delivered from without to the mains of the city's distributing system, it might appropriately be so described, and an electric current to be delivered at the main conduit of the city's electrical distributing system is not essentially different.

[1] Conceding the limitations of the powers of a municipality to such as are expressly granted or necessarily implied from powers expressly given, and that language purporting to define the powers of a municipality is to be strictly construed (Oro Elec. Corp. v. R. R. Commission, 169 Cal. 466, 147 Pac. 118; Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41; Wichmann v. City of Placerville, 147 Cal. 162, 81 Pac. 537; 1 Dillon, Munic. Corp. [5th Ed.], par. 237), we have here an express authority granted under the city charter to acquire and distribute such property as is necessary or convenient for supplying the city and its inhabitants with light, heat, power, or any other public service, and, this general purpose being express and definite, the means for carrying it into effect is within the reasonable discretion of the city authorities.

Counsel for appellant contend that this authority is not general but special and limited; that it is confined by the use of the terms "plants and property" to an equipment for manufacturing its own supply of electrical energy; and they call attention to the more general provision as it existed under an earlier expression of this same section of the charter, where the city was in terms given power "to provide for supplying the city and its inhabitants with water, gas, and electricity, or any thereof." Under the

amendment of 1913 this general clause was eliminated and the section re-enacted as hereinbefore quoted, thereby, as appellant claims, restricting the general power of the city. There are other sections of the charter, however, that seem to supply this general authority or at least to justify the broader interpretation of subdivision 7 of section 2 of article 1, claimed by the respondent. Subdivision (g) of section 192, article 18, after authorizing the board of public service commissioners to construct, operate, maintain, and extend electric plants, systems, and equipments, declares that said board shall have power "to acquire and take, by purchase, lease, condemnation, or otherwise, and in its own name to hold as special trustee for the city, any and all property situated within or without the limits of the city that may be necessary or convenient for such construction, operation, maintenance, or extension." Subdivision 50 of section 2 of the charter contains this general rider, apparently intended to cover all contingencies in the way of acquiring and operating municipal utilities:

"The city of Los Angeles shall have, and it is hereby given and it hereby reserves unto itself, and the people of the city hereby reserve unto it, and the people of the state of California hereby grant unto it, and said city may hereafter exercise, each and every of the powers which a municipal corporation might or could exercise under the Constitution of the state of California; and said city may hereafter acquire, own, hold, sell, deal in, manage, operate, or control any office, department, business, enterprise, utility, or property which might or could be acquired, owned, held, sold, dealt in, managed, operated, or controlled by any person, firm, or corporation whatsoever; provided, that under the authorization of this subdivision the city of Los Angeles shall not engage in any purely commercial or industrial enterprise not now engaged in by the city, except on the approval of a majority of the electors voting thereon at an election. By the insertion in this charter of the sentence next preceding the present sentence, the city of Los Angeles and the people thereof intend, and the people of the state of California, acting by and through the Legislature thereof in ratifying this charter, intend, that the said sentence shall be, and is hereby declared to be, an express grant of the powers referred to therein, without a more specific enumeration or designation."

The power here sought to be exercised is to purchase from sources without the city such amount of electrical energy to be supplied for distribution through its own distributing system as may be required to supplement the product of the city's own generating plants. We are of the opinion that such a contract as is here involved constitutes, under the terms of the charter, a purchase of property necessary or convenient for furnishing the city and its inhabitants with an authorized public service.

The convenience and economy of public service which is thus secured by a contract providing against any deficiency in the supply of electricity for public use would seem to be further served by an arrangement for the sale to a public service corporation outside the city of any surplus electrical energy the city may from time to time have on hand after supplying all its municipal demands and private or municipal customers. Such is the purpose of the provision of the contract between the city of Los Angeles and the Southern California Edison Company, against which appellant's second objection is directed.

It is declared by section 9 of the contract that, if at any time within 15 years after the contract goes into effect the city shall generate a surplus of electric energy in excess of the amount required to supply the city of Los Angeles and its consumers in such city and in the city of Pasadena, it may sell, during such period, such surplus to the Southern California Edison Company on terms to be fixed by the proper authorities. It is further provided by the contract that the agreement shall not become effective until the same is approved by the railroad commission of California, and until the provisions for sale of such surplus shall have been assented to by two-thirds of the qualified voters of said city voting on the proposition at a general or special election.

The contention of appellant is that the city of Los Angeles, under its charter, has no authority to dispose of its surplus electrical power for resale or distribution excepting to other municipal corporations.

[2] Subdivision 7 of section 2, article 1, of the charter, however, provides generally that the city shall have power "to sell the products or service" of any utilities described in that subdivision. Subdivision 17 of section 2 grants power "to sell gas, electric current, and all products of any public utility operated by the city." Subdivision 50 of section 2, hereinbefore quoted, declares that said "city may hereafter acquire, hold, sell * * * any business enterprise, utility, or property," and further sets forth that such provision "is an express grant of the powers referred to therein without a more specific enumeration or designation."

In the light of this general grant of power to sell we are of the opinion that the other charter provisions relied upon by appellant as a negation of such power are only a limitation to the extent that they impose certain conditions upon certain sales.

Subdivision 41 of section 2 declares that—

"No electric power now or hereafter owned or controlled by the city shall ever be sold, transferred, leased, or disposed of to any person or corporation for resale, rental, disposal, or distribution to consumers or other persons without the assent of two-thirds of the qualified voters of said city."

It is then provided by this section of the charter that the provision just quoted shall not apply to the ordinary sale of electric power to consumers in or out of the city for their own use, "or to other municipal corporations for municipal use or for resale and disposal by such municipal corporations to consumers within such municipality."

The reference, in the first sentence quoted, to disposal of electric power to "corporations for resale, rental, disposal, or distribution to consumers," cannot be construed to refer to municipal corporations, but is obviously a limitation of a general power to sell to private corporations, by requiring such sale to be first approved by a two-thirds vote of the people. Read in connection with the general power to sell utilities, products, or service, heretofore cited, we think this provision of subdivision 4 establishes authority under the charter to make the sale here contracted for; it appearing by the record that such proposition was submitted at an election held for that purpose and approved by two-thirds of the voters.

The validity of this election was upheld in a contest in the superior court of Los Angeles county, which judgment is now affirmed by the decision of this court. Rideout v. City of Los Angeles (L. A. 6500) decided March 31, 1921, 197 Pac. 74.

[3] The third contention of appellant is that the contract for the purchase of the distributing system of the Edison Company within the city of Los Angeles is void because it has never been submitted to or approved by a majority of the qualified electors of the city. Respondents deny that such a submission and approval is required by the charter. The decision on this point depends entirely upon the construction of paragraph (d) of subdivision 7 of section 2 of the charter. By this provision the city is empowered:

"To enter into a contract with the owner of any public utility held or operated under franchise rights acquired prior to the adoption of this charter by the terms of which contract the city may * * * agree to purchase all or any part of the property of such utility upon paying therefor a price to be paid in accordance with the terms of the contract."

Thus far this power of contract stands unrestricted. Immediately following the sentence just quoted, however, it is further declared:

"Such contract may provide that the city may acquire the utility subject to all or any portion of the outstanding indebtedness against the same, within the limitations above prescribed, but no such contract shall be valid until it is approved by a majority of the qualified electors of the city voting thereon at an election."

The question in dispute is as to whether this requirement, for submission to a vote of the electors, applies alone to "such contract" providing that the city shall purchase the utility "subject to its outstanding indebtedness," or whether it also governs the general power contained in the first sentence of paragraph (d) to contract and purchase at a fixed price.

Considering the fact that the requirement for an election is part of the same sentence with the authorization to enter into a contract of purchase subject to outstanding indebtedness, the logical and grammatical interpretation would be to apply the election requirement solely to this form of purchase. This construction is also supported by the fact that further modifying provisions of paragraph (d), which obviously relate to either form of contract, are set out in separate sentences, and contain words of inclusion showing their general application. These remaining provisions of paragraph (d) are as follows:

"The financial obligation assumed by the city under any such contract shall not be subject to the debt limitation [of the city] until the purchase is actually consummated, and then may be exempted by ordinance approved by a majority of the electors voting at an election, from such limitation, if the state railroad commission shall determine that the utility is self-sustaining."

"The provisions of the contract in this paragraph (d) mentioned need not include any, and the sale contract shall not be subject, as to the price to be paid thereunder, to any limitation prescribed in section 2 of this charter of which section this paragraph (d) is a part."

"Nothing in any such contract contained shall operate to extend the term of any franchise of any utility therein mentioned."

The reason for subjecting a contract which assumes an outstanding indebtedness to the approval of the voters is the fact that it might otherwise come in conflict with the provisions of section 6, article 11, of the Constitution, forbidding without such approval the incurring of an indebtedness exceeding the yearly income of the municipality.

In the second sentence of this paragraph above quoted the words "within the limitations above prescribed" refer back to a preceding paragraph (a), which limits the indebtedness of a utility that the city may take over to an amount not exceeding the purchase price to be paid by the city, and the subsequent references to exemption from limitation of indebtedness by approval of the voters upon determination of the railroad commission relate back to paragraph (c) of the section, which provides for such action whenever the public utility purchased shall be determined by the railroad commission to be self-sustaining and the exemption is approved by a majority vote of the electors.

The whole paragraph is sufficiently ambiguous and confusing, but it does not appeal to us as a reasonable construction that these

words requiring ratification by an election should have been coupled with and limited to a separate sentence with an entirely separate and distinct form of contract of purchase, if it was intended thereby to govern the entire subject-matter of the subdivision.

Another circumstance is that the city of Los Angeles, under the powers enumerated in section 2 of the charter, is authorized to purchase lands, rights, and properties, to purchase, lease, condemn, or otherwise construct, own, maintain, and equip telephone systems, telegraph systems, street railways, steamboats, and other means of conveyance, improve, maintain, and control its water fronts and harbors, build wharves, acquire and operate warehouses, bunkers, wharves, and dry docks, and engage in numerous other enterprises which would involve great expenditures, without submitting the question of such expenditure to a vote of the electors.

There is no reason, in the nature of the transaction covered by this subsection of the charter, why the requirement for approval by the electors which, under the ordinary grammatical construction of the language used, would seem to be limited to such contracts as involve an assumption of outstanding indebtedness of the utility purchased, should be extended by implication to an ordinary purchase of a public utility on a cash basis and within the means of the city, more than to the numerous other contracts and purchases authorized without such restrictions.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

185 Cal. 484

PULLMAN CO. v. RICHARDSON, State Treasurer.

HINES, Director General of Railroads, et al. v. SAME.

(S. F. 9080–9085, 9183.)

(Supreme Court of California. April 4, 1921.)

1. Commerce ⟸72—Taxes based on gross receipts of palace car company are "property taxes."

The taxes upon the property of a palace car company at the rate of 3 and 4 per cent. of the gross receipts from business transacted in the state of California, levied under Const. art. 13, § 14, as amended in 1910, and statutes passed pursuant thereto, are "property taxes," and not taxes on gross receipts derived from interstate taxes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property Tax.]

2. Taxation ⟸390(2)—Earnings derived from palace car company's property proper for consideration as basis on which to establish value of property.

As a basis on which to establish the value of a palace car company's property in California for purposes of taxation under Const. art. 13, § 14, as amended in 1910, and statutes passed pursuant thereto, it is proper to consider the earnings derived from its property tangible and intangible within the state, and proper to consider the proportion of its receipts derived from its interstate business earned within the state as an element of that business.

3. Commerce ⟸72—Constitutional system for apportionment of interstate earnings does not assert jurisdiction over earnings from interstate business.

System adopted by Const. art. 13, § 14, as amended in 1910, for the apportionment of interstate earnings of a palace car company for purposes of assessment of its property for taxation, does not assert jurisdiction over any earnings from interstate business not actually derived from the portion of such business conducted within the state, and does not draw from its earnings derived from capital or property situated elsewhere.

4. Commerce ⟸72—Reports of board of equalization held not to show tax on property of palace car company was on gross receipts derived in part from interstate commerce.

Reports of state board of equalization and assessment by them of palace car company's property pursuant to Const. art. 13, § 14, as amended in 1910, and statutes thereunder, *held* not to show that the tax levied on the company's property at the rate of 3 and 4 per cent. on the gross receipts from its business transacted in the state was a tax on gross receipts derived in part from interstate commerce, and not a property tax.

In Bank.

Appeals from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Actions by the Pullman Company, a corporation, and by Walker D. Hines, as Director General of Railroads, and the Pullman Company, against Friend W. Richardson, as treasurer of the State of California. From judgments for defendant, plaintiffs appeal. Affirmed.

T. C. Coogan, Burke Corbet, and Corbet & Selby, all of San Francisco (F. B. Daniels, and G. S. Fernald, both of Chicago, Ill., of counsel), for appellants.

U. S. Webb and Raymond Benjamin, both of San Francisco, for respondent.

WILBUR, J. The plaintiff brought seven separate suits for the purpose of recovering from the Treasurer of the State of California taxes paid by it under protest. The taxes were levied at the rate of either 3 or 4 per

cent. upon the gross receipts from the business of the plaintiff transacted in the state of California. The rate is fixed and the tax authorized by section 14, art. 13, of the Constitution of California, amended in 1910, and statutes passed in pursuance thereof. Approximately 50 per cent. of the gross revenue of the plaintiff corporation in California consists of returns from the interstate business of the plaintiff corporation. The amount of the California revenue derived from interstate business is ascertained by apportioning to the business in the state of California the proportion of the fare derived from each item of the business of the plaintiff, into, out of, and through the state of California, which the mileage traveled by the passenger in California bears to the total mileage traveled by him upon his ticket, and by adding these several amounts to ascertain the total amount of gross receipts for the year for such business. These amounts were furnished to the state board of equalization, and are as follows:

Year	Intrastate Business	Interstate Business	Total Business	Rate	Total Tax	Amount Plaintiff Seeks to Recover
1912	$ 938,786.80	$ 966,516.17	$1,905,302.97	3%	$57,159.08	$28,995.48
1913	1,000,963.16	953,036.44	1,953,999.60	3%	58,619.98	28,591.09
1914	1,124,877.77	956,213.61	2,081,091.38	4%	83,243.66	38,248.55
1915	1,196,719.76	1,004,681.57	2,201,401.33	4%	88,056.06	40,187.26
1916	998,330.30	855,072.22	1,853,402.52	4%	73,209.40	33,811.67
1917	1,053,141.34	1,025,743.33	2,078,884.67	4%	82,115.94	40,516.86
1918	1,214,463.33	1,182,424,90	2,396,888.23	4%	94,677.08	46,705.78

In considering the effect of this method of apportionment of the passenger fares derived from interstate business, it should be observed in passing that, if the rates of the plaintiff corporation for long interstate hauls are less proportionately per mile than for shorter hauls in intrastate business, it follows that if two passengers proceed from San Francisco to the state line at Yuma, one going to New York or Boston by the way of New Orleans and the other stopping at the state line, the amount of fare apportioned to the state of California would be less in the case of the traveler who is going to Boston or New York than in the case of the one who stops at the state line. If the state is entitled to levy a tax in the manner adopted, this would seem to be the fairest method of apportioning the receipts of an interstate common carrier. If the same system was adopted in all the states traversed by the carrier, the sum of the amounts thus apportioned to the several states would be equal to the gross receipts of the carrier derived from such interstate commerce.

Appellant's contention is that a tax upon the gross receipts derived from interstate commerce is in violation of the federal Constitution giving Congress the power to regulate interstate commerce, and for that reason seeks to recover the proportion of the tax which is based upon the gross receipts derived from interstate commerce.

It is apparently conceded by the appellant that the gross receipts of a common carrier engaged in interstate commerce can be considered as a basis in a bona fide effort to determine the value of the carrier's property within the state, and that if the value so derived from the consideration of these gross receipts from interstate commerce and from intrastate commerce is the fair valuation of the property within the state subject to taxation that the tax is valid. If not so conceded, it is clear that such a tax is valid. Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229.

The section of the California Constitution authorizing and levying the tax declares that it is a property tax in lieu of all other taxes, state, county, and municipal, and if this declaration is a true statement of the fact, it is undoubtedly true that the method is unobjectionable. The Constitution, after enumerating the various companies which are required to pay the tax levied under its provision, requires that—

They "(a) * * * shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies and each thereof within this state. * * * Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided. * * * All property enumerated in subdivision a [supra], b and d of this section shall be subject to taxation, in the manner provided by law, to pay the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township or district, before the adoption of this section. The taxes so paid for principal and interest on such bonded indebtedness shall be deducted from the total amount paid in taxes for state purposes. * * *"

[1] The question as to whether or not the taxes levied by section 14, art. 13, of the Constitution, are taxes upon property rather than upon receipts or income has several times been considered by this court, and in

each instance it has been declared to be essentially a property tax.

The opinion in City & County of San Francisco v. Pacific Telephone & Telegraph Co., 166 Cal. 244, 135 Pac. 971, gives a history of the enactment of section 14, art. 13, of the Constitution, to which we refer without repeating the same herein. With reference to the nature of the tax it was therein stated:

"The appellant's contention, briefly stated, is that the constitutional provision relieves the companies named from no burden except that of taxes upon the property theretofore enumerated, and that the charge imposed by the ordinance is a business or occupation tax, and not a tax upon property at all, and therefore not covered by the so-called exemption. The respondent, on the other hand, claims that under a fair reading of the constitutional amendment, the liability of a telephone company to pay a percentage of its gross receipts was designed to exclude the power of the state, or of any county or municipality, to exact from it any further revenue (except as stated in the proviso above quoted) whether by way of a direct tax upon its property or in the guise of a license fee upon its business. * * *

"The percentages enumerated in the amendment are declared to be 'in lieu of all other taxes,' etc., and such percentages were, doubtless, fixed at higher rates than would have been adopted in the absence of a restriction on other taxation. These considerations are of weight in determining the rule of interpretation by which the provision regarding freedom from other taxation is to be read. * * *

"For these reasons we agree with the conclusion of the learned trial judge that the taxes imposed by the amendment supersede, not only other taxes upon property, but also license fees like those exacted by the ordinance of the city and county. This result, it seems to us, not only accords with the language of the part of the amendment defining the tax, but is in harmony with the apparent purpose and scope of the new system of taxation created by the amendment."

In the opinion in the case of Lake Tahoe Ry., etc., Co. v. Roberts, 168 Cal. 551, 143 Pac. 786, Ann. Cas. 1916E, 1196, it is said:

"The fact that these manifest contingencies have not been provided for by law is additional evidence that the framers of the Constitution meant what they said, namely: That *only property* used exclusively, or only a severable part of property used exclusively in the operation of the business of the company, should be included in the *list of property whose sole and only tax is covered by the gross revenue percentage*, and that the earnings of other properties not so exclusively used in whole or in part are not an element in the admeasurement of this tax." (Italics ours.)

In the opinion in Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 143 Pac. 700, additional history of the constitutional amendment is set out on page 424 of 168 Cal. on page 701 of 143 Pac., to which we refer, and the decisions of the Supreme Court of the United States on this subject are thus summarized:

"Without pausing here to review the decisions of the Supreme Court bearing upon the question, but contenting ourselves with a subsequent reference to some of them, it may be said that the conclusions of the Supreme Court were that property used in the public service frequently acquired a value in the use, which value was something greater than the value of the property not engaged in such use; that by the systemization and unification of such properties in use they in the aggregate acquired a special value by virtue of this unity of use; that this special value was in the nature of property; that a fair tax upon gross earnings bore such a relation to the values of these properties under their unity of use as to justify such a tax upon revenue as being a legal and commutated or substituted tax for other taxes which were or might have been levied. Maine v. Grand Trunk Ry., 142 U. S. 217 (35 L. Ed. 994, 12 Sup. Ct. Rep. 121); Cleveland & St. Louis Ry. Co. v. Backus, 154 U. S. 439 (38 L. Ed. 1041, 14 Sup. Ct. Rep. 1122); Erie Ry. v. Pennsylvania, 158 U. S. 440 (39 L. Ed. 1046, 15 Sup. Ct. Rep. 900); Adams Express Co. v. Ohio, 165 U. S. 194 (41 L. Ed. 683, 17 Sup. Ct. Rep. 305); United States Express Co. v. Minnesota, 223 U. S. 335 (56 L. Ed. 459, 32 Sup. Ct. Rep. 211).

"So much for the justness and reasonableness and legality of the new method. * * *"

While we have not heretofore considered the proposition from the standpoint of its relation to interstate commerce, it is clear from the foregoing that this court has always considered the tax to be in fact what it purports to be, namely, a tax upon the property of the company as it is described in the Constitution and with more particularity in the assessment by the state board of equalization.

The validity of such a tax from the standpoint of the interstate commerce clause of the federal Constitution, as interpreted by the Supreme Court of the United States, received careful consideration from the commissioners, who were appointed to formulate and report upon the proposed system of taxation. Before the appointment of these commissioners, in pursuance of an act of the Legislature authorizing such a body to be formed, the Supreme Court of the United States in a number of cases had considered whether or not certain forms of state legislation authorizing the taxation of interstate commerce transportation companies was a valid exercise of the power of the state. The reports of the commission show that these cases were considered by them in formulating their plan of taxation and that an effort was made to conform to the then latest expression of the Supreme Court of the United States upon the subject. A quotation from Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229, supra, decided in 1903, will indicate the prin-

ciple upon which the tax commission relied in the drafting of the constitutional amendment, which was afterwards submitted to the state Legislature and by the Legislature submitted to the people for adoption. The court was considering the validity of a statute of Michigan levying a specific tax upon the property and business of every railroad corporation operated in the state. That statute provided that—

"When the railroad lies partly within and partly without this state, prima facie, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this state, such proportion of the income of said company arising from the interstate business as the length of the road over which said interstate business is carried in this state bears to the entire length of the road over which said interstate business is carried."

The court in disposing of the contention that the statute was an invalid interference with interstate commerce said:

"We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the tax is a tax on 'the property and business of such railroad corporation operated within the state,' computed upon certain percentages of gross income. The prima facie measure of the plaintiff's gross income is substantially that which was approved in Maine v. Grand Trunk Railway Co., 142 U. S. 217, 228. See also Western Union Telegraph Co. v. Taggart, 163 U. S. 1. Decree affirmed."

A decision (Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031) rendered later (1907) was also available before the Legislature or the people finally acted upon the proposed plan of taxation. In that case it was said:

"So it has been held that a tax on the property and business of a railroad operated within the state might be estimated prima facie by gross income, computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried. (Wisconsin and Michigan Ry. Co. v. Powers, 191 U. S. 379.)"

Of course, the fact that the constitutional provision assailed by the appellant purports to levy a tax upon the property and to consider the gross receipts solely as a basis for the valuation thereof, is not necessarily determinative of the question, however persuasive and definite such a declaration may be.

The question as to whether or not a particular taxing law violates the federal Constitution depends upon the practical operation and the effect of the tax imposed and not upon the definitions or declarations of the state authorities. The rule is thus stated in the recent case of Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445:

"For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed. (St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 362; Mountain Timber Co. v. Washington, 243 U. S. 219, 237; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294; American Mfg. Co. v. St. Louis, 250 U. S. 459, 463.) The practical burden of a tax imposed upon the net income derived by a nonresident from a business carried on within the state certainly is no greater than that of a tax upon the conduct of the business, and this the state has the lawful power to impose, as we have seen."

To the same effect is the case of American Mfg. Co. v. St. Louis, 250 U. S. 459, 39 Sup. Ct. 522, 63 L. Ed. 1084, where it is said:

"As a matter of construction, this, upon familiar principles, is conclusive upon us. But, as has been held very often, the question whether a state law or a tax imposed thereunder deprives a party of rights secured by the federal Constitution depends not upon the form of the act, nor upon how it is construed or characterized by the state court, but upon its practical operation and effect. (St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350-362; Mountain Timber Co. v. Washington, 243 U. S. 219, 237; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294.)"

Before considering the effect of our new constitutional scheme of taxation upon interstate commerce, we cite some of the decisions of the Supreme Court of the United States on the subject, rendered since the system was adopted by this state. The decision of that court in Union Tank Line Co. v. Wright, 249 U. S. 275, 39 Sup. Ct. 276, 63 L. Ed. 602, dealt with a statute of Georgia wherein that state had provided for the levying of a tax upon the interstate commerce of the Union Tank Line Company, based upon the proportion that the miles in Georgia over which the cars of that company moved bore to the total miles so traversed in all the states. It is to be observed that the plan did not consider "cars mileage," or "ton mileage," or "receipts," or "revenue," either gross or net, for such haulage, as is pointed out in the opinion holding the tax invalid, from which we quote as follows:

"A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the Fourteenth Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation

must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the state to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (Western Union Telegraph Co. v. Massachusetts), and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both. (Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530; Marye v. Baltimore & Ohio R. R. Co., 127 U. S. 117; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26; Adams Express Co. v. Ohio, 165 U. S. 194; s. c., 166 U. S. 185; American Refrigerator Transit Co. v. Hall, 174 U. S. 70; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149; Fargo v. Hart, 193 U. S. 490; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453.)

"In the present case the comptroller general made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim—of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. *During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length.* Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation amounted to $47,310—the challenged assessment specified $291,196. * * *

"Pullman's Palace Car Co. v. Pennsylvania, supra, relied on by defendant in error, contains the following passage which seems to uphold the Georgia rule: 'The mode which the state of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.' But the point therein spoken of was unnecessary to determination of the cause; and so far as the quoted passage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable and productive of conclusive results, it must be regarded as obiter dictum, and we cannot now approve or follow it." (Italics ours.)

It is worthy of note that three members of the Supreme Court considered that even this method of assessment was a valid exercise of the state taxing power as theretofore determined by the Supreme Court. The opinion of the minority is thus stated by Mr. Justice Pitney, Mr. Justice Brandeis and Mr. Justice Clarke concurring:

"The Supreme Court of Georgia sustained the tax on the authority of numerous decisions of this court, cited for the purpose. (143 Georgia, 765; 146 Georgia, 489.) This court reverses the judgment, and holds the taxing law unconstitutional, upon reasoning to which I am unable to yield assent.

"In my opinion the Georgia system of taxing movable property of this character when habitually employed in the state, and the decision of the state Supreme Court sustaining the particular taxes in question, are based upon a correct view of the powers of the state under the federal Constitution, and are in entire harmony with principles laid down in authoritative decisions of this court which have remained unchallenged for more than a quarter of a century. (Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530, 552; Marye v. Baltimore & Ohio R. R. Co., 127 U. S. 117, 123; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22, 26, et seq.; Cleveland, etc., Ry. Co. v. Backus, 154 U. S. 439, 445; Western Union Telegraph Co. v. Taggart, 163 U. S. 1, 14; Adams Express Co. v. Ohio, 165 U. S. 194, 221; s. c., 166 U. S. 185; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 75, et seq.; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 152; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453.)"

The appellant relies very strongly upon a recent decision of that court, Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031, in which a tax of 1 per cent. of their gross receipts is levied upon all railroads operating in the state. The tax was held invalid. As we understand the main opinion in that case, the court concluded that the Texas statute taxed all revenue of such interstate commerce carrier actually received within the state without regard to the proportion earned in the state, although in some cases the larger part of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, other points without the state. The tax was regarded by the majority of that court as a tax upon the gross receipts derived from interstate commerce, and in addition to ad valorem taxes upon a valuation of their property "taken as a going concern." The minority of the court, Mr. Justice Harlan, Mr. Chief Justice Fuller, Mr. Justice White, and Mr. Justice McKenna, held that the tax should be sustained as an occupation tax, levied by the state law as interpreted by the Supreme Court of Texas as applicable only to the proportion of the interstate commerce gross receipts, apportioned to the mileage

traveled thereby in Texas, in proportion to the total mileage traveled. The main opinion recognizes and is based upon the principles of such taxation theretofore established, and relied upon by the people of this state in adopting the new method of taxation, as will be apparent from the following quotation therefrom:

"It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. As the property of companies engaged in such commerce may be taxed (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18), and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged (Adams Express Co. v. Ohio State Auditor, 165 U. S. 194; s. c. 166 U. S. 171; Fargo v. Hart, 193 U. S. 490, 499). So it has been held that a tax on the property and business of a railroad operated within the state might be estimated prima facie by gross income, computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried. (Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379.)

"Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least in the long run, come out of income, obviously taxes called taxes on property and those called taxes on income or receipts tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern. In Wisconsin & Michigan Ry. Co. v. Powers, supra, the measure of property by income purported only to be prima facie valid. But the extreme case came earlier. In Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 'an annual excise tax for the privilege of exercising its franchise,' was levied upon every one operating a railroad in the state, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the state when the road extended outside. This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the state was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. (See Ficklen v. Taxing District of Shelby County, 145 U. S. 1, 23; Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 697; McHenry v. Alford, 168 U. S. 651, 670, 671.)

" 'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' (Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 697. See New York, Lake Erie & Western R. R. Co. v. Pennsylvania, 158 U. S. 431, 438, 439.) The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. (Stockard v. Morgan, 185 U. S. 27, 37; Asbell v. Kansas, 209 U. S. 251, 254, 256.)"

That the Texas Case just quoted is not decisive of the case at bar is made apparent by a later decision of the Supreme Court of the United States much relied upon by respondent, wherein a law of Minnesota is sustained, requiring car loaning companies to pay a tax upon their gross earnings within the state, in lieu of other taxes on the property. The matter is discussed as follows in the opinion (Cudahy Packing Co. v. Minnesota, 246 U. S. 450–452, 38 Sup. Ct. 373, 374 [62 L. Ed. 827]):

"As construed and applied by the state court, the Minnesota law requires a freight line company, meaning a company furnishing or leasing cars to railroads for freight transportation, to report annually its gross earnings from the operation of its car line within the state and to pay, in lieu of other taxes on the property so employed, a tax fixed at a stated per cent. of such earnings. That court holds that this law is an exertion of the power of the state to tax the property within its limits from which the

earnings are derived and is intended to embody a practical method of reaching and valuing that property, tangible, and intangible, for taxing purposes.

"In so far as the property constituting this car line is regularly or habitually used or employed in Minnesota it is within the taxing power of the state, although chiefly devoted or applied to interstate transportation. Pullman's Car Co. v. Pennsylvania, 141 U. S. 18; Adams Express Co. v. Ohio, 165 U. S. 194; s. c. 166 U. S. 185; American Refrigerator Co. v. Hall, 174 U. S. 70; Union Refrigerator Co. v. Lynch, 177 U. S. 149. This is not questioned; but it is insisted that the tax imposed is not a property tax but one laid directly on the gross earnings. *Of course, if it is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void.* [Italics ours.] Fargo v. Michigan, 121 U. S. 230; Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326; Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217. On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said, 'by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack' as restraining or burdening such commerce. St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 367; Postal Telegraph Co. v. Adams, 155 U. S. 688; Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379, 387; Fargo v. Hart, 193 U. S. 490, 499; Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, supra.

"As before stated, the state court regards the tax as imposed in respect of the property rather than the earnings, and the same view seems to be taken by the Legislature, for the act of 1909 speaks of the tax as 'a tax upon its (the company's) property' and the Act of 1911 says 'the value of such property (that used within the state) for purposes of taxation is to be determined' by reference to the gross earnings from the mileage within the state. True, this local view is not conclusive on this court, but it cannot be rejected unless it can be said to be ill founded. * * *

"The other case [United States Express Co. v. Minnesota, 223 U. S. 335] involved a tax in Minnesota of a designated per cent. of the gross earnings of an express company from business done in that state, the business being partly local and partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the state as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax [Meyer v. Wells Fargo & Co., 223 U. S. 298] was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the state.

"The law imposing the present tax is closely patterned after the one exacting the tax upheld in United States Express Co. v. Minnesota, and contains the same declaration that the tax shall be in lieu of other taxes on the property. The statutes differ only in minor details and are both parts of a general system which the state applies to railroads, telephone lines and the like. So, unless this tax be otherwise distinguishable, it must, under the decision in that case, be regarded as a property tax and not as laid on the gross earnings."

The decision in this case is clear authority for the system of taxation incorporated in our Constitution, and "the local view" concerning the same embodied in that Constitution and the statutes and court decisions defining its purpose and scope.

In a still later case the system adopted by California was apparently applied by the state authorities of Nevada, and sustained by the Supreme Court of the United States. State v. Wells Fargo & Co., 38 Nev. 505, 540, 150 Pac. 836; Wells Fargo & Co. v. Nevada, 248 U. S. 165, 39 Sup. Ct. 62, 63 L. Ed. 190. The valuation of $850,000 was sustained as a reasonable valuation, regardless of the method used in ascertaining its value. A valuation of $300 per mile was placed upon the business of the express company. This involved a capitalization of $850,000, which was taken as the value for taxation. In connection with this valuation the Supreme Court of Nevada made the following statement:

"Whether the system of determining the valuation of appellant's property, applied by the state board of assessors, was correct or not, it does not appear that it operated to impose an excessive valuation. The fact that erroneous methods may in good faith have been used to determine valuations is immaterial, we think, if an excessive valuation did not result therefrom."

The Supreme Court of the United States affirmed the decision of the Nevada court (Wells Fargo & Co. v. Nevada, 248 U. S. 165, 39 Sup. Ct. 62, 63 L. Ed. 190), stating:

"As construed by the state court, the statute under which the tax was imposed does not provide for a privilege or franchise tax, but only for an ad valorem property tax. Acting under the statute, a state board valued the company's personal property, tangible and intangible, used in its express business within the state, at $300

per mile of line; * * * the assessor of Humboldt county * * * inaccurately described the property as consisting of the right to carry on express business there.

"Looking only at that entry there is strong ground for saying that the tax was laid on the privilege or act of doing an express business which was principally interstate. On the other hand, the action of the state board, on which the assessment concededly was predicated, indicates that what was taxed was the company's property in Humboldt county. The difference is vital, for, consistently with the commerce clause of the federal Constitution, the state could not tax the privilege or act of engaging in interstate commerce but could tax the company's property within the state, although chiefly employed in such commerce. (Adams Express Co. v. Ohio, 165 U. S. 194, 220; s. c. 166 U. S. 185, 218; Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 225–227; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453.)

"The company insists that the state is concluded by the entry on the assessment roll. But the state court, as shown in its opinion, rejects that view and holds, in effect, that the entry must be construed in the light of the statute and the action of the state board, and that when this is done it is apparent that the tax was not laid on the privilege or act of engaging in interstate commerce, but on the company's property within the county. We perceive no ground for disturbing that ruling. In so far as it turns on the authority of the state board and the assessor under the statute and the relative effect to be given to their acts it is not reviewable here, and in so far as it relates to what really was the subject of the tax we think it was right. See Cudahy Packing Co. v. Minnesota, supra, p. 454. Evidently the company at one time took this view of the tax, for in an amendment to its answer we find an allegation that the state board 'valued the property used by this defendant at the rate or sum of $300 for every mile of railroad over which this defendant transacted business, and apportioned said assessment or tax to the various counties of the state in accordance with the number of miles of such railroads, so situated within said county, and that the tax herein sued for was not otherwise levied or assessed.' * * *

"It also is asserted that the state board in valuing the property acted on inaccurate data and applied erroneous standards which resulted in a valuation so excessive as to make the tax a burden on interstate commerce. It is true that some inaccurate data and some computations following erroneous standards were presented to the board by a state officer in support of a suggestion that the property be valued at $500 or more per mile of line. But the suggestion was not adopted, and it is not shown that the board's valuation was based on the data and computations so presented. Besides, if the valuation was excessive, the company was entitled in the present suit to show the true value and to have the tax reduced accordingly. (Rev. Laws 1912, § 3664.) An attempt at such a showing was made, but the state court concluded therefrom that a valuation of $300 per mile, as fixed by the board, was not excessive. It may be that the showing was not complete, but, even if so, it was the company's showing and was all that was before the court. After examining it we think it discloses no ground for condemning the tax as a burden on interstate commerce."

[2, 3] It follows from the foregoing decisions that it is proper to consider, as a basis on which to establish the value of plaintiff's property in this state, the earnings derived from its property, tangible and intangible, within the state; and that it is proper to consider the proportion of its receipts derived from its interstate business, earned within the state as an element of that basis. It is also clear that the system adopted by our state Constitution for such apportionment of interstate earnings is the fairest possible method of such apportionment, and that by such method the state does not assert jurisdiction over any earnings from the interstate business, not actually derived from that portion of such business actually conducted within the state, and does not draw to itself earnings derived from capital or property elsewhere situated. In short, that the method adopted for the ascertainment of local values is wholly unobjectionable.

[4] The appellant advances one other argument in support of its contention that the constitutional system of taxation is in reality a tax upon the gross revenues derived in part from interstate commerce and not a tax upon the appellant's property. The contention may best be stated in the words of the appellant:

"The facts regarding what was done refute completely the claim set up by the defendant in his answer and found by the court that the property was taxed at all. It was the gross receipts and gross receipts only."

The claim is that the reports of the state board of equalization and assessment by them of appellant's property make manifest that the tax in question is not a property tax. For the purpose of considering appellant's contention it will be necessary to consider the method of fixing the rate or percentage of gross receipts (3 per cent. and later 4 per cent.) used in determining the tax.

Before the new scheme was recommended hearings were had before this commission and all transportation companies, including plaintiff, doing business in this state, were given an opportunity to present their views and their data upon the subject. It is, perhaps, worthy of note that the report of the commission shows that the plaintiff then stated that it was unable to comply with the request of the commission for information as to the proportion of its interstate business conducted in California and contented itself with a protest against any form of taxation which operated to place a burden upon its interstate commerce.

The tax commission in its report of 1906 to

the Legislature furnished the proper rate of taxation based on the gross receipts in order to properly tax the property of the various corporations involved in the amendment, as follows, to wit:

"In view of the strength of the popular feeling that taxes should be 'equal' and of the obvious and essential justice of such a demand, it is highly important to discover a practical method for determining whether the burden of a tax which it is proposed to impose upon the gross earnings of a given class of corporations is the equivalent or not of a tax which might be levied under an ad valorem plan. Such a method has been devised by this commission. By the application of this method we can ascertain what rate of tax on the gross earnings is the equivalent of a given tax rate on the property, and vice versa. This will make it possible to compare any proposed gross earnings tax with an assumed 'fair' rate on property.

"Briefly stated that method is: To determine what tax rate on gross earnings is the equivalent of a given rate on the property, for a given class of public-service corporations, (1) ascertain what percentage of the gross earnings is net, (2) ascertain what rate of interest would constitute a fair return to investors in the securities of the class of public-service corporations under consideration, then (3) divide the percentage of net earnings by the rate of interest and multiply the result by the given tax rate on property.† This method is not as rigid or as infallible as the mathematical statement of it might seem to imply. There is still room for difference of opinion. But it has been found of great practical value in testing the probable effect of different rates on any set of assumptions. * * *

"In order to compute what rate of taxation on gross earnings is the equivalent of a given rate of taxation on the property, we have simply to divide the percentage of net earnings by the assumed rate of capitalization and multiply the result by whatever tax rate on the property we wish to compare the gross earnings rate with. Thus, for example, if we wish to impose, in the form of a gross earnings tax, a burden which shall be the equivalent of a tax of 1½% on the property, then in the case of a railroad, taking the figures assessed above, we divide 36 by 6 or 8, whichever shall be determined upon as a fair rate at which to capitalize railroad earnings, and multiply the result by 1½, obtaining, at 6%, 9% as an equivalent rate on gross earnings, or at 8% as a basis of capitalization, 6¾%. If the tax rate on property or capital were fixed at 1%, the above rates would become 6% and 4½%."

The commission of 1906 also shows in its report the close approximation between the value of railroad property as theretofore assessed by the state board of equalization for taxation purposes, and the value to be ascertained by the proposed system. That portion of the report is as follows:

"The question of the equity of the gross earnings tax as between different roads can be tested somewhat roughly by comparing the taxes now paid on the ad valorem plan with the taxes that would be paid on the gross earnings plan. This is done in the following table for the more important railroad systems of the state. It is not argued that the present system is equitable as between the different roads, but it affords the easiest and most readily available basis of comparison:

	Tax on Property. Present System 1904.	Per Cent. of all Taxes on Railroads.	Tax on Gross Earnings at 4 Per Cent. Proposed System.	Per Cent. of all Taxes on Railroads.	Column 3 Reduced to Same Total as Column 1.
Southern Pacific System..	$1,349,425	75.85	$1,508,958	74.17	$1,319,484.30
Santa Fé System.....	306,372	17.22	375,109	18.44	328,047.60
California Northwestern and North Shore.....	62,612	3.52	82,027	4.03	71,693.70
Nevada-California-Oregon and Sierra Valleys.....	4,666	.262	7,661	.37	6,582.30
Salt Lake Road.....	27,237	1.530	24,423	1.205	21,436.95
Nevada County Narrow Gauge	3,397	.191	5,125	.252	4,483.08
Pacific Coast.....	6,959	.391	5,806	.285	5,070.15
Pajaro Valley Consolidated	2,881	.161	2,535	.124	2,205.96
Sierra Railway.....	8,424	.472	14,657	.721	12,326.59
Boca and Loyalton.....	5,501	.308	6,936	.341	6,066.39
Lake Tahoe.....	1,700	.095	1,265	.062	1,102.98
	‡ $1,779,174	100.00	$2,034,502	100.00	$1,779,000.00

"In the case of the larger roads the change of system would not materially alter their proportion of the total taxes on railroads. But in the case of some of the smaller roads the changes would be quite important."

The similarity of values derived by the assessment of individual items of property, and by adding such items and thus ascertaining the total value, and the system inaugurated by the Constitution, can be determined by a comparison of the assessment of plaintiff's properties by the two methods for the same years. The use of the two methods of valuation resulted from the adoption of a constitu-

† "Expressed algebraically, let t equal the tax rate sought, n equal the percentage of net earnings to gross, i equal the interest rate on the investment, and r equal the given tax rate on property; then: $t = \frac{n}{i} \times r$. * * *

‡ Includes state, county, city and district taxes.

tional amendment in 1910 requiring a tax to be levied upon all the property of the state for the Panama-Pacific Exposition.

While the discrepancies between these two valuations is pointed out by the plaintiff as an evidence of the inequality and excess of the percentage tax, the analysis of the figures by the Attorney General shows that the valuations of the plaintiff's property, ascertained by the two methods, were practically identical. In considering these figures, however, it is important to bear in mind that while the law directs that all property shall be assessed at its full cash value, as a matter of fact experience has shown that the assessed value is less than 50 per cent. of the actual value, or, to be more accurate, and use the figures of the state board of equalization in 1911, 1912, 1913, and 1914, the assessed value was 45.1 per cent. of the actual value; in 1915, 41.991 per cent.; 1916, 42.755 per cent.

If the state board of equalization had certified to the county assessors the true valuation of plaintiff's property instead of the percentage of its value based upon the system of assessment adopted by the county assessors, the plaintiff's property would have borne an excessive proportion of the tax. As stated by the Supreme Court of the United States in Sunday Lake Iron Co. v. Township of Wakefield, 247 U. S. 350, 38 Sup. Ct. 495, 62 L. Ed. 1154:

"It must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

This court has recognized such rule and has permitted a recovery of taxes levied upon such valuation. Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164; Southern Pacific Land Co. v. County of San Diego, 191 Pac. 931.

In making the comparisons of values another fact must also be considered, namely, that the gross revenue method includes all operative property (Const. Cal. art. 13, § 14), while the property valuation, by the state board of equalization, for taxation purposes according to the former plan excludes certain operative properties, which are separately assessed by the various local assessors.

For the purpose of comparison we will use the figures furnished by the Attorney General in his brief for plaintiff's property:

Year.	Assessed Value.	Percentage of Actual Value.	Actual Value.	Value Ascertained from Percentage Gross Receipts.	Under-Valuation by Latter Method.
1911	$2,995,760	45.1	$6,642,438	$5,020,112	$1,620,000.00
1912	3,070,654	45.1	6,808,500	5,148,426.13	660,073.37
1913	3,270,246	45.1	7,251,000	7,238,579.13	12,421.13
1914	3,459,920	45.1	7,671,600	7,227,781.25	353,819.25
1915	2,913,253	42.	6,936,300	6,009,143.88	927,156.22
1916	3,548,032	42.75	8,300,000	6,792,000	1,508,000.00

To such item of undervaluation must be added the operative properties locally assessed. Expressed in terms of tax the comparison is compiled by the Attorney General from the reports of the state board of equalization, and is shown in the next table:

"Assessment by State Board of Equalization.

"Assessment of Pullman Company's cars and franchises by state board of equalization and estimated amount of tax thereon if levied at average tax rate, compared with taxes paid on basis of gross receipts. These figures do not include assessment of valuable operative property assessed by local assessors.

Year.	State Board Assessment.	Average Tax Rate.	Ad Valorem Tax Would Have Been.	Gross Receipts Tax Was.
1911	$2,995,760	[1] $2.53	$ 75.793	$57,159.08
1912	3,070,654	[2] 2.53	77.687	58,619.98
1913	3,270,246	[3] 2.55	83.391	83,243.66
1914	3,459,920	[4] 2.90	100.338	88,056.06
1915	2,913,253	[5] 2.91	84.778	73.209.40
1916	3,548,023	[6] 2.824	100.196	82,115.94

[1] State Board of Equalization special report of 1912.
[2] State Board of Equalization special report of 1912.
[3] State Board of Equalization special report of 1912, revised by special committee of 1915.
[4] Estimated on basis report of Tax Commission of 1915-17.
[5] Report of Tax Commission, 1915-17.
[6] Report of Tax Commission, 1915-17."

The foregoing tables will make it clear that the plaintiff has not been unfairly treated by the state, although it is well to note that the plaintiff in its complaints herein does not raise the issue of overvaluation and makes no allegation of excessive tax as compared with the value of property taxed. The valuations presented in plaintiff's argument were all derived from the work of the officers of the state, and the figures are only relevant as showing that the state system of taxation was based in fact, as well as in name, upon the value of plaintiff's property in the state, and as further illustrating that interstate commerce carriers have not been made to bear an undue proportion of the burden of taxation.

In view of our conclusion on this branch of the case, it will be unnecessary to consider or determine the extent to which the taxing power of the state may be exercised in the event that the burden upon the property of interstate commerce carriers is out of all reasonable proportion to that imposed upon the property of others within the state.

We cannot see that the validity of that portion of the act (Stats. 1911, pp. 530, 548, § 24), declaring a forfeiture of the right of a foreign corporation to do business in the state if taxes are not paid, is involved in this action to recover taxes already paid.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SLOANE, J.; SHAW, J.; LENNON, J.; LAWLOR, J.

51 Cal. App. 547

BERGES v. GUTHRIE. (Civ. 3497.)

(District Court of Appeal, First District, Division 2, California. Feb. 24, 1921. Rehearing Denied March 25, 1921. Hearing Denied by Supreme Court April 25, 1921.)

1. Municipal corporations ⟸705(11)—Plaintiff's violation of speed ordinance bars recovery only if it contributed to collision.

The violation of an ordinance, limiting the speed at which an automobile may be driven on the city streets, is negligence per se, but it bars recovery for injuries to the automobile so driven only in case the speed contributed to the accident which caused the injury.

2. Municipal corporations ⟸705(11)—Plaintiff's violation of speed ordinance held to have contributed to accident.

Where it appeared that plaintiff drove his automobile across a street intersection when his view to the left was obstructed by a passing street car and automobile, at a speed exceeding that permitted by a city ordinance when the view was obstructed, and that he collided with defendant's automobile, which came suddenly from behind the meeting automobile, and which would have crossed the intersection ahead of plaintiff if the latter had been going at a lawful speed, plaintiff's violation of the speed ordinance contributed to the accident, and he cannot recover therefor.

3. Appeal and error ⟸193(4)—General allegation of contributory negligence sufficient, if not demurred to.

An allegation in the answer and cross-complaint that plaintiff was careless and negligent, and that his injuries were proximately caused by said carelessness and negligence, is sufficient on appeal, where there was no demurrer, either general or special.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by E. R. Berges against George Guthrie, for damages for injuries caused by an automobile collision. Judgment for plaintiff, and defendant appeals. Reversed.

Charles W. Haswell, of San Francisco, for appellant.

Hankins & Hankins, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for $583. The action was to recover for the amount of damage caused to plaintiff's automobile by reason of a collision between it and the defendant's automobile. The cause was submitted to the court sitting without a jury.

On May 29, 1918, plaintiff was operating his automobile in a northerly direction on the east side of Potrero avenue in the city and county of San Francisco. According to plaintiff's testimony, at the time he reached the intersection of Twenty-Third street and Potrero avenue he saw a street car on Potrero avenue, about at the middle of the intersection of the two streets, and an automobile closely following the street car, traveling southerly. Plaintiff testified that defendant's automobile came from behind the street car and the automobile following it; that the defendant's car came from Twenty-Third street where it intersects the west line of Potrero avenue, and attempted to cross into Twenty-Third street where it intersects the east line of said street. (Twenty-Third street intersects Potrero avenue on its east side at a point south of the point where it intersects said Potrero avenue on its west side. In other words, Twenty-Third street does not run directly through Potrero avenue at right angles, but breaks off, and in order to continue in Twenty-Third street after crossing Potrero avenue going east one must go a few feet south. This configuration of the streets is a necessary element in the situation presented in this case.) The cars of plaintiff and defendant were proceeding at about the same rate of speed, which was variously estimated by witnesses—but, let us say, was approximately 20 miles an hour. When defendant's car loomed into plaintiff's view, it was but a few feet away from plaintiff, and, according to his testimony, "coming right at him." Both drivers then attempted to avoid a collision, the defendant by whirling his car around facing north, and driving it upon the sidewalk on Potrero avenue and against a wall inclosing the city and county hospital, and the plaintiff by swinging to his right and onto the sidewalk on the northerly line of Twenty-Third street, dashing his car into a fire hydrant and against the wall of said city and county hospital. Plaintiff testified that the defendant's car struck his left rear fender before the cars reached the sidewalk. Both cars were damaged somewhat by the impact of the two cars, but, mainly by crashing into the wall.

[1] The appellant's main contention upon this appeal is that the plaintiff was guilty of contributory negligence, as a matter of law, by reason of the fact that the evidence shows him to have been going at the rate of 20 miles an hour. It is contended such speed of 20

miles an hour was a violation of the provisions of the state motor vehicle act and of ordinance No. 1857 of the city and county of San Francisco under the circumstances of this case, and that such violation of law made plaintiff negligent per se. It is well settled that the violation of an ordinance is conclusive evidence of negligence in this state. Scragg v. Sallee, 24 Cal. App. 144, 140 Pac. 706. But it is equally well settled that the principle has this limitation:

"The act or omission must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages can be founded upon it." Williams v. Southern Pac. Co., 173 Cal. at page 540, 160 Pac. at page 666.

See, also, Driscoll v. Cable Railway Co., 97 Cal. at page 565, 32 Pac. 591, 33 Am. St. Rep. 203; McKune v. Santa Clara M. & L. Co., 110 Cal. at page 486, 42 Pac. 980; Fenn v. Clark, 11 Cal. App. at page 81, 103 Pac. 944; Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663.

[2] Plaintiff himself testified that his car was going at the rate of approximately 20 miles an hour as he approached and crossed the street where the collision took place. The state motor vehicle law provides that no person shall drive or operate a motor vehicle at a speed greater than 15 miles an hour in approaching or traversing an intersecting highway, when the operator's view of the road or railway traffic is obstructed. Section 37 of Ordinance 1857 of the city and county of San Francisco provides that no person shall operate or drive a motor or other vehicle on any public highway at a greater rate of speed than 10 miles an hour, where the operator's or chauffeur's view of the road traffic is obstructed either upon approaching an intersecting way or in traversing a crossing or intersection of ways.

Plaintiff testified that at the time he reached the intersection of the streets, he saw a street car on Potrero avenue, about the middle of the intersection of the two streets, and an automobile closely following the street car, both traveling southerly. Defendant's automobile came from behind these two vehicles, and from the left of the plaintiff, and could not be seen by plaintiff until it emerged from behind the street car, directly in the path of plaintiff. It is beyond dispute, therefore, that a street car blocked plaintiff's view, and that he was required to lessen his speed because his view of the road traffic was obstructed. This he did not do, according to his own admissions, and his failure in this regard constituted negligence on his part as a matter of law.

The further question as to whether such negligence, under the circumstances here presented, would bar a recovery, is answered, we think, by the case of Cook v. Miller, 175 Cal. 497, 166 Pac. 316. That case presented a situation where the defendant "cut across a corner" in violation of an ordinance, and the plaintiff also violated an ordinance by swerving to the right to pass a wagon, instead of to the left. The court said:

"If he had not passed to the right of the wagon he would not have struck the automobile. So, also, if the defendant had turned the corner by going to the right of the intersection, his automobile would not have been struck by the motorcycle. The disobedience of the ordinance by both of them brought on this accident. It was the result of their concurrent negligence, the negligence of each was a proximate cause, and each contributed to the injury."

In the present case, if the defendant had not recklessly emerged from behind the street car without waiting to see whether an automobile was approaching from his right, which would have the right of way, he would not have struck the plaintiff. On the other hand, if the plaintiff had slackened his speed upon approaching the crossing, where his view of the road traffic was obstructed by the street car and automobile following it, defendant would have cleared the street before plaintiff reached the point of collision, or plaintiff would have had time and space to turn safely to his right into Twenty-Third street, and thus have avoided the accident when he saw the danger impending. It appears, therefore, that the situation here is closely analogous to the facts in the case of Cook v. Miller, supra, and that the disobedience of the ordinance by both plaintiff and defendant brought about the accident; the negligence of each being a proximate cause. Under such circumstances the plaintiff should not recover.

[3] Respondent points out that the defendant in his answer merely pleads contributory negligence in general terms, alleging:

"That plaintiff was guilty of carelessness and negligence in and about the matters set forth in said complaint, and that any injuries or damages sustained by plaintiff at said time and place, if any, were proximately caused by said carelessness and negligence, and that said carelessness and negligence proximately contributed thereto."

Defendant also alleged "that said accident happened solely through the carelessness and negligence of said plaintiff," and that the automobile of the plaintiff "was so negligently and carelessly run and operated by said plaintiff as to force the said automobile of said defendant upon and over the sidewalk at or near the intersection of said Potrero avenue and said Twenty-Third street." There was no demurrer, either general or special, to this answer and cross-complaint, and plaintiff cannot, under such circumstances,

upon appeal, complain that the specific acts constituting the negligence were not set forth.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

51 Cal. App. 688

JOHNSON et al. v. CRABBE. (Civ. 3704.)

(District Court of Appeal, First District, Division 2, California. March 8, 1921.)

Judgment ⊂=445—Facts relied on for annulment of judgment held res judicata between parties.

Where the facts set up in suit to annul a judgment previously entered against plaintiffs in an action in which defendant was plaintiff were decided adversely to plaintiffs in an action in the superior court, from which no appeal was taken, and which had become final before entry of judgment in the present action, the questions raised in the present action are res judicata between the parties, and the facts cannot be inquired into anew.

Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by Jennie B. Johnson and others against John H. Crabbe. From judgment for defendant, plaintiffs appeal. Affirmed.

Daniel O'Connell, of San Francisco, for appellants.

John H. Crabbe, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiffs from a judgment against them in an action brought by them to annul a judgment previously entered against them in an action in which the defendant herein was plaintiff and the plaintiffs herein were defendants. The complaint alleged that on March 6, 1916, John H. Crabbe, defendant herein, commenced an action for $208 against Johnson and O'Connell in the justices' court. The details of the proceedings had in said justices' court are then alleged, and the fact of the entry of a default judgment in said action against said Johnson and O'Connell on April 6, 1916, and the issuance and levy of an execution thereunder. It is also alleged that said Johnson and O'Connell filed an undertaking on appeal, staying execution on said judgment; that upon appeal to the superior court said judgment of the justices' court was affirmed. The complaint is voluminous, and contains much argumentative matter upon the effect of the various rulings and orders made by the justices' court and by the superior court, the general purport of the argument being that the judgment of the justice's court was void for irregularities, and that the action of the superior court in affirming said judgment was also void, because it affirmed a void judgment. The prayer is "that said judgment of the superior court, and also said judgment of the justices' court be canceled and annulled, and that the defendant, his agents, servants, and assigns be restrained and enjoined from commencing or prosecuting any action or proceedings whatever for the enforcement or collection of said judgment or said undertaking on appeal staying said execution."

The second count alleges that the undertaking staying execution on appeal which plaintiffs caused to be filed in the justices' court was procured by the representations of Crabbe that he had recovered a judgment against said Johnson and O'Connell and had levied execution thereunder upon the bank accounts of said Johnson and O'Connell; that the said conduct of said Crabbe was menace and duress towards the plaintiffs, and the representation and allegation that he had a good and valid judgment and execution against plaintiffs were false and fraudulent in that he had no judgment, the said judgment being a void judgment, etc. It is then alleged that said Crabbe is prosecuting an action in the justices' court on said undertaking. It is prayed that said undertaking be set aside and canceled, and Crabbe restrained and enjoined from proceeding with any action on said undertaking.

The defendant Crabbe denied all the material allegations of the complaint, and, as one of his affirmative defenses, alleged that at the time of the filing of the complaint herein there was pending in the superior court, department No. 2 thereof, an action numbered 79792, wherein the parties plaintiff and party defendant were the same parties, respectively, as the parties plaintiff and party defendant in the present action; that the cause of action involved in said action No. 79792 was identical with and the same as the cause of action attempted to be alleged in the present action; and, that in said action 79792, so involving the same questions of law and fact between the same parties plaintiff and defendant, judgment in favor of defendant was duly given, made, and entered, and that such judgment is an adjudication of the rights of the respective parties in the present action, and the questions involved in the present action are, therefore, res adjudicata as between the parties plaintiff and defendant herein.

The record in said action No. 79792 was admitted into evidence in the present action, and while it is not included in the transcript on appeal, and is not before this court, the trial court found with reference thereto that—

"Complaint therein (action No. 79792) was filed on February 7, 1917, in said superior court, and that thereafter, and on, to wit, the 9th day of March, 1917, a general demurrer of

said John H. Crabbe interposed to said complaint was sustained, and the plaintiffs were allowed time to amend; that the plaintiffs did not file the amended complaint within the time allowed by law and the order of the court, or at any other time, or otherwise, or at all; and, that thereafter, and on, to wit, the 27th day of April, 1917, judgment for costs was rendered in favor of the defendant, to wit, John H. Crabbe, in said action No. 79792; and that the said judgment was fully paid and discharged on the 16th day of June, 1917; that no appeal has been taken from said judgment, and that said judgment in said action No. 79792, has become, and is now, final. And the court further finds that the parties plaintiff, and the party defendant in said action No. 79792 in the above-entitled court were, and are, the same parties plaintiff and defendant, respectively, as in this action, to wit No. 82038, in the above-entitled court, and that the relief sought in said action No. 79792 was the same as, and identical with, the relief sought in this action, to wit No. 82038 in the above-entitled court, and that the pretended cause of action in each case is the same."

Under this state of facts, most of the matters argued by the appellants in their brief have no bearing whatever upon the question presented to this court upon this appeal. We are not concerned with the errors, if any, committed in the justices' court; that judgment has been affirmed by the superior court. The involved facts set up in the present case, and urged as grounds for the annullment of the judgments of the justices' and superior courts, were decided adversely to appellants in an action in the superior court, from which no appeal has ever been taken, and which had become final before the entry of judgment in the present action. Clearly, under the above-quoted finding of the trial court, the questions involved in the present action were res adjudicata between the parties, and the facts could not be inquired into anew.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

51 Cal. App. 595

HICKEY v. ALGIE. (Civ. 3678.)

(District Court of Appeal, First District, Division 1, California. Feb. 28, 1921.)

1. Judgment ⟹497(2)—Recital of appearance raises presumption thereof, though proof in judgment roll is incomplete.

In a suit to quiet title as against the lien of a judgment, where the judgment recited that the defendant appeared generally and failed to demur or answer, it will be presumed that there was a general appearance, though the proof of that fact in the judgment roll is incomplete; there being nothing to contradict such recital.

2. Appeal and error ⟹179(1)—In suit to quiet title, question of homestead not considered when pleadings and findings silent on the subject.

In a suit to quiet title as against the lien of a judgment, plaintiff's claim of homestead will not be passed on where the pleadings and findings are silent on the subject of homestead, and it appears only incidentally that there was a homestead claim in the former action in which the judgment was recovered.

3. Appeal and error ⟹1071(6)—Refusal to find on particular question not reversible error, when conclusion and judgment not affected.

In a suit to quiet title as against the lien of a judgment, the court's refusal to make any finding as to the ownership of one of the lots, apparently for want of necessary parties, was not reversible error, where the conclusion and judgment in favor of defendant would have been the same, though court had found plaintiff to be the owner of such lot.

4. Quieting title ⟹7(4)—Relief not granted as against judgment without showing of defense, or that judgment was not just.

Equity will not quiet plaintiff's title as against the lien of a judgment for irregularity or defect in the service of process, in the absence of any averment or proof that plaintiff had any defense on the merits, or that the judgment was not in fact just, especially where limitations have run against the note on which the judgment was recovered.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Suit to quiet title by Cora M. Hickey against Matthew Algie. From a judgment for defendant, plaintiff appeals. Affirmed.

Wm. Crawford, of Los Angeles, for appellant.

E. A. Lane, of Los Angeles, for respondent.

WASTE, P. J. Plaintiff brought this suit to quiet title to four lots of land in a designated tract in the city of Inglewood. The defendant had judgment, and plaintiff has appealed. The particular object of the suit is to remove a cloud of an alleged "pretended judgment" against the appellant, obtained by the respondent in a previous action in the same court entitled Algie v. Buck (the former name of the present plaintiff), and which judgment was docketed in the superior court of Los Angeles county, wherein the real estate is located.

It is alleged in the complaint:

"That said pretended judgment was obtained by a representation made to the court that the defendant therein had appeared in the action, when in fact the defendant therein had not appeared, nor had an attorney appeared for her, nor had she been served with the summons therein, and the said judgment was obtained without any knowledge thereof on the part of the plaintiff herein."

The trial court found that defendant, plaintiff and appellant here, did, as a matter of fact, appear generally in the former action, and that by reason of said judgment this respondent has a lien upon three of the plaintiff's lots. Appellant contends that this finding is not supported by the evidence, and has appealed from the judgment.

It is the claim of the appellant that there is nothing in the record of the former case from which it can be said that the court had jurisdiction of her person in that action, thereby enabling it to render judgment against her. There is no merit in the contention. The evidence is brought here in a bill of exceptions which includes, among other matters, the papers constituting the judgment roll in the action of Algie v. Buck. At the time of the filing of the complaint and issuance of summons in that action an attachment was issued and levied upon real property which Cora M. Buck, defendant in the action, claimed as a homestead. She duly gave and served notice by her attorney that she would, at a time designated, move the superior court for an order setting aside the levy of the writ of attachment and dissolving the same, upon the ground that the levy was made on exempt property. At the hearing of the motion she appeared in court by her attorney, and in support of her contentions offered in evidence a declaration of homestead. The court held the declaration insufficient, and denied the motion. On the order of the attorney for plaintiff in the action, and upon his filing an affidavit of appellant's "general appearance," her default was entered. The manner of her appearance was alleged to be her giving and serving upon the attorney for the plaintiff notice of her motion for the setting aside of the levy and her appearance in court in support of the motion. The court subsequently rendered judgment against her, which was duly entered. There also appears to have been attached to the complaint in the action a memorandum by the clerk, reciting that the defendant had been regularly served with process, and had failed to appear, and that her default, therefore, had been entered. The summons does not appear to have been included in the judgment roll.

What constitutes an appearance in an action in this state was very recently considered by the Supreme Court in Davenport v. Superior Court of Imperial County, 191 Pac. 911, in which the court said:

"An act of a defendant by which he intentionally submits himself to the jurisdiction of the court in that action for the purpose of obtaining any ruling or order of the court going to the merits of the case, as, for example, a motion to strike out part of the complaint, or the making of stipulations, as in the cases above mentioned, which may reasonably be construed to imply that the court has, in that action, acquired jurisdiction of the person of the defendant, will be equivalent to an appearance, although not strictly in accordance with the terms of section 1014." Code Civ. Proc.

[1] But, whether or not the facts thus far established in this case constituted an appearance by this appellant, as defendant in the former action, of such general character as to warrant the entry of her default therein, becomes a wholly immaterial question in the face of a recital in the judgment which followed, to the effect that—

The defendant "appeared generally, and having failed to demur or answer to plaintiff's complaint, the legal time for answering having expired, and no answer or demurrer having been filed, the default of the defendant was duly entered according to law."

There is absolutely nothing in the record, either in the judgment roll of the former action or in the other evidence contained in the present bill of exceptions, to contradict this recital. Appellant merely relies upon her contention that the affidavit of her appearance in connection with the motion to set aside the attachment is not sufficient evidence to warrant the court in now saying that she appeared generally in the other action. But a general appearance in an action can be made in any number of ways. Davenport v. Superior Court, supra. How it was made in the instant case, and what proof was made of the fact, assuming for the purpose of argument only that the facts appearing were not sufficient, does not appear and is immaterial. It has long been the rule in this state that in such cases, if the proof of service of process or of an appearance in an action is on its face incomplete, yet the court in its judgment states that service was complete or the appearance sufficient, "it will be presumed that other proof than that contained in the judgment roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it." Hahn v. Kelly, 34 Cal. 391, 408, 419, 420, 94 Am. Dec. 742, the leading case on the subject in this jurisdiction.

After the judgment was docketed the plaintiff in the former action took certain steps looking to an appraisement of the property of the appellant, claimed by her as a homestead. She appeared in open court by the attorney who had previously represented her in the attachment proceedings, and resisted the application for the appointment of appraisers, which was denied. Subsequently, she made and pressed a motion to vacate and set aside the sale of lot 10, one of the lots in question here, which had been sold under execution, upon the ground that the property was a portion of her homestead. The court granted this motion. The respondent here claims that by taking these steps appellant subjected herself to the jurisdiction of the court as effectually as if she

had previously appeared, and that these steps after judgment constituted a general appearance on her part in the action, citing Security, etc., Co. v. Boston, etc., Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296. We are not inclined to agree with respondent in this regard, but in view of what we have already said, that question is also immaterial.

[2] Part of appellant's argument in this court is predicated upon a claim now advanced that the property affected by the lien of the judgment in the former action is a homestead. The pleadings are silent upon that matter; there is no finding upon the subject of the homestead, and that there was a homestead claimed by appellant appears only incidentally in the bill of exceptions. It was only made an issue in the former action in connection with the attachment and the execution sale. If there be any merit in appellant's contention that, "even if valid, the judgment was not a lien on the premises" because entered after the recordation of the homestead, we are unable to pass upon the question, for the declaration of homestead is not before us.

[3] The parties stipulated as to the title of three of the lots owned by appellant, but refused to stipulate as to lot 10, which was the portion of the property sold on execution following judgment in the former action, which sale was subsequently set aside. Following the stipulation the court found the plaintiff to be the owner of three lots and as to said lot 10 expressly refused to make a finding, apparently being of the opinion (we can only judge from the context of the record) that the necessary parties were not before it for a complete adjudication on that point. We are of the opinion that the court's failure to find upon this issue, although it was made by the pleadings, does not amount to reversible error, for, as the record determines, as between appellant and respondent, respondent was entitled to the lien of his prior judgment. The conclusion and judgment of the lower court would have been the same even though it had found plaintiff to be the owner of said lot 10.

[4] The decision of this case is justified by the findings of the trial court. For another reason appellant should not be allowed to recover in this action. She brings this suit in equity to remove the cloud of a judgment rendered against her in an action brought to recover upon a promissory note, and the statute of limitations appears to have run against the original obligation. Equity will not set aside a judgment merely upon the ground of some irregularity or defect of service of process upon the defendant unless there is presented some ground for equitable relief. Plaintiff's complaint negatives her right to recover. She has pleaded the existence of the judgment, but there is a complete absence of averment or of proof that plaintiff had any defense on the merits to the action brought by respondent, or that the judgment was not in fact just. Without regard to other points made, this alone is a complete obstacle to the granting of equitable relief. Matson v. John Batto & Sons, 173 Cal. 800, 801, 161 Pac. 1144; Bell v. Thompson, 147 Cal. 689, 693, 82 Pac. 327; Parsons v. Weis, 144 Cal. 410, 416, 77 Pac. 1007.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

51 Cal. App. 589

JONES v. BAXTER et al. (Civ. 3644.)

(District Court of Appeal, First District, Division 1, California. Feb. 26, 1921. Hearing Denied by Supreme Court April 27, 1921.)

1. Appeal and error ⟹110 — Order denying new trial not appealable.

Under Code Civ. Proc. §§ 956 and 963, as amended in 1915, an order denying a motion for a new trial is reviewable on appeal from the judgment, but no appeal from the order is authorized.

2. Mortgages ⟹186(5)—Evidence held to support finding against claim that purchase-money mortgage was taken with notice of intervening rights.

Where, after the execution of a deed from plaintiff to B. but before the execution on the same day of a mortgage from B. to plaintiff for a part of the purchase price, B. conveyed an undivided two-thirds interest to defendant, evidence *held* to support a finding against the claim that plaintiff took the mortgage with knowledge that it covered only B.'s one-third interest.

3. Appeal and error ⟹1011(1)—Findings on conflicting evidence not disturbed.

The weight of the evidence is for the consideration and determination of the trial court, and where the evidence is highly conflicting an appellate court will not disturb the findings.

4. Mortgages ⟹490—Mortgagee compelled to sue on insurance policy entitled to deduct attorney's fee before crediting proceeds.

Where an insurance policy made the loss payable to a mortgagee and the mortgagee was compelled to sue to recover the loss, he was entitled to deduct the reasonable and necessary amount paid an attorney in addition to the costs recovered before crediting the proceeds on the mortgage.

5. Mortgages ⟹581(5)—Allowance of attorney's fee without evidence of reasonableness not error.

In an action for the foreclosure of a mortgage providing for the payment of a reasonable counsel fee, it was not error for the court to allow $75 for such fee without evidence to show what would be a reasonable amount to allow.

6. Pleading ⟸218(3) — Notice of overruling of demurrer need not be served on party represented by counsel.

Though Code Civ. Proc. §§ 476 and 1010, contemplate the service of notice on adverse parties of the overruling of a demurrer, such service is not necessary where the party is represented by counsel present in court when the order is made.

7. Attorney and client ⟸70—Appearance for party presumed authorized.

Though one defendant appeared in the action in proper person, where, on the hearing on demurrer, an attorney appeared for both defendants, it must be presumed, in the absence of any showing to the contrary, that his appearance was authorized, as every intendment is to be indulged in support of the judgment and an attorney is an officer of the court and occupies a position of trust and confidence respecting the administration of justice, and it must be presumed that he will not violate his obligation by making an unauthorized appearance.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by Isham R. Jones against Edward A. Baxter and others. From a judgment for plaintiff and an order denying a new trial, the defendants John F. Dufur and another appeal. Judgment affirmed, and appeal from order dismissed.

Henry L. Ford, of Eureka, for appellants John F. Dufur.

Geo. W. Hunter, of Eureka, for respondent.

BARDIN, Presiding Justice pro tem. [1] This action was brought to foreclose a mortgage given by Edward A. Baxter upon real property in Humboldt county to secure the payment of a promissory note in the sum of $700. The defendants John F. Dufur and his wife, A. D. Dufur, appeal from the judgment rendered in favor of the plaintiff, Jones, and also include in their notice of appeal a purported appeal from the order denying their motion for a new trial. While it is proper on an appeal from the judgment for us to review such an order, yet an appeal therefrom is now unauthorized and should be dismissed. Sections 956, 963, Code Civ. Proc.; Roberts v. Colyear, 179 Cal. 669, 180 Pac. 937.

The trial court determined that there was due, owing, and unpaid to the plaintiff upon said promissory note and for money expended under the terms of the mortgage the sum of $397.47, and also the further sum of $108.85 for attorney fees and costs incurred in the action, aggregating in all $506.32, for which defendant Baxter was personally liable, and declared that such sum was secured to be paid by the mortgage referred to. The usual decree directing the sale of the mortgaged premises to satisfy such indebtedness, attorney fees, and costs followed.

[2] The principal point relied upon for a reversal of the judgment is founded upon the claim of appellants that at the time the mortgage was given to Jones, the mortgagor Baxter owned but an undivided one-third interest in the mortgaged property, and that at that time A. D. Dufur owned the remaining two-thirds interest, and that Jones accepted the mortgage with full knowledge of that fact. The trial court found against this claim, and it is now urged that such finding is without proper support in the evidence. We have carefully examined the record and find that there was ample testimony adduced at the hearing to support the finding complained of. The evidence shows that Jones, while the owner of the premises described in the mortgage, entered into a verbal agreement for the sale thereof to Baxter and John F. Dufur, who was acting as the agent of his wife, A. D. Dufur, whereby it was agreed that Jones would sell the premises, together with certain live stock thereon, for the sum of $2,000. Jones, Baxter, and John F. Dufur all met in the latter's office on September 29, 1914, to consummate the oral agreement of sale, and Dufur, who was an attorney at law, thereupon prepared a deed for the signatures of Jones and his wife, whereby the premises were to be conveyed to Baxter. Jones signed the same and departed, leaving it with Dufur, but it was not signed by Mrs. Jones until a later hour on the same day at a neighboring bank. After Jones had signed the deed referred to, Baxter executed and delivered to John F. Dufur, in his capacity as agent for his wife, a deed conveying to Mrs. Dufur an undivided two-thirds interest in and to the real property in controversy. After the partial execution of the deed from Jones to Baxter, Baxter and Dufur went to the bank referred to where Mrs. Jones added her signature to the deed, and Dufur, in behalf of Mrs. Dufur, thereupon paid to Jones $1,300 of the purchase price of the premises; the balance of the purchase price being paid by the execution of the note and mortgage in suit. The two deeds were afterwards placed of record at the request of Dufur, but by some arrangement not made clear, the mortgage was caused to be recorded at the request of a local bank immediately following the recordation of the deed from Jones to Baxter, and prior to that of the deed from Baxter to Mrs. Dufur.

The respondent testified to the effect that he had conveyed the real property referred to to Baxter and had taken the mortgage back simultaneously and as a single transaction; that he was not a party to the transaction between Baxter and Dufur, and knew nothing of that; and that he had never heard of the appellants' claim that his mortgage

was intended to cover only a one-third interest in the mortgaged premises until a short time before the trial, and that the mortgage was intended to cover the full title to the land, and not an undivided interest therein.

The testimony of Jones was strongly corroborated by Baxter and by certain indirect evidence not necessary to here discuss. We attach no importance to the order in which the two deeds and the mortgage were recorded, for the question of what interest in the lands was really intended to be mortgaged must be answered by a determination of the nature of the transaction at the time the deed from Jones to Baxter passed and the mortgage given.

[3] It is true that some testimony highly contradictory to plaintiff's theory of the case was given at the trial; but as has so often been said before, the weight of the evidence is for the consideration and determination of the trial court, and where there is such a conflict in the evidence as is here disclosed, an appellate court will not disturb the findings.

[4] Certain buildings situate upon the mortgaged premises were destroyed by fire, while the mortgage was in effect, which were covered by a policy of fire insurance containing the usual provision that such a loss should be payable to the mortgagee. The mortgage provided that the mortgagee might insure such buildings if the mortgagor failed so to do, with loss, if any, payable to the mortgagee. The insurance company refused to pay the amount of the loss, and it became necessary for Jones to institute an action upon the policy to recover the loss thus sustained. Judgment was rendered for plaintiff in the sum of $704.41 and of which amount $18.75 was for costs of suit. In crediting the mortgagor on account of the receipt of such moneys, the plaintiff deducted not only the said sum of $18.75 recovered as costs, but also the further sum of $100 paid as attorney's fee in the action against the fire insurance company. The court found that this fee was both reasonable and necessary and was paid for the benefit of A. D. Dufur. As relating to this last finding, it may be stated parenthetically that Mrs. Dufur had meanwhile succeeded to the full title to the premises described in the mortgage. We agree with the trial court that the deductions made from the insurance moneys on account of the expenses referred to were proper.

[5] The allowance of an attorney's fee in the sum of $75 for services in the present action is attacked. The mortgage provided for the payment of "a reasonable counsel fee" in the event of foreclosure, and the court allowed plaintiff the sum of $75 as and for such a fee. The point is urged that the court made such an allowance arbitrarily and without recourse to any evidence being adduced to show what would be a reasonable amount to allow for such purpose. The point is not well taken. Woodward v. Brown, 119 Cal. 283, 309, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Hotaling v. Montieth, 128 Cal. 556, 61 Pac. 95; Baker v. Eilers Music Co., 175 Cal. 652, 166 Pac. 1006.

One point remains to be considered, and that is the contention of appellant John F. Dufur that as to him the judgment should be reversed for the reason that the default taken against him for not answering the complaint was without warrant or authority of law. Dufur appeared in the action in proper person and filed a demurrer. Henry L. Ford appeared for Mrs. Dufur, by filing a demurrer in her behalf. It is recited in a minute order, contained in the judgment roll, that at the time fixed for hearing argument on the demurrers of John F. Dufur and A. D. Dufur to plaintiff's complaint, Henry L. Ford, as attorney for said defendants, appeared in court, and made argument on said demurrers, whereupon the demurrers were overruled and 20 days granted and allowed to answer the complaint. The defendant John F. Dufur was not served with notice of the said ruling on his demurrer, and having failed to answer the complaint within the time allowed, his default was entered by the clerk. No motion to vacate and set aside such default was ever made nor was it ever suggested, and it is not now claimed that Mr. Ford was not authorized to appear for Mr. Dufur, although Mr. Dufur was present at the trial and participated therein as a witness. It is recited in the judgment that the default of said Dufur was duly and regularly entered.

[6] While it is true that the Code (sections 476, 1010, Code Civ. Proc.) contemplates service of a written notice on an adverse party, of the action of the court in overruling a demurrer and allowing time to answer, yet where a party is represented by counsel in court present at the time such order is made, the necessity of the service of such a notice is dispensed with. Wall v. Heald, 95 Cal. 364, 30 Pac. 551.

[7] We must presume, in the absence of any showing to the contrary, that Mr. Ford's appearance for Mr. Dufur was an authorized appearance. Not only does this follow by reason of the familiar rule that every intendment is to be indulged in to support the judgment (Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361), but also for the further reason that it must be presumed, until the contrary is made to appear, that an attorney appearing in court for a party to an action or other proceeding is authorized so to do. An attorney is an officer of the court and occupies, with relation to the administration of justice, a position of trust and confidence, and it must be presumed, until the contrary is made to appear, that he will not violate his obligation and make an unauthor-

ized appearance for any person whom he purports to represent.

Perceiving no error, the judgment is affirmed. The appeal from the order denying the motion for a new trial is dismissed.

We concur: KERRIGAN, J.; RICHARDS, J.

51 Cal. App. 665

ARNAZ v. FORBES. (Civ. 2963.)

(District Court of Appeal, Second District, Division 1. California. March 5, 1921.)

1. Trial ⊜388(1) — In action tried without jury, court should find on material issues.

In an action tried without a jury, the law imposes on the trial judge the duty to make findings on all material issues upon which evidence has been introduced.

2. Trial ⊜397(4) — Finding on contributory negligence not necessary, where evidence does not support plea.

Where the evidence heard does not support plea of contributory negligence, a finding on that issue is unnecessary.

3. Municipal corporations ⊜706(5)—Evidence held insufficient to show pedestrian's negligence when run down by automobile.

In an action by a pedestrian run down by a motorcar while he was waiting for a street car to round a curve in front of him, evidence *held* insufficient to show pedestrian's contributory negligence.

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by Louis A. Arnaz against H. W. Forbes. From a judgment for plaintiff, defendant appeals. Affirmed.

Lynn Helm, of Los Angeles, for appellant.
Edward F. Wehrle, of Los Angeles, for respondent.

JAMES, J. This action was brought to recover damages alleged to have been suffered by the plaintiff by reason of the negligent acts of the defendant in the handling and driving of an automobile. The case was tried before the court without a jury, and judgment entered in favor of the plaintiff. From that judgment defendant appeals. Defendant in his answer pleaded that the plaintiff was guilty of contributory negligence which was the proximate cause of his injuries. The court failed to make a finding upon this plea, and that omission constitutes the sole claim for a reversal.

[1, 2] The law imposes upon a trial judge the duty to make findings upon all material issues as to which evidence has been introduced. On the other hand, it is well settled that, where the evidence heard does not support the plea of contributory negligence, a finding upon the issue is not necessary to be made. Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Maloof v. Maloof, 175 Cal. 571, 166 Pac. 330. The latter case is cited upon the general proposition just announced, without our agreement with the statement made in that decision, to the effect that the omission of the court to find upon an issue made by the pleading falls within the errors described in section 4½ of article 6 of the Constitution.

[3] Examining the evidence to which our attention is directed, we are not able to conclude that this evidence justified a finding in favor of the defendant on his claim that contributory negligence of the plaintiff had been shown. All of the evidence to which we are pointed is that given in substantiation of the situation as described by the plaintiff when the accident occurred. Briefly stated, the evidence was that the plaintiff at a street intersection left the east sidewalk to cross to the westerly corner of the street at the customary place. He traversed a distance of 28½ feet, which composed pavement designed for vehicles to travel upon, and came to the easterly rail of a double street car track laid in the street, where he stopped. The track at this point curved to make the turn from the street, across which plaintiff had moved, into the intersecting street. A car was approaching from the intersecting street at the corner, and it was for the purpose of allowing this car to pass that plaintiff stopped. He testified that at the time he stepped from the curb to advance to the place where he was standing when struck, he had observed the automobile which struck him approaching from the south at a distance, as shown by other testimony, of about 340 feet. He testified that he stood still at the point indicated for several minutes to allow the approaching car to start and round the curve in front of him; that, standing in his place, he suddenly saw the automobile almost upon him; that he tried to escape from the dangerous position by grabbing the "bumper" and jumping to one side. By this collision he suffered bodily injuries. The automobile of the defendant had ample room to pass the plaintiff, as the distance from where he stood to the east sidewalk which he left was, as before stated, 28½ feet. Plaintiff, according to his testimony, which seems to be without dispute, had remained in a stationary position, where he could be plainly seen under ordinary circumstances for several minutes. That plaintiff had a right to be in the position where he was, and that defendant in the careful management of his machine could and should have avoided contact with the plaintiff, seems very clear to us. There was other testimony ample to the point that the defendant was negligent. The motorman of the car which plaintiff was wait-

ing to allow to pass, testified that the automobile came up at a speed of not less than 20 miles per hour, and almost collided with the car, which was traveling upon the side of the street opposite to that upon which the defendant should have been traveling, had he conformed to the requirement of the law. We conclude that under the evidence a finding that plaintiff was guilty of contributory negligence would not be supported.

The judgment is affirmed.

I concur: SHAW, J.

51 Cal. App. 706

Ex parte MARTIN. (Cr. 976.)

(District Court of Appeal, First District, Division 1, California. March 9, 1921.)

1. Habeas corpus ⟹3—Prior prosecution and excessive bail held not ground for issuance of writ.

That petitioner is being again prosecuted for an offense for which he was once in jeopardy, or is being held to answer on excessive bail, constitute no grounds for issuance of writ of habeas corpus, where it does not appear that he has made timely or any application for a reduction of the amount of the bail, and since he may upon the trial of his case plead the prior conviction and establish the identity of the cases by evidence.

2. Criminal law ⟹295—Burden of proving former jeopardy on defendant.

The burden is on defendant, claiming that he is being again prosecuted for an offense for which he was once in jeopardy and was convicted, to show such conviction and establish the identity of the cases by evidence.

In the matter of the application of John Martin for writ of habeas corpus to be directed to the sheriff of the city and county of San Francisco to secure release from custody. Writ denied.

Raine Ewell, of San Francisco, for petitioner.

PER CURIAM. This is an application in behalf of John Martin for writ of habeas corpus. On reading the petition for the writ in the first instance the court was of the opinion that an order for the writ should not issue for the reason that it did not sufficiently appear from the facts stated that the petitioner was entitled to the relief sought. Permission was granted to file an amended petition on filing and reading of which the court is of the opinion that the application should be denied.

Two points are presented for our consideration:

[1, 2] If it be true, as alleged, that petitioner is being again prosecuted for an offense for which he was once in jeopardy, he may upon the trial of his case plead such conviction and establish the identity of the cases by evidence; the burden being on him. People v. Faust, 113 Cal. 172, 176, 45 Pac. 261.

Petitioner also contends that he is being held to answer in the superior court of the city and county of San Francisco on excessive bail. If this be true, it does not appear that he has made timely or any application to the court below for a reduction of the amount. Until he has done so and been denied any relief, we do not feel in a position to entertain an application for a writ of habeas corpus on that ground.

The writ is denied.

51 Cal. App. 512

PRATT v. DITTMER. (Civ. 3126.)

(District Court of Appeal, Second District, Division 2, California. Feb. 23, 1921.)

1. Bills and notes ⟹525—Evidence insufficient to support finding of want of consideration for transfer.

In an action on notes given by the maker in connection with a sales-stimulating contest organized by the payee company, evidence *held* insufficient to support the trial court's finding of want of consideration paid by plaintiff transferee, his direct and uncontradicted testimony being that he paid the payee company $1,600 for them.

2. Bills and notes ⟹525—Evidence held insufficient to support finding plaintiff transferee did not take notes in good faith.

In an action on notes given by the maker in connection with a sales-stimulating contest organized by the payee company, evidence *held* insufficient to support finding that plaintiff transferee of the notes did not receive them in good faith from the payee company, though he had dealt with it before, buying in all some $200,000 worth of paper, and bringing suit to collect some of such notes.

3. Appeal and error ⟹846(6)—Finding outside issue ignored on appeal.

The existence of good faith on the part of plaintiff transferee of notes not having been challenged by defendant maker's answer, it is not an issue in the case, and a finding negativing good faith, not being within the issues, must be disregarded.

4. Bills and notes ⟹343—Transferee held liable both on the doctrine of estoppel and principle that failure of consideration no defense in suit by assignee.

Where defendant gave his notes in connection with a sales-stimulating contest organized by the payee company, though all the notes were payable before expiration of time for completion of the payee company's contract, both on the doctrine of estoppel and on the principle

that a failure of consideration in whole or in part after a bona fide assignment of a promissory note is no defense to a suit by the assignee against the maker, notwithstanding the assignee's full knowledge of the original consideration for which the note was given, defendant maker was liable to a transferee of the notes.

5. Bills and notes ⟸328—Law of state where payable governs.

Promissory notes payable in Iowa are to be interpreted under the law of that state as to rights of bona fide holder.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by W. I. Pratt against Adolph Dittmer. From judgment for defendant, plaintiff appeals. Judgment reversed, and trial court directed to enter judgment in conformity with the opinion.

Hartwick & Drumm, of Orange, for appellant.

Wm. M. Brown, of Los Angeles, and D. G. Wettlin, of Orange, for respondent.

CRAIG, J. The material facts of this case are as follows: On the 19th day of May, 1915, Adolph Dittmer, a resident of Orange, Cal., entered into an agreement with the Brenard Manufacturing Company of Iowa City, Iowa, whereby the company agreed to conduct a voting contest for Dittmer. It was stipulated that the Brenard Manufacturing Company would furnish him with a certain piano and other articles, which it did, and would direct the management of the voting contest, and in that connection it was stipulated as follows:

"The Brenard Mfg. Co. agrees to send their organizer to us within the first six weeks from the starting of the campaign, for constructive campaign work and for the completion of clubs. Organizer to remain for such a period as Brenard Mfg. Co. may deem necessary."

And again:

"My last twelve months sales were $13,500 and upon this figure my next twelve months sales to be $16,000 and that if 3&6/100 per cent. of my gross sales does not amount to four hundred ninety dollars (490.00) for the next twelve months you will pay me the deficiency in cash, and immediately upon approval of this order send your bond for $490.00 to cover this agreement with me."

Dittmer, in consideration of securing the personal property ordered in the contract and the performance by the manufacturing company of its covenants contained therein, executed six promissory notes, which were attached to the contract. The notes were payable two, three, four, five, six and seven months after date respectively. Except as to date they are identical. The first one reads as follows:

"P. O. Orange, State Calif. 5/19/1915. For value received I promise to pay to the order of the Brenard Manufacturing Company, eighty dollars, at Iowa City, Iowa, payable as below, two months after date. Amount $80.00 2 ct. U. S. Rev. Stamp duly cancelled. Signed by Adolph Dittmer."

At the end of the contract in question, the following provision appears:

"These notes to be detached by the Brenard Mfg. Co."

It is also stipulated in the contract upon the part of Dittmer as follows:

"I agree to furnish you within ten days approximately one hundred fifty names and addresses of persons whom I believe will make good club leaders and members," etc.

His testimony shows that he sent the names at the end of 10 days. The contract was signed by the defendant, Dittmer, in Orange, Cal., and also by the Brenard Manufacturing Company through its duly authorized agent, B. F. Bates. The contract, with the notes attached, was sent to the Brenard Manufacturing Company at Iowa City, Iowa, and thereafter the notes were detached from the contract by Loveland, one of the partners of the Brenard Manufacturing Company. Subsequently to being so detached, and before any breach of the contract, on the 31st day of May, 1915, they were sold and assigned to the plaintiff in this action, W. I. Pratt.

The court found:

"That plaintiff at the time of said transfer of said alleged notes knew all about the conditions upon which the said Brenard Manufacturing Company did business with defendant, and plaintiff knew that said alleged notes were a part only of the entire agreement made between defendant and Brenard Mfg. Co."

Also finding number 6 is as follows:

"That said plaintiff did not take said alleged notes in good faith and for value, but that said alleged notes were transferred by said Brenard Manufacturing Company, and received by plaintiff for the purpose of preventing defendant from receiving the benefit of any defense said defendant might have against said alleged notes"

—and, further, that the Brenard Manufacturing Company did not comply with the terms of the contract in the matter of giving personal supervision to the contest. Defendant, Dittmer, failed to pay the promissory notes, and Pratt brought this action upon them without reference to the contract, but we find it attached to the answer.

The trial court found that the agreement and the notes constituted a single contract, and that the defendant had been injured in the sum of $280 by reason of the Brenard Manufacturing Company having failed to

perform its part of the contract, and gave judgment for the plaintiff for the remaining $200 with interest due on the notes. From this judgment the plaintiff appeals.

[1-3] It is claimed by the appellant that the findings above recited are not supported by the evidence, but on account of the view which we take of the law applicable to the case it will be unnecessary to pass upon that issue except as to finding 6. This finding may be divided into two parts: First, that the plaintiff did not take the notes "in good faith and for value," which, it is readily seen, involves two propositions, one negativing plaintiff's good faith and the other his having parted with a valuable consideration for the notes. The finding of want of consideration has no support in the evidence. The direct and uncontradicted testimony of Pratt was that he paid the Brenard Manufacturing Company $1,600 for these notes, and section 3104 of the Civil Code directs the presumption that a valuable consideration was paid. The nearest approach to evidence supporting a finding that plaintiff did not receive the notes in good faith is found in the testimony of the plaintiff himself to the effect that he had dealt with the Brenard Manufacturing Company upon many other occasions and bought in all $200,000 worth of their notes; had brought suit to collect some of them; was well acquainted with the members of the copartnership and their general manner of doing business. Construing this most strongly against the plaintiff and in support of the finding in question, these facts do not constitute bad faith. There is nothing to indicate that the other notes bought by the plaintiff from the manufacturing company were in the same form as the ones here in litigation or connected with contracts similar to the one with which we have to deal; and nothing to indicate absence of good faith on the part of the company in connection with this transaction (Citizens' Trust & Savings Bank v. Stackhouse, 91 S. C. 455, 74 S. E. 977, 40 L. R. A. [N. S.] 454); and further, in so far as good faith is concerned, its existence, not having been challenged by the answer, is not an issue in this case. The second part of finding 6, "That said alleged notes were transferred by said Brenard Manufacturing Company, and received by plaintiff for the purpose of preventing defendant from receiving the benefit of any defense said defendant might have against said alleged note," is not within any issue tendered by the pleadings, and must be disregarded.

The answer contains no allegation that the Brenard Manufacturing Company secured the execution of the notes by fraud or misrepresentation, but only that of partial failure of consideration. Respondent cites Hoffman v. Liebfarth, 51 Iowa, 711, 2 N. W. 518; Commercial Bank v. Paddock, 90 Iowa, 63, 57 N. W. 687, and Merchants' National Bank v. Grigsley, 170 Iowa, 675, 149 N. W. 626. These are cases in which an issue of fraud was presented by the pleadings, and in the last the court merely held that the question of fraud and entire want of consideration was one for the jury. Also, in Burns v. Bauer, 37 Cal. App. 251, 174 Pac. 346, the court found that the note sued upon had been secured from the maker by fraud and misrepresentation. In the case at bar, the defense is partial failure of consideration. Splivallo v. Patten, 38 Cal. 139, 99 Am. Dec. 358, and Flood v. Petry, 165 Cal. 314, 132 Pac. 256, 46 L. R. A. (N. S.) 861, are in point and must control the decision of the case at bar. The former was a case where the sole question involved was the right of an assignee of a promissory note to recover against a maker where the original consideration for the note was an executory contract.

After the assignment of the note to Splivallo, the consideration failed. The court held that such failure of consideration after the assignment was not a defense, notwithstanding the assignee, at the time of the assignment, had full knowledge of the original consideration for which the note was given. This decision is quoted by our Supreme Court in the case of Flood v. Petry, 165 Cal. 314, 132 Pac. 256, 46 L. R. A. (N. S.) 861, with approval. The bank pledgee received the note with full knowledge that it was part of a nonnegotiable building contract, but before the note matured, yet, with the further knowledge that at the time the note was pledged no portion of the work to be done by the contractor had been done. The court held that the delivery of the note by the maker under these circumstances "precludes the maker of the instrument, upon the simplest principles of estoppel, from asserting that its only consideration was the completion of the building.

[4] In the case at bar the facts constituting the estoppel are that the contract upon which the defendant relies and of which the note was originally a part expressly provided, "These notes to be detached by the Brenard Mfg. Company"; that the first note was payable before the Brenard Manufacturing Company could by any fair construction of the contract be required to begin to perform any part thereof, and all of the notes were payable long before the expiration of time for the completion or carrying out of the contract on the part of the company, the life of the contract being 12 months and the sixth note being payable 7 months from the execution of the contract. We conclude, therefore, that both upon the doctrine of estoppel as applied in the case of Flood v. Petry and the principle "that a failure of consideration in whole or in part after a bona fide assignment of a promissory note is no defense to a suit by the assignee against the maker, notwithstanding the former's full knowledge of the original consideration for which the

note was given," a rule clearly recognized in Splivallo v. Patten, and approved by Flood v. Petry, the facts found to be true by the court do not constitute a defense.

[5] The notes were payable in Iowa, and are to be interpreted therefore under the law of that state. However, no Iowa case is cited, nor, we apprehend, exists in conflict with the doctrine expressed in this opinion. The language of the Supreme Court of Iowa, in the case of McNight v. Parsons, 136 Iowa, 392, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665, would indicate its agreement with the prevailing rule, for it says:

"The courts quite universally hold that knowledge that a note was given in consideration of the executory agreement or contract of the payee which has not been performed will not deprive the indorsee of the character of a bona fide holder, unless he also has notice of the breach of that agreement or contract."

The judgment is reversed, and the trial court directed to enter judgment in conformity with this opinion.

We concur: FINLAYSON, P. J.; WORKS, J.

51 Cal. App. 685

PATTON v. WOODWARD CO. (Civ. 3719.)

(District Court of Appeal, First District, Division 2, California. March 8, 1921. Hearing Denied by Supreme Court May 5, 1921.)

Master and servant ⟸332(2)—Evidence to connect automobile dealer with operation of car negligently driven held to justify nonsuit.

In an action against a corporation selling automobiles, for injuries to a bicyclist struck by an automobile driven by the company's employee demonstrating the car, which had been left with the company to be sold, *held* that defendant was entitled to a nonsuit on the ground that the evidence was insufficient to connect defendant either with the ownership or operation of the automobile, the only evidence offered clearly showing that its employee at the time of the accident was working on his own time and beyond the scope of his employment.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by George M. Patton against the Woodward Company, a corporation. From judgment of nonsuit, plaintiff appeals. Affirmed.

C. K. Bonestell, of Fresno, for appellant.

Everts & Ewing and J. R. Fitch, all of Fresno, for respondent.

NOURSE, J. Plaintiff appeals from a judgment in favor of defendant following the granting of defendant's motion for nonsuit in an action for personal injuries. The motion for nonsuit was granted upon the grounds that there was no evidence introduced connecting the defendant with the ownership of the automobile or with its operation at the time of the accident, and that there was no evidence introduced which showed that the person operating the automobile was at the time of the accident either in the employ of the defendant or acting within the scope of his employment. The complaint alleged that the defendant, a corporation, while engaged in the business of demonstrating and selling automobiles, operated an automobile along Inyo street in the city of Fresno in a westerly direction, while plaintiff was operating a bicycle along the same street in an easterly direction and approaching the intersection thereof with I street; that as plaintiff approached the intersection of said streets the defendant corporation negligently caused said automobile to be driven along said Inyo street and into I street at such an angle across the intersection of said streets that it passed to the left of the center thereof; that by reason of the collision so caused plaintiff was thrown to the pavement and injured.

The evidence disclosed by the bill of exceptions is that one Pearson, an employee of the defendant corporation, was operating the car in question after business hours and after defendant's place of business had been closed for the day; that the car belonged to another employee of defendant by the name of Collins, and had been taken by him in trade for another machine; that it had been left at defendant's place of business for the purpose of being sold, but that the arrangements for selling it had been made between Pearson and Collins, the owner, without any negotiations with or instructions to or from the defendant corporation; that without any instructions from the defendant corporation Pearson took the car for the purpose of demonstrating it after he had completed his work for the day, and sold it on that day, payment being made directly to Collins. No commission was paid to the defendant corporation on account of the sale of the car, and Pearson himself received no commission therefor. The automobile had been stored by Collins in the offices of the corporation for a period of about one week prior to the accident, and on some occasions was run out to the street in front of the offices or on a nearby lot for the purpose of display with cars of the company which were thus exhibited for sale. At the time of the accident the car carried a dealer's license issued to and belonging to the corporation, which Pearson testified he had taken without permission. The foregoing facts appear from the testimony of Pearson, who was called for the plaintiff. Another witness, Collins, also called for the plaintiff, corroborated this testimony in the main, though his testimony relating to his authorization of

Pearson to sell the car was indefinite. Collins further testified that with reference to the sale of the automobile he made no contract with the corporation.

This was all the evidence offered by plaintiff on this phase of the case. In appellant's brief it is argued that the testimony of these two witnesses is conflicting, and that the trial court should have disregarded the conflict and resolved all inferences and presumptions in favor of the plaintiff. But the record discloses no conflict. The argument in the brief is based upon a misquotation of the evidence of Collins as disclosed by the bill of exceptions as follows:

"I was the owner of the Ford Automobile which had caused the accident. I had left it with the defendant to be sold."

The testimony of this witness appearing in the bill of exceptions is:

"I was the owner of this Ford automobile which caused the accident. I had never turned the automobile over to the Woodward Company. I had left it there to be sold. Q. But not to be sold by the Woodward Company, was it? A. Well, it was with the other used cars. I never talked to either of the Woodwards about selling the car for me to my knowledge. I might possibly have talked to Mr. Pearson about it."

This testimony is in complete harmony with that of the witness Pearson, who testified that his fellow employee Collins had merely brought his car to his place of employment; that it had not been turned over to the corporation for the purpose of sale, but that Collins had authorized him to act as his own agent in the sale of the car.

There was no evidence connecting defendant either with the ownership or operation of the automobile, and the only evidence offered clearly showed that Pearson, at the time of the accident, was working upon his own time, and beyond the scope of his employment with defendant.

The motion for a nonsuit was properly granted, and the judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

(51 Cal. App. 624)

CLAPP'S PARKING STATION et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3397.)

(District Court of Appeal, Second District, Division 2, California. March 1, 1921.)

1. Master and servant ⊜375(2)—Injury while going to or from work not in course of employment within Compensation Act.

An employee merely going to or from the place of his work is not engaged in performing any service growing out of and incidental to his employment, relative to right to award for his injury at such time.

2. Master and servant ⊜417(3)—Compensation award without proof of injury in employment void.

Workmen's Compensation Act, § 6, subsec. "a," creating a liability against an employer only for an injury arising out of and in the course of the employment, an award without proof of such condition precedent is void, and, being attacked by certiorari under section 67, must be annulled as in excess of jurisdiction.

3. Master and servant ⊜417(7)—Commission's findings not conclusive unless supported by evidence.

Though Workmen's Compensation Act, § 67, subsec. "c," declares conclusion of commission on questions of fact to be conclusive and final, this is only where there is conflict of evidence or opposing inferences may reasonably be drawn; and, the award being based wholly on circumstantial evidence, the court may determine whether there are the necessary reasonable inferences deducible from the evidence to sustain the findings; conjecture or guesswork will not suffice.

4. Master and servant ⊜405(4)—Finding of injury in employment based on "conjecture" as distinguished from "inference" held unsupported.

Commission's conclusion that employee's injury arose out of and in the course of his employment *held* not supported by evidence, there being no reasonable "inference," which rests on premises of fact, to this effect, but mere "conjecture" and surmise, which have no such basis.

[Ed. Note.—For other definitions, see Words and Phrases, Conjecture; First and Second Series, Inference.]

5. Master and servant ⊜417(9)—Cause remanded on commission's statement of new evidence.

Award of commission being annulled for insufficiency of evidence, the cause will under the authority of Workmen's Compensation Act, § 67, subsec. "c," be remanded for further proceedings, it being made to appear that additional evidence can be produced, and this on the statement of the commission as to the evidence that can be produced, without supporting affidavits; the claimant being too poor to engage counsel.

Award of death benefit was made by the Industrial Accident Commission and others to Silas M. Friend's widow, and Frederick A. Clapp, doing business as Clapp's Parking Station, employer, brings certiorari. Award annulled and cause remanded.

Porter & Sutton, of Los Angeles, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

FINLAYSON, P. J. This is a proceeding in certiorari to review an award of the In-

dustrial Accident Commission allowing a death benefit to the widow of Silas M. Friend, deceased.

The petitioner for the writ, Frederick A. Clapp, doing business in the city of Los Angeles under the name of "Clapp's Parking Station," employed Friend as a carpenter to do various kinds of work about his automobile parking ground. For several days prior to the accident, Friend had been engaged in constructing a fence for Clapp around the latter's parking ground. On July 3, 1919, at about 11 o'clock a. m., Friend left his work of fence building, and shortly thereafter, while crossing Los Angeles street, was run down by an automobile and received injuries that were the proximate cause of his death.

It is contended by petitioner that there was no evidence before the Commission sufficient to justify its finding that the injuries that resulted in Friend's death arose out of and in the course of his employment. This contention, we think, must be sustained.

[1] It seems that the award was based upon the theory that, at the time of the accident, Friend was on an errand for his employer, that is, that he was on his way to or was returning from the lumber yard of the Whiting-Mead Wrecking Company, whither, it is claimed, he had been sent by Clapp to purchase lumber to be used in the construction of the fence. There is no direct evidence that Friend was performing any such errand for his employer at the time of the accident; the claim is that there is circumstantial evidence to sustain the theory that Friend was on such errand when the accident happened. We think that the circumstances are wholly insufficient to justify any reasonable inference that Friend was engaged in any such errand. If he was not, then indubitably the widow is not entitled to a death benefit, for it is well settled that an employee going to or from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment. Ocean Acc., etc., Co. v. Industrial Acc. Comn., 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B. 336; Fidelity & Casualty Co. v. Industrial Acc. Comn., 192 Pac. 166.

If we resolve all conflicts in the evidence in favor of the widow and construe the evidence most favorably to her, we shall have presented the following circumstances: Some time prior to the accident, Clapp had given Friend $5, and told him that if he needed any additional lumber for the construction of the fence to go and get it—to get it from the lumber yard of the Whiting-Mead Wrecking Company. Clapp's parking ground is on the westerly side of Los Angeles street, between Seventh and Eighth streets. The lumber yard of the Whiting-Mead Wrecking Company is between Seventh and Eighth streets on San Pedro street—a street four blocks east of Los Angeles street. After the accident, five dollars and a few cents were found in one of the pockets of the clothing that had been worn by Friend. According to the uncontradicted testimony of the manager of the Whiting-Mead Wrecking Company, that company, as its books show, did not sell any lumber to Friend on July 3, though it had sold lumber to Clapp on the 1st of July. The construction of the fence was left entirely to Friend, who came and went as and when he saw fit. He was paid by the hour. During the period he worked for Clapp, i. e., from June 23 to July 3, he would sometimes leave his work for half a day at a time.

According to the uncontradicted evidence of the eyewitnesses of the accident, Friend, at about 11 o'clock a. m. on July 3, 1919, while crossing Los Angeles street about 50 feet north of Eighth street, going in a westerly direction, that is, in a direction away from the lumber yard and toward the parking ground where the fence was in the course of construction, stepped from behind a truck into the path of an automobile proceeding southerly on Los Angeles street, was struck by the front left fender and received the injuries from which he subsequently died. At the time of the accident, Friend was not wearing a coat.

[2, 3] The Workmen's Compensation Act creates a liability against an employer only for an injury "arising out of and in the course of the employment." Stats. 1917, p. 834, § 6, subsec. "a". The fact that the injury arose out of and in the course of the employment is a condition precedent to the power of the Commission to award compensation to the injured employee or a death benefit to his dependents. An award made without proof of this essential fact is void; and, if attacked by certiorari, as provided in section 67 of the law, it must be annulled as an act in excess of the Commission's jurisdiction. The statute, it is true, expressly declares that the conclusions of the Commission on questions of fact are "conclusive and final and shall not be subject to review" (section 67 of the act, subsec. "c."). But this means no more than that the Commission is the final arbiter where there is a conflict in the evidence or where opposing inferences may reasonably be drawn. It is always within the province of the court, in reviewing an award based wholly on circumstantial evidence, to determine whether there are inferences reasonably deducible from the evidence to sustain the Commission's findings. The findings, in such case, must be based on reasonable inferences; conjecture or guesswork will not suffice.

[4] In Kerr v. Ayre S. S. Co., [1915] A. C. 217, 233, Lord Shaw draws the distinction between conjecture and inference in these words:

"The distinction is as broad as philosophy itself. It is that an inference rests upon premises of fact and a conjecture does not."

The conclusion that Friend's injuries arose out of and in the course of his employment must find its support in the finding that he was injured while performing an errand for his employer, i. e., while going to or returning from the lumber yard to purchase lumber for the fence. But that finding rests upon no premises of fact. The uncontradicted evidence of the manager of the Whiting-Mead Wrecking Company shows that Friend had not purchased any lumber at the lumber yard on the day of the accident. It necessarily follows, therefore, that he was not returning from the purchase of lumber when he sustained his fatal injuries. The fact that, according to the uncontradicted evidence, Friend, when struck down, was crossing from the east to the west side of Los Angeles street, that is, while going in a direction away from the lumber yard, shows that he was not on his way to purchase lumber. From this it necessarily follows that the finding that he was injured while on an errand to purchase lumber is based on mere conjecture and surmise. There is no premise of fact upon which to base any inference that he was on any such errand.

It is argued that the hour, 11 o'clock a. m. was not the usual lunch hour, and that therefore Friend had not been to his lunch. It also is said that the fact that he did not have on his coat shows that he had not been to lunch. This is non sequitur. Clapp testified that he was eating his lunch when the accident happened. If Clapp was so engaged at that hour, why not Friend? It is not unreasonable to assume that one who goes to his work early in the morning, particularly one who, like Friend, has no regular and stated working hours, should eat his lunch an hour earlier than the noon hour. Nor is the fact that he did not have on his coat a pregnant circumstance. The accident happened at a time of the year when, as a rule, the forenoons are quite warm. At that season men whose vocation is that which Friend pursued are frequently seen eating their noonday meal in their shirt sleeves. The probabilities, therefore, are as consistent with the assumption that Friend was returning from his lunch as that he was going to or returning from the purchase of lumber for Clapp. Moreover, the assumption that Friend may have been returning from his lunch is not necessarily the only reasonable alternative to the assumption that he was going to or returning from the purchase of lumber. The evidence shows that he did not always work steadily on the fence throughout the day, but that, for any purpose that might suit his whim, he sometimes left the fence-building job for an hour or so, or even for a longer period of time.

[5] We find no substantial evidence to sustain the Commission's conclusion that the injury to Friend arose out of and in the course of his employment, and therefore we, perforce, must annul the award.

The statute expressly authorizes us to enter a judgment affirming or annulling the award or remanding the case for further proceedings before the Commission. Stats. 1917, p. 876, § 67, subsec. "c". The judgment in Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 325, 153 Pac. 24, affords a precedent for the entry of a judgment annulling the award, and, at the same time, remanding the case for further proceedings by the Commission. We are asked by the Commission, in the event that we find it necessary to annul the award, to remand the cause for further proceedings before that body. This request is based upon the ground that, since the entry of the award, new evidence, material to the claimant's case has been discovered—evidence which, it is claimed, could not have been sooner discovered by the exercise of reasonable diligence. The petitioner here opposes the request upon the grounds: (1) That the court's power to remand exists only where the applicant did not have a fair trial before the Commission, as, for example, where testimony was improperly rejected; and (2) that in any event the nature of the newly discovered evidence should be shown by affidavits.

We think that where an award is annulled for insufficiency of the evidence to sustain a material finding of the Commission, and it is made to appear that if the case be remanded for further proceedings before the Commission additional evidence can be produced, the court should exercise its power to remand. A new trial in a court of record follows as a matter of course when the judgment of such a tribunal is reversed by an appellate court on the ground that a material finding is not sustained by the evidence; and we can see no reason why a more rigorous rule should be applied to a judgment of the Industrial Accident Commission, annulled in a certiorari proceeding, in view of the express grant of power to remand the case for further proceedings by the Commission. Such liberal construction of the act accords with the express declaration that its provisions are to be liberally construed, with the purpose of extending its benefit to the protection of injured persons. Section 68, Stats. 1917, p. 877.

As to the other objection—the failure to support the motion by affidavits—we think that while it doubtless would be more regular to file an affidavit showing the new evidence that can be produced on a rehearing by the Commission, still in this particular instance that course is not a sine qua non. Here the claimant, Mrs. Friend, was too poor to engage counsel. The Commission, a public body created by law with power to subpœna any witness who has not been required to

attend at the request of any party (section 61), claims that it has endeavored to ascertain all the facts. We think that under the circumstances we should accept at its face value the Commission's statement of the evidence which it claims can be produced in the event of a rehearing.

The award is annulled, the cause remanded, and the Commission is directed to take such further proceedings in the matter as it may deem advisable.

We concur: WORKS, J.; CRAIG, J.

51 Cal. App. 370

PEOPLE v. STENNETT. (Cr. 542.)

(District Court of Appeal, Third District, California. Feb. 14, 1921. Rehearing Denied March 16, 1921. Hearing Denied by Supreme Court April 14, 1921.)

1. Criminal law ⊜1039 — Objection deputy sheriffs were disqualified to take custody of jury must be made below.

The objection that, since the sheriff was a witness in the case and was thereby disqualified from summoning the jury, his deputies were likewise disqualified to have the custody of the jury pending the trial, cannot for the first time be raised on appeal.

2. Criminal law ⊜868—Objection to improper custody of jury is waived by failure to object.

Accused, by his failure to object to the order placing the jury in charge of one of the sheriff's deputies because the sheriff was a witness for the prosecution in the case and the deputy was therefore disqualified, waived the objection even in the trial of a felony, since such order is a mere irregularity which can be waived.

3. Witnesses ⊜274(2)—Defendant's character witnesses can be cross-examined as to knowledge of previous offenses by him.

Where defendant offers witnesses who testify to his previous good reputation, the prosecution can cross-examine such witnesses to ascertain the credibility of their testimony by asking them if they had heard that defendant had been previously convicted or charged with other offenses.

4. Witnesses ⊜274(2) — Statute prohibiting reference to prior conviction does not prevent cross-examination of character witnesses.

Pen. Code, § 1025, providing that, if defendant pleads guilty and answers that he has suffered the previous conviction alleged in the indictment, the charge of the previous conviction must not be read to the jury nor alluded to on the trial, merely prohibits a gratuitous and unnecessary allusion thereto, but does not prevent the district attorney from cross-examining defendant's character witnesses by asking them if they knew defendant had been convicted of the prior offense.

5. Criminal law ⊜722½—Statute prohibiting reference to prior conviction is one of procedure which defendant can waive by offering evidence of good character.

The provision of Pen. Code, § 1025, prohibiting reference at the trial to a prior conviction if defendant has admitted such conviction on arraignment, is only a statutory regulation of the trial which defendant can waive and does waive by offering evidence of previous good character.

6. Criminal law ⊜722½—Argument on reference to prior offense on cross-examination of character witnesses held proper.

In a prosecution for petit larceny after a prior conviction, where defendant had offered character witnesses who had admitted on cross-examination they had heard defendant had been previously convicted of petit larceny and accused of other crimes, it was proper for the district attorney in his argument to refer to such admissions in discussing the credibility of defendant's testimony.

7. Witnesses ⊜37(4)—Witness who has not heard defendant's reputation discussed can testify it was good.

A statement by a witness called by defendant as a character witness that had never heard defendant's reputation discussed, does not render him incompetent to testify defendant's reputation was good, since the fact that it was not discussed is an indication that it was good.

8. Criminal law ⊜1186(4)—Exclusion of testimony of one of several character witnesses for defendant held harmless.

Error in excluding the testimony of only one of several character witnesses offered by defendant is harmless, where the evidence of defendant's guilt was such that it could not be held the error resulted in the miscarriage of justice within meaning of Const. art. 6, § 4½.

9. Criminal law ⊜789(17)—Instruction reasonable doubt could only arise from evidence held correct.

An instruction defining "reasonable doubt" is not objectionable because the court therein told the jury that such doubt could only arise from the evidence actually produced in the case and consequently excluded doubt created through or by a want of evidence.

10. Criminal law ⊜822(13)—Instruction held not to authorize consideration of circumstances not shown by evidence.

An instruction that unexplained possession of stolen property, though not itself sufficient to justify conviction, is a circumstance which might be considered with other designated circumstances which had been shown by the evidence "and by any and all other circumstances tending to show the guilt of accused," is not objectionable as authorizing consideration of circumstances not brought out by the evidence, where the instruction when read as a whole and in the light of the general charge must have been considered by the jury as limited to circumstances shown by the evidence.

11. Criminal law ⊜822(11)—Instruction defendant must explain possession of stolen goods to remove incriminatory effect is correct.

In a prosecution for larceny, an instruction that defendant was bound to explain the innocent possession of the property to remove the effect of such possession as a circumstance to be considered in connection with other suspicious facts, which, when considered with other parts of the instruction, merely meant that if the property was stolen and in possession of the defendant immediately thereafter he would be required to explain that his possession was innocent to remove the incriminatory effect of those circumstances, was not erroneous.

12. Criminal law ⊜784(4)—Instruction all relevant circumstances may be considered held unobjectionable.

An instruction that, when circumstantial evidence is wholly relied upon, any relevant fact or circumstance leading to or surrounding the fact of the commission of such crime may be shown and considered by the jury, hardly more than states a commonplace and is not open to substantial objection.

13. Criminal law ⊜784(5)—Instruction as to circumstantial evidence held unobjectionable.

An instruction, explaining the distinction between direct and circumstantial evidence and declaring that guilt may be established by means of either, and emphasizing the obvious proposition that to justify a conviction on circumstantial evidence there must be produced in the minds of the jury the same degree of certainty as is required where direct evidence is relied upon, is not objectionable.

14. Criminal law ⊜757(5) — Instruction on credibility of witnesses held not one on the facts.

An instruction on the credibility of the witnesses in the language of Code Civ. Proc. § 1847, except that after the statement that the presumption that witness spoke the truth may be repelled by the manner in which he testifies was added "his interest in the case, if any, or his bias, or prejudice, if any," does not make the instruction objectionable as one on the facts.

15. Criminal law ⊜810—Instruction defining "willfully" in statutory language held misleading and contradictory.

An instruction in the language of Pen. Code, § 7, subd. 1, defining "willfully" and including the clause that it does not require any intent to violate law or to injure another or to require an advantage, is misleading and contradictory to an instruction given in the language of Pen. Code, § 20, that in every crime there must exist a joint operation of act and intent or criminal negligence.

16. Criminal law ⊜1172(4, 5) — Instruction defining "willfully" held harmless.

An instruction defining "willfully" in the language of the statute which is misleading and contradictory does not require reversal of the conviction, where the evidence is amply sufficient to warrant the inference that defendant had the intent to steal.

17. Larceny ⊜64(7)—Evidence held sufficient to sustain conviction of stealing automobile tires.

Evidence that defendant had an opportunity to steal the automobile tires of prosecuting witness, and that when the officers appeared at his house with a search warrant he stated that he knew they came for the tires and gave an improbable explanation of his possession of them, *held* sufficient to sustain a conviction.

18. Larceny ⊜51(1), 64(1) — Unexplained possession of recently stolen property not alone sufficient to convict, but may be considered with other evidence.

The mere unexplained possession of recently stolen property is not of itself sufficient to establish the guilt of the possessor, though it is a circumstance tending to show guilt to be considered with other facts and circumstances having a like tendency.

On Petition for Rehearing.

19. Jury ⊜70(3)—No formal showing required for summoning special venire or directing coroner to serve summons.

No formal showing or procedure is required to authorize the court to order a special venire of jurors because of the depletion of the regular panel or to order the special venire to be summoned by the coroner because of the disqualification of the sheriff.

20. Jury ⊜70(6) — Court can order special venire before case is called.

Though a special venire is generally not called until the trial of the case has been begun and the regular panel has been exhausted without securing a jury, there is no legal objection to the summoning of such special venire before the case is called for trial whenever it appears satisfactorily to the court, howsoever informally, that a special venire will be required in a case about to come to trial.

21. Criminal law ⊜1166½(5)—Directing coroner to summon special venire when sheriff was witness is favorable to defendant.

Where the sheriff was a witness for the prosecution and thereby disqualified from serving the process for the special jury under Civ. Proc. § 602, subd. 4, and a challenge to the special venire selected by him could have been sustained under Pen. Code, § 1064, the action of the court in directing the coroner to serve the summons for special venire, if erroneous because no formal showing had been made of the sheriff's disqualification, was favorable to defendant.

22. Jury ⊜31(5)—Provisions for selection of matters of procedure which can be regulated.

The proceeding for the ordering and summoning of a special venire is a matter of procedure which the Legislature can regulate so long as the right of the accused to a fair and impartial trial guaranteed him by the Constitution is protected.

23. Criminal law ⊜1144(8)—Presumed necessary showing was made to authorize special venire, unless minutes show they contained only showing.

If any special showing was necessary to authorize the trial court to order a special venire

and to direct the coroner to summon it because of the disqualification of the sheriff, it will be presumed on appeal that such showing was made, where the minutes of the court at the time of entering the order were in the record, but they contained no recital that no showing other than that stated in the minutes was made.

24. Criminal law ⊂1144(11)—Presence of defendant presumed unless record shows contrary.

If the presence of the defendant was necessary at the time the court ordered a special venire to be summoned by the coroner, it will be presumed on appeal in support of the judgment that defendant was present unless the record affirmatively shows that he was not.

25. Criminal law ⊂1186(4)—Errors in summoning jury held not reversible.

If it was error for the court to order a special venire and direct it to be summoned by the coroner because the sheriff was disqualified as a witness without any formal showing, such error was a mere irregularity involving only a matter of procedure which does not require a reversal of the conviction under Const. art. 6, § 4½, where an examination of the entire record including the evidence shows that no miscarriage of justice resulted therefrom.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

J. H. Stennett was convicted of the felony of petit larceny after a prior conviction of a like offense under Pen. Code, § 666, and he appeals from the judgment and the order denying his motion for a new trial. Judgment and order affirmed.

M. T. Brittan and W. E. Davies, both of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the State.

HART, J. The defendant was charged by an information filed in the superior court in and for the county of Sutter with a felony, consisting of the crime of petit larceny and a prior conviction of a like offense (Pen. Code, § 666), and he brings the case to this court by an appeal from the judgment and the order denying his motion for a new trial.

The property charged to have been stolen by the defendant consisted of automobile tires, three outer casings or tires, and three inner tubes, and were, so it is claimed, taken from the Ford automobile of one A. F. King, a resident of Meridian, Sutter county.

It appears that on the evening of March 5, 1920, between the hours of 8 and 9 o'clock, Raymond King, a brother of the owner of said automobile, was driving in said car on the road running between the city of Marysville and the town of Meridian when, at a point on said road a distance of about a mile and a quarter from the last-named place, a part of the machinery of the car became so disabled that it could not be made to move, and thereupon said Raymond King left the machine on the roadside at said point, where it remained overnight or until the next morning. At the time that said King left the machine, the tires of the car were on the wheels of the car and in good condition. On the following morning, March 6th, between the hours of 8 and 9 o'clock, it was discovered by one of the Kings (the evidence does not show clearly which of the two brothers) that the tires above described had been removed from the wheels of the car and taken away. The larceny was immediately reported to the sheriff of Sutter county, who thereupon, in ferreting out the author of the crime, immediately invoked the assistance of the sheriff of Yuba county, the county seat of said county (the city of Marysville) and the county seat of Sutter county (Yuba City) being only a short distance from each other and divided by the Feather river.

It further appears that the defendant was, at the time the tires were taken, a taxi driver in the city of Marysville, his hours of work at the time in question being in the nighttime, and that, near the hour of 2 o'clock of the morning of the 6th of March, 1920, one Royce Albertson, a resident of the aforesaid town of Meridian, employed the defendant to carry him from Marysville to his (Albertson's) home in said town. Albertson testified that it was about 2 o'clock in the morning when they departed from Marysville; that, while they were going towards Meridian, he saw a car standing on the road about a mile and a quarter east of that town and identified it as the car of A. F. King; that, referring to the stalled car, he remarked to the defendant that "somebody must have run out of gasoline"; that he observed that on the side of the car that he could see, while passing it, the tires were on the wheels; that they proceeded on their way to Meridian without stopping, arriving at his home about 3 o'clock, or about an hour or possibly a little more from the time they left Marysville; that he paid the defendant for his services; and that the latter immediately started on his return to Marysville.

Upon the complaint of A. F. King, a search warrant was issued by a justice of the peace, authorizing the search of the defendant's house. With this process the sheriff of Sutter and Yuba counties went to the home of the defendant, in Marysville, arriving there shortly after noon. The defendant was at home and, on seeing the officers and before the object of their visit was made known to him by them, made a remark to the effect that their presence there was rather expected by him. One of the officers proceeded to read the warrant to him, when he interrupted to say that the tires they were looking for were in his house.

Explaining to the officers his possession of the tires, the defendant stated (so the officers testified) that, while he was on his return to Marysville from Meridian, and as he was crossing a long bridge not far distant from Meridian but beyond the point at which King's car was standing, he observed a car, apparently stalled, on the opposite end of the bridge; that, as he approached said car, he noticed that it was a Ford truck; and that when he reached the point where the car was standing, the owner or man in charge of the car saluted him as follows: "Hello, Jack, do you want to buy some tires?" The defendant, so he proceeded with his explanation, asked the man what his trouble was, and the latter replied that he could not make the truck work. The defendant thereupon alighted from his car and proceeded to make an inspection of the truck, finally discovering and pointing out the reason the truck refused to move. He found, upon examination, that the truck was loaded with a variety of old articles or junk, among which were about 20 or 25 used or second-hand automobile tires. He looked over the tires and picked or selected from the number in the truck the tires referred to and described in the information and therein alleged to be the property of A. F. King. After considerable dickering as to the price, it was agreed that defendant could have the tires he had selected for the total sum of $21. Defendant, so he further explained, paid the man $7.50 in cash, with the understanding that the latter would later that day call at defendant's house and receive the balance of the money, and thereupon, placing the tires in his own car, resumed his journey home. He further stated that he waited for some hours for the man to put in an appearance at his home to receive the balance due for the tires, but that, up to the time the officers called at his house, the vendor of the tires had not called for the money.

The above embraces substantially a statement of the testimony presented by the people.

The defendant, testifying for himself, denied seeing or noticing King's car standing on the roadside as he and Albertson were on their way to Meridian; stated that, as they were within a short distance of Meridian, he heard Albertson make a remark about a car being out of gas, but thought that, because his own car was not running smoothly at about that time, Albertson was referring to his (defendant's) machine; stated that the side curtains were up on his car; that Albertson had very little to say while they were moving along and that from that fact and from the position in which he placed and maintained himself in the seat from the time they left Marysville, he supposed that he (Albertson) was asleep or dozing most of the way; denied seeing King's or any car standing on the roadside when returning to Marysville and denied taking the tires found in his possession from any car; positively denied that he knew or had any previous acquaintance with the man from whom he claimed to have purchased the tires, and denied telling the officers that the seller of the tires addressed or saluted him as "Jack," and denied that he was so addressed by said seller. He stated that, with the exception that he did not say to the officers or either of them that the vendor called him "Jack," the circumstances under which he met the man who sold him the tires were such as were related by him to the officers and to which the officers testified, as above indicated. He testified that he bought the tires from the man referred to for the sum of $21; that he paid down the sum of $7.50 only and that the vendor was to call at his home in Marysville between the hours of 12 and 2 o'clock of the day the sale was made for the balance of the $21. He explained that the reason he said to the officers when they arrived at his house that he expected that they came for the tires he had purchased from the man on the road, was because the vendor had not called for the balance of the purchase price at the hour agreed upon (it was after 1 o'clock p. m., when the officers appeared at defendant's home), and he thereupon became suspicious that the tires had been stolen by the man he bought them of; that he had, before the officers arrived at his home, remarked to his wife that he was afraid that he had bought stolen tires and that he intended to take them to the police office, where he would leave them pending an investigation and determination of whether or not they had been stolen. He further declared that he left Meridian on his return trip to Marysville at about half past 3 o'clock, arriving at the latter place near the hour of 5 o'clock, and in this he was corroborated by a night watchman who saw him when he reached Yuba City. He further expressed the opinion or his best judgment, based upon his experience in that particular, that it would have required at least a half an hour for him to remove the tires from the King car; the inference from this statement being that, if he had stopped to remove and take the tires, he would not have arrived at Marysville as early as he and said night watchman testified that he did.

Taking up in orderly sequence such points urged for a reversal as it is conceived require special consideration, attention first will be given to the proposition, advanced by the defendant, that the trial court erred in denying his challenge to the panel of jurors from which the jury to try his case was selected; and, as to this point, it may in the outset be stated that there is before us no properly authenticated or, indeed, any record upon that particular proceeding authorizing this court to review that question.

It appears that, prior to the day that the case had been set for trial, an order was made by the court for the summoning of a special venire of jurors to try the case, and the court ordered the coroner of the county to serve the summons. On the day on which the case was called up for trial, counsel interposed a challenge to the panel; said challenge being in writing. The grounds thereof were: (1) That there was "a material departure from the forms prescribed (by C. C. P.) in respect to the drawing and return of the jury," in that it was not made to appear that the regular panel of jurors had been exhausted at the time the special venire of 35 jurors (the number ordered to be summoned by the court) "was ordered by the court to serve on the trial of said defendant," it also being claimed that said order for a special venire was made in the absence of the accused from court when said proceeding was had. (2) That, without any showing of the disqualification of the sheriff of Sutter county to serve and summons the special venire, the court ordered that duty be performed by the coroner of that county.

The minutes of the court relating to the orders in question are not reproduced in the transcript containing the record in these appeals, and there is, consequently, nothing in the transcript disclosing upon what showing, if any, the court ordered a special venire of jurors to be summoned to try the case or who were present in court at the time the order was made. In other words, the record as it is presented to us does not disclose that the sheriff was not legally qualified to serve the process for the special venire, nor does it disclose that the defendant was not present in court when that proceeding was had. The only information regarding the proceeding furnished by the record as we have it here is the written challenge to the panel as returned by the coroner interposed by defendant's counsel and the statement of the district attorney, in reply to the challenge so made, that it was made to appear, before the order for the special venire and the order appointing the coroner to serve the process and so secure the attendance of the special jury were made, that there was on the regular panel in the jury box an insufficient number of jurors to secure a jury to try the case and that the sheriff was disqualified from serving the process for the special venire. The district attorney did not state whether the defendant was or was not in court when those orders were made, but he did state that the disqualification of the sheriff consisted in the fact that he was a witness for the people against the defendant. These matters are, however, purely extrajudicial or dehors the record, and cannot be considered in determining whether the challenge was or was not well taken. There is before us, therefore, as before stated, no record upon which we may predicate a consideration of the point now in hand, except to rest our conclusion upon the presumption, which must be indulged where the record is silent as to a vital matter of procedure or there is no affirmative showing that those steps which the law requires shall be taken in a case have not been taken, that all that has been legally required to be done was done as required. The rule "is too well settled in this state to require the citation of authorities that where an appellant alleges error it is incumbent upon him to show it affirmatively, and that we will not presume that a trial judge failed to do what the law required him to do, but, in the absence of a showing to the contrary, will presume that he did what he was directed * * * to do." People v. Russell, 156 Cal. 450, 457, 105 Pac. 416, 419. See, also, People v. Yee Foo, 4 Cal. App. 730, 89 Pac. 450; People v. Holmes, 118 Cal. 444, 449, 50 Pac. 675; People v. Douglass, 100 Cal. 1, 4, 34 Pac. 490. In this case, as before stated, the minutes of the court containing a record of the proceedings of which complaint is made by appellant are not in the record here. What, therefore, those minutes show, we do not know, nor have we any authentic way of finding out. The result is that there is here not only no affirmative showing of error or failure by the court to observe the legal requisites for or the essential legal prerequisites to the making of the orders complained of, but the record is absolutely silent as to what took place in court when the orders were made or who were present at that time. We must presume, therefore, that there was a sufficient legal showing to justify the court in ordering a special venire, and that, upon a like showing, it found that the sheriff was not qualified under the law to serve the writ. It is, of course, not questioned but that if the sheriff was disqualified to summons the special venire it was not only within the power but the duty of the court to require the coroner to perform that duty, if he was not also disqualified. Pol. Code, §§ 4172, 4773, subd. 1; Code Civ. Proc. § 226.

[1, 2] In connection with the point above considered, it is argued that, if the sheriff was disqualified, so were his deputies, and therefore the court erred in placing the jury in charge of one of the sheriff's deputies pending its deliberation upon the case. The point was not made in the court below and cannot for the first time be raised on appeal. Indeed, by his failure to object to the order at the time it was made, the defendant waived any objection which might have been interposed to the order placing the jury in charge of the sheriff's deputy. To a precisely similar point, arising under like circumstances, in the case of People v. Nakis, 193 Pac. 92, the Supreme Court replied:

"While the deputy was, perhaps, technically disqualified by reason of the admitted disquali-

fication of the sheriff from official participation in the proceedings (People v. Le Doux, 155 Cal. 535), no objection to his appointment was raised at the trial, and, in fact, it was at one time suggested by counsel for defendant that the jury be placed in charge of the sheriff himself. The rule that by failing to call the court's attention thereto by timely objection at the trial a defendant in a criminal case may waive his right to object to certain irregularities and errors not basal in their nature has frequently been applied to irregularities in matters concerning the custody and control of the jury. People v. White, 20 Cal. App. 156; People v. Tarm Poi, 86 Cal. 225, 24 Pac. 998; Price v. U. S., 14 App. D. C. 391; Dreyer v. People, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869; Id., 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79."

It is further said in the Nakis Case:

"Moreover, in the instant case no attempt has been made to demonstrate that any prejudice has resulted from the error. In the absence of an affirmative showing of prejudice to the defendant, a reversal for irregularities in regard to the custody and management of the jury cannot be had. People v. White, supra; Jarnagin v. State, 18 Tenn. (10 Yerg.) 529; Speer v. State, 57 Tex. Cr. Rep. 297, 123 S. W. 415; Galan v. State, 68 Tex. Cr. Rep. 200, 150 S. W. 1171; Holmes v. State, 70 Tex. Cr. Rep. 214, 156 S. W. 1172."

In the case at bar there is no affirmative showing that the defendant was prejudiced by the act of the court in committing to the deputy sheriff the custody of the jury pending its determination of the verdict.

Next to be considered is the complaint that the court erred to the serious detriment of the rights of the accused by permitting the district attorney, over his objection, to ask on the cross-examination of certain character witnesses introduced by the defendant, whether they had ever heard of the latter having been previously convicted of the crime of petit larceny. The witness Hyde, chairman of the board of supervisors of Yuba county, having stated, in reply to a question by an attorney for the defense as to the defendant's general reputation for "truth, honesty, and integrity" in the city of Marysville, where the latter had continuously resided for some fifteen years, that such reputation was good, was asked by the district attorney, on cross-examination, among other like questions, whether he had ever heard that defendant had, previously to the commission of the larceny charged in the information, suffered a conviction of the crime of petit larceny in San Joaquin county, which question the witness answered in the negative.

The prior conviction charged in the information is therein alleged to have taken place "in the justice's court of Elkhorn township, in the county of San Joaquin," this state. Section 1025 of the Penal Code provides, inter alia:

"In case the defendant pleads not guilty, and answers that he has suffered the previous conviction [a prior conviction being charged in the accusatory pleading], the charge of the previous conviction must not be read to the jury, nor alluded to on the trial."

The point here made is that, by asking the witness Hyde whether he had ever heard of the defendant having been convicted of the crime of petit larceny in San Joaquin county the district attorney violated the provision of section 1025 of the Penal Code above quoted, the said question to said witness involving, it is argued, an allusion, in the presence of the jury, to the prior conviction charged in the information, the truth of which the defendant had, upon his arraignment, acknowledged.

[3] Evidence of the good reputation of a person on trial for a crime is valuable, as a rule, only in those cases where the guilt of the accused is required to be established, if at all, wholly by means of circumstantial evidence, the theory being that evidence of the good reputation of the defendant for the trait or traits of character necessarily involved in the charge in the community where he has resided for a sufficient period to acquire a general reputation as to such trait or traits may be sufficient to overturn the effect of the incriminatory circumstances proved against him, or so to diminish, as in their application to him, the inculpatory force of such circumstances as that thereby a reasonable doubt of his guilt may be created. Such testimony is, in its nature, of a hearsay species, being based upon what the people of the community generally say of the accused, taken out of the rule of exclusion as to such testimony, however, because of the jealous consideration which the law has for the rights of a citizen when his right to life or liberty is, for some infraction of that self-same law, duly and regularly challenged in a judicial proceeding appropriated by the law to that purpose. Such testimony, while not involving a very high character of exculpatory proof where one is charged with and on trial for a crime, is, nevertheless, of that peculiar character which is likely to have a more far-reaching effect upon the just rights of the parties in the trial than it is actually entitled to exert, unless it is so sifted and its stability so tested before the case is given to the jury as to keep it down to the standard of its real probative function and abstract probative value. The testimony of a witness that, as to certain indicated traits of character, a defendant on trial bears a good reputation generally in the community in which he resides or has resided, necessarily implies that the defendant's personal character, as to those traits, is such that it is most likely he would not commit the crime charged against him, and likewise implies that the witness giving such testimony has never heard anything to the contrary as to such de-

fendant in such community, or has never heard or known of the defendant having been accused of acts which, if committed by him, would not only tend to prove that he was not a man of good general reputation but would stamp him as a man of bad character. It is true that a witness giving such testimony concerning a defendant cannot, on direct examination, detail or refer to specific acts tending to show the defendant's personal character and consequently his general reputation to be good. He may only answer the general question in a general or a categorical way, but, having declared such reputation to be good, it is then within the legal province of the other side (the district attorney in a criminal case) to prosecute an inquiry by cross-examination of the witness as to the basis of his statement that the general reputation of the defendant is good, and to that end he is entitled to and should be given the privilege of asking the witness about any fact or circumstance adversely affecting the defendant's personal character, as, for instance, whether he knew or had ever heard of the defendant being previously convicted of, charged with or accused of or arrested for other crimes, and this not for the purpose of proving against the accused the commission of other crimes, or merely of prejudicing the defendant in the minds of the jury, but only to weaken or destroy the force of the direct testimony of the witness that the general reputation of the defendant for the traits involved in the inquiry was good and at the same time remove from the case, as far as it may so be done, such testimony as an evidential factor to be considered in determining the question of the guilt or innocence of the defendant. The rule has often been, in different language, so stated and explained. The case of People v. Burke, 18 Cal. App. 72, 88, 89, 122 Pac. 435, exhaustively considers the rule and, besides an independent discussion and exposition thereof and the principle supporting it, braces the conclusion therein arrived at, and with which the views above expressed harmonize, by a throng of authorities.

[4] We know of no exception to that rule, unless it can be successfully maintained that an exception must be recognized in a case to which the provision quoted above from section 1025 of the Penal Code is applicable. But, in view of the above considerations, we can conceive of no sound reason for holding such exception exists or that the Legislature could have so intended. The evident intent of said provision is that, where a prior conviction is charged against a defendant and he has, upon his arraignment, admitted such prior conviction, he shall not be prejudiced thereby in the minds of the jury, in its consideration of the case as to the subsequent offense charged, by a gratuitous and an unnecessary allusion thereto at the trial by the district attorney or the court. In the instant case, however, the defendant himself made the question of his general reputation as a man of good character, in so far as the traits or elements of personal character involved in the charge against him are concerned, an issue in the case by voluntarily introducing testimony tending to establish for him a good general reputation for said traits. The issue was presented upon his own initiative; no attack upon his character, other than that inhering in the charge against him, having previously been made. We may presume that he introduced and pressed that issue with full knowledge that thus he was inviting a full and minute examination by the district attorney into the basis of the testimony of any witness declaring such reputation to be good, and that any such witness, for the purpose only of impeaching the force of his direct testimony, could properly be asked whether he knew of prior specific acts that the defendant had either committed or been accused of which would not comport with the declaration of the witness that the general reputation of the defendant was good.

[5] The provision of the Penal Code safeguarding a defendant charged with a prior conviction of a public offense, who upon his arraignment admitted such a conviction, against the detrimental consequences which are apt to follow reference thereto in the presence of the jury, is not basal or fundamental, but only a statutory regulation in the trial of such a case, and therefore it must be held that the defendant in this case, by opening up himself the question of his good reputation, waived his right to the protection of the provision of the Penal Code referred to, in so far as it was necessary for the district attorney to transcend that right in an attempt to destroy the force of the direct testimony of witnesses produced by him to bolster up his personal character for the traits involved in the charge against him. If the protection guaranteed to a defendant by the provision of the Penal Code in question were by the Constitution, a different proposition might then be presented in a case such as this; but, as before declared, it is a statutory provision and must be read and understood with the qualification that when the defendant himself voluntarily invites inquiry into his personal character for traits involved in the charge against him, as well as in the offense of which he was previously convicted, as also charged, by introducing testimony tending to establish a good general reputation for such traits, he must be held to have challenged inquiry, in this collateral way, into every wrongful act involving such traits which previously he may have committed or been accused of, for the purpose of destroying the force of the testimony of witnesses testifying to his good general reputation, and it must be held that the opera-

tion of the provision of the Penal Code referred to is, in such case, in the very nature of the situation, for that purpose, suspended or put in abeyance.

[6] The district attorney, in his argument to the jury, referred to the fact that certain of the character witnesses had admitted or testified that they had heard of the defendant having been previously convicted of petit larceny, and also of his having been previously accused of the crime of assault with intent to commit murder, grand larceny, and perjury. It is claimed that, even if the cross-examination (above considered) of the defendant's character witnesses was permissible, still the district attorney went beyond proper and legitimate argument in referring to the prior offense and those of which he had been accused. Except for the purpose of showing by argument that the defendant failed to establish a good general reputation, we think the district attorney was not at liberty to refer in his address to the jury to the past record of the accused; and, as we read that officer's argument, as it is embodied in the transcript, he went no farther than that. He was discussing the question of the credibility of the defendant's testimony and comparing it to that of certain witnesses for the prosecution as to matters as to which there was a variance between the testimony of the former and that of the latter, and pointed out, in his own way, how, in his opinion, the defendant not only failed to show a good reputation, but had by his own course at the trial opened the door for the prosecution to show that, as a matter of fact, he had a bad reputation for those traits inhering in the charge set forth in the information. We doubt not that the prosecuting officer thus kept himself within the sphere of legitimate argument.

There is a large number of other assignments of error, involving rulings of the court on evidence; but all of these, with the exception of one, to which we will next give special notice, we have found, upon examination, to possess no substantial merit, and therefore require no specific consideration herein.

[7, 8] The witness Johnson, for the defendant, was asked if he knew the general reputation of the accused, in Marysville and vicinity, "for truth, honesty, and integrity," to which question he replied in the affirmative. When asked whether it was good or bad, the district attorney interposed before an answer was returned to the question and asked permission to ask the witness some preliminary questions to ascertain whether he did know such general reputation and was qualified to testify to it. The district attorney brought out the fact from the witness that he had never, previously to the time of the filing of the charges against defendant of stealing the tires described in the information, heard the latter's reputation for the traits mentioned discussed, and the court thereupon ruled that the witness was incompetent to give testimony as to the general reputation of the defendant, and the witness did not answer the question whether such reputation was good or bad. It is argued that the ruling was erroneous and prejudicial. We think the witness, having said that he knew the defendant's general reputation, etc., should have been permitted, also, to say whether it was good or bad. It does not necessarily follow from the fact that a person has not heard another's character discussed in the community in which he has resided for a number of years that he does not know or cannot say that he knows such other person's general reputation in such community for the traits of character germane to such inquiry. The fact that no reproach has ever been heard or known to have been uttered against the character of a person generally known in a community in which he has for many years resided may be the very highest evidence that the general reputation of such person in such community is good. Generally speaking, it is the man addicted to the commission of bad or wrongful acts whose character is generally discussed by those who know him, while, on the other hand, a person who has lived a uniformly exemplary life in all respects is one whose character is not often spoken of. But be that as it may, as stated, the court should have allowed Johnson to answer the question whether the defendant's general reputation in Marysville was good or bad (First National Bank v. Wolff, 79 Cal. 69, 21 Pac. 551, 748), and the fact that the witness had never heard defendant's reputation or character discussed could have been brought out by the people as a fact to be considered by the jury in determining whether it affected the weight of the witness' testimony, and, if so, to what extent. We are, however, firmly of the opinion that, since there were several other witnesses who testified to the good general reputation of the defendant, which would make Johnson's testimony, if allowed, merely cumulative as to that fact, the action of the court with respect to said witness' testimony could not have had the effect of prejudicing the substantial rights of the accused. Moreover, as we shall later particularly point out and, indeed, as we think the above recital of the facts shows, the evidence of the defendant's guilt is such that it cannot justly be held that the error referred to has resulted in a miscarriage of justice. Const. art. 6, § 4½; Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

[9] The instruction given in this case, defining and amplifying the doctrine of reasonable doubt, is criticized by the defendant. The criticism is that the court told the jury that a reasonable doubt could only arise from the

evidence actually produced in the case, and that, consequently, such a doubt could not be created through or by want of evidence. But an instruction in precisely the same language as the instruction here assailed was critically considered and sustained as involving a correct exposition of the doctrine in People v. Del Cerro, 9 Cal. App. 764, 771, 100 Pac. 887, the Supreme Court having denied an application for the hearing of the case by it after decision by this court, and we here refer to that case for an answer to the argument here against the soundness of the instruction.

Instruction No. 7, after stating that while the mere unexplained possession of stolen property is not of itself sufficient to justify a conviction, such possession is nevertheless a circumstance which may be considered in connection with other testimony in determining the question of the guilt of the accused, declared that there must be, in addition to the proof of possession, proof of corroborating circumstances tending in themselves to establish guilt. This language of the instruction is followed by a statement of specific circumstances, the existence of which could well be inferred from the evidence in this case, which, it was stated, could be considered as corroborative of the circumstance of the unexplained possession of the stolen property, and the instruction concludes as follows: "*and any and all other acts or circumstances tending to show the guilt of the accused.*"

[10, 11] The criticism of the instruction is directly aimed at the italicized language, and of it it is said that in effect it invited consideration by the jury of facts, acts, and circumstances not brought out by the evidence. The criticism is unjust. The instruction must be read and considered in its entirety and in connection with and by the light of the general charge of the court, and as so considered, as obviously the jury considered it, the language criticized plainly means such other acts or circumstances as were shown by the evidence as tending to show the guilt of the accused. The court, in a preceding instruction, told the jury that the question as to what facts had been proved and whether the defendant was or was not guilty must be determined by them "from a consideration of the testimony admitted at the trial," and the language of the instruction condemned by the defendant must be and undoubtedly by the jury was considered as referring only to acts or circumstances shown by "the testimony admitted at the trial." The above instruction is further assailed because it stated that—

"The defendant is bound to explain the innocent possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such."

This language of the instruction followed the statement in the same instruction that—

"If the jury believe the property was stolen, and was seen in the possession of the defendant shortly after being stolen," etc.

Considered as a whole, we understand the instruction merely to mean that, if the property was stolen and in the possession of the defendant immediately after it was stolen, to remove the incriminatory effect of those circumstances as against him, he would be required to explain that his possession was innocent or honestly brought about. As so understood, we can see nothing wrong in the instruction. Indeed, if it be the law, as undoubtedly it is, that the unexplained possession of stolen property soon after it is stolen, while in itself not sufficient to convict, may nevertheless be regarded as an incriminatory circumstance against the accused, then, quite logically, it follows that, to remove the incriminatory effect of the circumstances as against him, it is incumbent upon the accused to explain that his possession was innocent.

[12, 13] We have examined instructions Nos. 13 and 14 and have found no substantial objection to them. No. 13 simply means that, when circumstantial evidence is wholly relied upon to prove the defendant's connection with the commission of the crime, any relevant fact or circumstance leading to or surrounding the fact of the commission of such crime may be shown and considered by the jury. The instruction, it may be said, is not in graceful language, but at the most it hardly more than states a commonplace. No. 14 fairly well explains the distinction between direct and circumstantial evidence, correctly declares that guilt may be established by means of either, and emphasizes the obvious proposition that, to justify a conviction on circumstantial evidence, there must be produced in the minds of the jury the same degree of certainty as to the defendant's guilt as is required where direct evidence is relied upon.

[14] Instruction No. 6 very clearly explained how or in what manner the jury should consider the evidence and the testimony of any witness testifying in the case, also explaining the tests whereby the credibility of any witness might be determined by the jury, and concludes with the statement that a witness is presumed to speak the truth, that such presumption may be repelled by the manner in which he testifies, "his interest in the case, if any, or his bias, or prejudice, if any," etc. The words in quotation constitute the foundation for the contention by defendant that the instruction enters upon the domain of fact. With the exception of those words, the instruction is in the language of section 1847 of the Code of Civil Procedure; but the instruction, as

so given, is general or abstract and refers to no particular witness and, with the added words indicated, has often been given and very properly held not to be obnoxious to the objection registered against it here. See People v. Amaya, 134 Cal. 531, 546, 66 Pac. 794; People v. Sheffield, 9 Cal. App. 130, 98 Pac. 67.

[15] Instruction No. 10 is in the precise language of subdivision 1 of section 7 of the Penal Code, defining the legal meaning of the word "willfully" as applied to the intent with which an act is done or omitted, and includes the following language which is that of the concluding clause of said section:

"It does not require any intent to violate law, or to injure another, or to acquire an advantage."

This language, it is claimed, states a proposition contradictory to the rule, stated by the court to the jury in a preceding part of its charge, that—

"In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." Pen. Code, § 20.

[16] The instruction, with the language complained of embodied therein, is really misleading and should never be given; but the instruction involves only an abstract statement of a rule of law as it is declared by the Legislature, and, in view of the fact that the evidence is amply sufficient to warrant the inference that the defendant took the property in question with the intent to steal it (which, it seems to us, in a sense involves an intent to violate the law), and in view of the further consideration that the court instructed the jury in the language of section 20 of the Penal Code, we think it is very clear that the defendant could have suffered no prejudice from said instruction, and we so hold.

[17] The last point which it is conceived necessary to consider is that the evidence is insufficient to support the verdict. We think the recital of the facts in the outset of this opinion is of itself sufficient to refute this contention.

[18] It is true, as has been above intimated, that the mere unexplained possession of stolen property is not of itself sufficient to establish the guilt of the possessor thereof, although a circumstance tending to show guilt, to be considered with any other proved facts or circumstances having a like tendency. In this case, however, there are many cicuumstances, other than the possession of the stolen property by the defendant, which are strongly indicative of his guilt and, with the circumstance of possession, sufficient, if the jury believed them to be true, to sustain the conclusion that the defendant committed the larceny charged. His alleged purchase of the tires under the circumstances claimed and detailed by him; his selection, in the nighttime, out of 20 or 25 tires, the very tires stolen from King's car; the fact that the alleged vendor was willing to let him (a perfect stranger, he testified) have tires sold for $21 upon payment down of only $7.50, with the understanding that such vendor would call at his (defendant's) house for the balance of the purchase price later that day; the failure of the alleged seller to call at the appointed time for such balance; the statement of the officers that the defendant told them that, upon meeting the alleged seller in the dark at the end of the bridge, the latter familiarly addressed him as "Jack," and the further fact that defendant on the stand declared that he made no such statement to the officers; the fact that defendant passed and was near the point on the roadside where the King car stood—these and other circumstances which it is not necessary to restate were matters for the jury to consider in connection with the fact of the defendant's possesson of the stolen property, and all, it must be admitted, are of the most incriminatory nature as against the accused.

We have examined and considered such of the points, of which there are many, as we have conceived called for special notice with a minuteness which the briefs and the importance of said points appear to us to have demanded, and our conclusion is, as must be apparent from the foregoing discussion, that the result reached below should not be disturbed.

The judgment and the order are, accordingly, affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

On Petition for Rehearing.

HART, J. The defendant asks for a rehearing of his appeal, basing his petition on the sole ground that this court, in treating the points urged by him that error was made in the ordering of a special venire of jurymen to try his case, and in the making of the order, because of the disqualification of the sheriff, that the coroner serve the process for the special jury, grounded its conclusion thereon upon a misapprehension of the record. In the original opinion it was stated:

"The minutes of the court relating to the orders in question are not reproduced in the transcript containing the record in these appeals, and there is, consequently, nothing in the transcript disclosing upon what showing, if any, the court ordered a special venire of jurors to be summoned to try the case or who were present in court at the time the order was made."

Upon a re-examination of the transcript we find that we were mistaken in declar-

ing that the minutes pertaining to the orders in question were not contained in the transcript, that portion of the transcript having in some way been overlooked by the writer of the opinion in the original investigation.

It appears from the transcript that, prior to the day previously fixed for the trial of the accused, the district attorney stated in open court that there were remaining but 28 names in the jury box of jurors summoned on the regular panel, "some of whom are not now living in the county," and others of whom "had been drawn and examined in the two previous trials of said case" (two previous mistrials of the defendant on the charge stated in the information having been had), "others legally disqualified on account of deafness, and not being able to understand the English language, and at least two of them mothers with infant children at their breasts"; that the sheriff of the county, who had testified at the two previous trials as a witness to material and incriminating facts against the defendant, would be called as a witness against the defendant again at the ensuing trial, and asked that, in view of the disqualification of the sheriff to summon a special panel, the coroner of Sutter county be appointed as an elisor to summon a special jury to try the case. It further likewise appears:

"The court met at 2 p. m. Present: Hon. K. S. Mahon, judge; Albert Brown, clerk; the district attorney and the sheriff."

It does not appear from the minutes whether the defendant was or was not present.

As shown in the original opinion, the attorney for the defendant, on the day that the case was called for trial, interposed a challenge to the panel on the grounds that the order for the special venire was made in the absence of a showing that the regular panel had been exhausted or so reduced numerically as to require a special venire and that the order appointing the coroner to perform the duty of summoning the special venire was made in the absence of a showing of the sheriff's disqualification to serve the process for the special venire. It is also argued in the briefs filed on behalf of defendant that it does not appear from the minutes that the defendant was present when the said orders were made. There was no other showing made by the defendant on the challenge than that involved in the mere written challenge itself.

We are still of the opinion that there is not before us a record upon the proceedings resulting in the making of the orders complained of which warrants a review of the objections to the action of the court with regard to the matters referred to.

[19-21] In the first place, we remark that we know of no provision of law prescribing a particular or a formal procedure whereby a special venire of jurors shall be ordered, nor do we know of any provision for such procedure in the appointment of the coroner or an elisor to summons a special venire of jurors because of the disqualification of the sheriff to perform that duty. Ordinarily, the ordering of a special venire in a particular case is done in the course of the trial —that is, of course, before a jury to try the cause has been completed and the regular panel has been exhausted without securing a jury. And it is generally then, where it transpires that the sheriff is for any legal reasons disqualified from summoning the special veniremen, that the court orders either the coroner or an elisor to serve the process. We think we can safely say that in almost all such cases the court acts, not upon any formal showing, but upon its own knowledge of the situation with respect to the trial. It is to be conceded that (so far as the writer of this opinion knows) the ordering of a special venire for a particular case and the appointment of the coroner or an elisor to summons the special jury before the trial has begun constitute an unusual proceeding; but we know of no legal objection to it. In such a case, however, it seems to us that when it has been made to appear satisfactorily to the court, howsoever informal the showing may be (there being, as stated, no formal procedure prescribed for conducting such a proceeding), that a special venire will be required in a case not yet on trial, but about to come to trial, and that the sheriff is legally disqualified from summoning the special jury, the court, exercising a lawful jurisdiction and power, is then authorized to make the order for the special venire and an order naming the coroner or appointing an elisor to serve the process for the special veniremen. In fact, we know of no reason why the court may not in such a case act largely if not altogether upon its own knowledge of the situation, and, as it undoubtedly may in the case where the trial is actually on, make the orders sua sponte. Indeed, if the court was invested with knowledge of the fact that the sheriff was disqualified from summoning the special venire because of bias and prejudice against the defendant in a criminal case, it would be its duty, as a matter of common justice, to commit the duty of serving the process for a special jury to act in the defendant's case to some other proper person. The minutes of the court and, in fact, the record of the trial, show that the sheriff was a witness against the defendant at two previous trials of the charge stated in the information and that he was to be and was a witness against the accused in the third trial, which resulted in a verdict of guilty, and in all the trials gave testimony tending strongly to show the defendant's guilt. Clearly, then, it was made to appear that the sheriff was disqualified

from serving the process for the special jury (Code Civ. Proc. § 602, subd. 4; People v. Le Doux, 155 Cal. 535, 542, 102 Pac. 517), and if that officer had summoned the special venire, a challenge to the panel could have been successfully interposed on the ground of the bias of the sheriff (Pen. Code, § 1064; People v. Le Doux, supra), and obviously, it was in the interest of and for the special benefit of the defendant, and in his interest and for his benefit alone, that the order appointing the coroner to take the place of the sheriff as the server of the special jury process was made—a duty which conferred upon the coroner, as it is by law conferred upon the sheriff, where he summons a special venire, the power of selecting the persons to be returned under the process. And so it is to be said that, even if there was an irregularity in the proceedings culminating in the orders complained of, particularly that devolving upon the coroner the duty of serving the special process, in point of fact the defendant could not have been prejudiced by that order or the manner in which it was made, unless it transpired that the coroner, too, was biased and prejudiced against the defendant. There was, though, no showing that the coroner was biased against the accused or that he was disqualified legally from serving the summons. In fact, the defendant made no extrinsic showing whatsoever in support of his challenge to the panel. In other words, the defendant did not show, by affidavits or otherwise, except by reference to the minutes of the court, what actually took place when the orders were made, if, in fact, anything more than said minutes disclose did then take place.

[22] The whole proceeding involved in this discussion was merely one of procedure. The Constitution, it is true, guarantees the right of trial by jury as that institution was known to the common law, and thus the right inheres in all criminal cases amounting to felonies. That right cannot, of course, be denied to a defendant in such a case by legislative fiat, nor can the Legislature by the procedure it adopts for the enforcement of the right impair its exercise in any degree. But the Legislature may regulate the procedure by which the right is enforced or exercised. All that a defendant in a criminal or a litigant in a civil case is entitled to, so far as that right is concerned, is to a trial by a fair and impartial jury. He is entitled to no more—he cannot be denied any less. The provisions of the law authorizing the selection of special venires and the appointment of the coroner or an elisor to summons such special veniremen are designed to preserve to litigants in civil and defendants in criminal cases the full efficacy of the constitutional guaranty of a jury trial. Those provisions and the method of enforcing them are, as stated, purely procedural in their nature, and this the Legislature is legally competent to regulate, and has so regulated it as not to impinge in the least upon the basal right. It is plainly manifest in this case that the action of the court in the proceeding with which we are here concerned, particularly in the matter of committing to the coroner of the county the duty of summoning the special jury, was, as before stated, not only in the interest of justice but for the sole benefit of the defendant, who was entitled to have the jury by which he was to be tried composed of persons fair and impartial as to his case. He was therefore entitled, not only as a matter of common justice, but by the express mandate of the law, to have the special jury selected by a person not directly interested in the prosecution of the case against him—not by one who the law declares is to be regarded as entertaining bias and prejudice against him. And the fact that the court, having knowledge of the situation, and to the end that the party serving the process for the special venire would be wholly disinterested in the case and not biased and prejudiced against the accused and that the defendant might be given that fair and impartial trial to which he was entitled, "took time by the forelock" and in advance of the day fixed for the trial provided for the special jury and the summoning thereof in the manner indicated, cannot be said to be more than an irregularity in procedure, even if that, but if that, the only effect thereof was, without detrimentally affecting the substantial rights of the accused, to save the time, trouble, and delay which would necesariy have attended similar action after the trial had been begun and while in progress; for safely may we venture the conjecture that had the sheriff instead of the coroner selected the special venire, either before or in the course of the trial, the defendant, upon the return of the process by that official, would have challenged the panel on the ground of the bias of the sheriff and, of course, under the circumstances of this case as revealed by the record of the trial, the court would have been required to sustain the challenge.

[23] Nor can it avail the defendant anything by a consideration of the points under discussion upon the theory, as assumed by him, that, in order to clothe the court with authority to make the orders in question, it was necessary that a showing be made by affidavits or some other mode of proof of the existence of the conditions upon which only may a special venire be ordered and the coroner designated to serve the process for such venire because of the disqualification of the sheriff. If such a showing be required in such cases, then the reply to the defendant's position that the court was without authority to make said orders is, as be-

fore pointed out, that the record does not affirmatively disclose or show whether any other showing than that indicated by the minutes above referred to was or was not made. The transcript does not contain a statement that the minutes contained and revealed the only showing that was made in the proceedings eventuating in the making of the orders. It follows, then, that it must be presumed, as we declared in the original opinion, that all the legal steps essential to the giving the court the right to exercise and apply its jurisdiction to order a special venire and to find that the sheriff was disqualified and thereupon to appoint the coroner to summons the special venire were regularly taken. The presumptions applicable to this situation (we are now merely assuming that the position of defendant as to the showing that should be made in such matters is sound) are that official duty has been regularly performed, and that a court or judge, acting as such, was regularly acting in the lawful exercise of its or his jurisdiction and of the power vested by law in it or him as to any particular proceeding. Code Civ. Proc. § 1963, subds. 15 and 16. In other words, if the law contemplates that there must be, before the court is authorized to order a special venire and to designate the coroner as the server of the process for such venire in the place of the sheriff, some showing by way of proof of the existence of conditions justifying the making of such orders, then, in the absence of an affirmative statement in the record that the minutes of the proceeding resulting in the making of the orders contain all the showing that was made and upon which the orders were predicated, the presumption would be that whatever showing was required by the law to be made as a prerequisite to the making of the orders was regularly and duly made.

[24] As to the declaration of the defendant that he was not present in court when said orders were made and that, consequently, the orders were void, we first desire to be understood as not deciding that his presence at the time mentioned was either necessary or unnecessary. It is to be suggested that parties to civil actions or the defendants in criminal cases are never present or by law required to be present when a regular panel of jurors is drawn, and we mention this only for the purpose of showing that the Legislature never regarded the presence of the parties litigant in court when that proceeding is carried on as important or as affecting their substantial rights at the trial. Generally, however, when a special venire is ordered the trial is in progress, and it may be that the action of the court in ordering a special venire and in appointing the coroner to serve the process for the special jury, where it appears that the sheriff is disqualified from performing that service, is to be regarded as a part of the trial. But, however that may all be, and without deciding whether the defendant should or should not be present in court when such a proceeding is had, the reply to the point predicated upon that proposition in this case is to be found in what we have above had to say regarding the ordering of a special venire and the appointment of the coroner to summon it, since there is no affirmative showing in the record that the defendant was not in court at the time referred to. The record neither shows that he was then present nor shows that he was not present in court. Therefore, if his presence in court at that time was essential to the validity of the proceedings, upon the presumption of the due regularity of the proceedings, it must be assumed, in the absence of an affirmative showing to the contrary, that he was present in court when the orders were made.

[25] We may suggest, in conclusion, that assuming that the proceedings complained of were irregular, we can conceive of no reason why section 4½ of article 6 of the Constitution is not applicable; the said proceedings involving only a matter of procedure and it appearing to our minds, after an examination of the entire record, including the evidence, that a miscarriage of justice has not resulted therefrom.

The petition for rehearing is denied.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

51 Cal. App. 307

PEOPLE ex rel. JONES et al. v. CARDIFF IRR. DIST. OF SAN DIEGO COUNTY.

(Civ. 3403.)

(District Court of Appeal, Second District, Division 1, California. Feb. 7, 1921. Hearing Denied by Supreme Court April 7, 1921.)

1. Waters and water courses ⊂=224—Irrigation district a municipal corporation, though duties and powers are limited.

The legal status of an irrigation district is that of a municipal corporation, although its duties and powers are of narrower scope in the subjects of their action than in the case of a city or other municipal organization.

2. Waters and water courses ⊂=225—Law as to proceedings for organization of irrigation districts to be liberally construed.

So far as proceedings for the organization of irrigation districts are concerned, a reasonably liberal rule of construction should be adopted to carry out the wise purposes of the law, and the same rule of construction should be applied to provisions of the statute which cover the changing of boundaries of a district.

and the annexation of additional territory (Irrigation District Act, §§ 85–97).

3. Waters and water courses ⟸226—Irrigation district without water supply may legally enlarge boundaries.

An irrigation district, organized under the Irrigation District Act and amendments thereto (St. 1897, p. 254, St. 1915, p. 1367, St. 1917, p. 751, Deering's Gen. Laws 1915, p. 701, and Consolidated Supplement of 1917–19, p. 1282), could change its boundaries and enlarge the district under sections 85–97, although it did not own or possess any water supply for irrigation purposes, original proposed source having failed or having been abandoned, and new sources of water supply being contemplated.

4. Constitutional law ⟸278(2)—Waters and water courses ⟸226—Owner of property being taken into irrigation district not entitled to notice under due process of law provision of Constitution.

The requirement of the Constitution as to due process of law does not give a property owner an absolute right to notice and hearing before his property may be included within the limits of an irrigation district on petition for change of boundaries under Irrigation District Act, §§ 85–97.

On Hearing in Supreme Court.

5. Waters and water courses ⟸226—No jurisdiction in board of directors under petition for change of boundaries of irrigation district where land taken in was not contiguous.

A petition under Irrigation District Act, §§ 85–97, for change of boundaries and inclusion of additional lands in an irrigation district did not vest in the board of directors any jurisdiction over the proceeding where the description of the boundaries of the land proposed to be included, as set forth in the petition, clearly exhibited the fact that the lands were not contiguous and did not, taken together or at all, constitute one tract of land, and an order of inclusion, as well as the intervening steps in the proceeding, were void.

6. Waters and water courses ⟸226 — Lands attempted to be included in irrigation district held not contiguous.

Parcels of land separated by a lagoon from a quarter of a mile to three-quarters of a mile in width were not contiguous, and a petition, under Irrigation District Act, §§ 85–97, attempting to include them in an existing irrigation district, did not give board of directors any jurisdiction, and an order of inclusion and intervening steps in the proceeding were void; the nature of the land underlying the lagoon being such that it could not appropriately be made part of an irrigation district, even though the petition included such lagoon in its description.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Quo warranto by the People of the State of California, on the relation of George H. Jones and others, against the Cardiff Irrigation District of San Diego County. Judgment for defendant, and relators appeal. Reversed in the District Court of Appeal, and hearing denied in Supreme Court.

U. S. Webb, Atty. Gen., S. D. O'Neal, of San Diego, and Charles H. Taylor, Haines & Haines, of San Diego, for appellants.

Charles C. Crouch, Claude L. Chambers, and Crouch & Chambers, all of San Diego, and Henry J. Stevens, of Los Angeles, for respondent.

CONREY, P. J. Quo warranto. By order of the board of supervisors of the county of San Diego, under date of March 20, 1916, respondent herein was organized as an irrigation district, in compliance with the provisions of the California Irrigation District Act and amendments thereto. Stats. 1897, p. 254; Stats. 1915, p. 1367; Stats. 1917, p. 751; also in Deering's Gen. Laws, 1915, p. 701; and Consolidated Supplement of 1917–19, p. 1282. As originally formed, the district contained about 1,000 acres of land. By subsequent proceedings the area thereof was reduced to 616.8 acres. Thereafter, on the 14th day of October, 1918, a petition was filed with the board of directors of the district praying for a change of boundaries of the district so as to include therein the lands described in the petition, which additional lands contained 25,751 acres. This petition was signed by the owners of more than one-half of the territory which they sought to have included within the district. Thereafter, on the 23d day of December, 1918, the board of directors of the district passed its resolution No. 44, purporting to change the boundaries of the district by including therein said additional area, in accordance with the prayer of said petition. All of the proceedings, from the filing of the petition to and including the final order of inclusion, were in accordance with the form of such proceedings as set forth in section 85 et seq. of the California Irrigation District Act. This action is prosecuted for the purpose of obtaining a judgment that said petition for change of boundaries and inclusion of land and all of the proceedings had thereunder are null and void, that the defendant is unlawfully exercising the franchise of an irrigation district over the lands described in the petition, and that defendant be ousted and excluded from exercising any power or franchise as an irrigation district over said lands or any part thereof. Judgment was entered in favor of the defendant, and the plaintiffs appeal therefrom.

Appellants' first point, as stated by their counsel, is that the thing attempted to be accomplished by the inclusion proceedings is not, within the meaning and intent of the Irrigation District Act, the enlarging of an existing district, but is in all substantial respects the creation of a new district. In ef-

fect, the contention is that at the time of filing the annexation petition and during the pendency of the proceedings thereunder, notwithstanding that respondent had been organized as an irrigation district, it was not in reality an existing district, and therefore was not a district which the law intended to vest with authority to increase its territory by such proceedings as those here challenged by appellants. The claim is that the irrigation enterprise on which the original organization was based had wholly failed; that the district did not own or possess any water supply for irrigation purposes; that the district had become a mere legal shell, without substance and fit only for dissolution; and that a district in that condition is not legally capable of saving its existence by bringing in other lands and thereby acquiring actual capacity to function as an irrigation district by the development of new sources of water supply not contemplated in the original organization.

The proceedings which must be followed in the organization of an irrigation district are set forth in the first 12 sections of the Irrigation District Act. Those proceedings are conducted by and under the supervision of the board of supervisors of the county in which the district is to be located. In the course of those proceedings the board of supervisors is empowered to receive and consider a report from the state engineer concerning the supply of water available for the use of the proposed district, and is authorized to make such changes as it may deem advisable in the boundaries proposed by the petition presented to it by the required number of property owners within the proposed district. When the board of supervisors, in the exercise of the authority vested in it by the statute, shall have made the necessary preliminary orders, it is required to give notice of an election, at which the electors within the boundaries of the proposed district shall by their votes determine whether or not the district shall be organized. It is only after such an election is duly canvassed and a declaration of the result duly made by the board of supervisors that, if the necesssary favorable vote has been obtained, the organization of the district becomes complete.

Sections 85 to 97 of the same act provide for changing the boundaries of an irrigating district and the inclusion of other lands therein. None of these proceedings are submitted to the board of supervisors of the county. Inclusion proceedings are initiated by petition filed with the board of directors of the district. The required notice of such filing and of the proposed hearing thereon is given and published by the secretary of the board of directors. All of the successive steps of the process are conducted by that board or under its supervision, and all orders made, including the final order of inclusion, are made by the board of directors. The election, which under certain contingencies is required to be held to determine whether the boundaries of the district shall be changed, is an election solely by the electors within the existing district. The argument for appellants rests in part upon these and other striking differences between the proceedings for the organization of a new district and the proceedings for the inclusion of lands by annexation thereof to an existing district.

The lands constituting the territory of the Cardiff irrigation district, as it existed prior to these inclusion proceedings, are located near the shore of the Pacific Ocean. The lands which are claimed to have been annexed lie south, east, and north of the old district and extend along the coast in such form that there is a distance of about 18 miles between the southerly limits and the northerly limits thereof. Section 1 of the Irrigation District Act, in designating the necessary conditions on which the organization of an irrigation district may be proposed, provides for the presentation of such proposition by a required number of holders of "lands susceptible of irrigation from a common source and by the same system of works (including pumping from subsurface or other waters)." Section 2 requires that the petition "shall set forth the boundaries of the proposed district, and also shall state, generally, the source [or sources which may be in the alternative] from which said lands are proposed to be irrigated, * * * and shall pray that the territory embraced within the boundaries of the proposed district may be organized as an irrigation district under the provisions of this act." In the petition for the formation of the Cardiff irrigation district it was stated:

"That the source from which the said lands are proposed to be irrigated are from the storage of surface water and from water-bearing sands and underground streams and percolating waters of the Escondido creek at a point situate two miles distant from the said irrigation district, or to be utilized by means of wells, reservoirs, pumping and distributing plants, and storage and distributing reservoirs to be acquired and installed by the said district, or water to be leased or purchased for delivery into storage and distributing systems of the said district from persons, companies, associations, or corporations furnishing water for irrigation to consumers."

Prior to the time of the inclusion proceedings respondent abandoned its plan for obtaining water from the Escondido creek source. It had acquired a pumping plant and three wells on the Encinitas creek, located about two miles away from the Cardiff village. This water was used for domestic and garden purposes in the village, but not for irrigating lands set to crops. In accordance with the evidence of these facts the trial court determined, by finding XIII:

"That the said Cardiff irrigation district before the inclusion of said annexed territory did

not own or possess any water supply or any system of waterworks or any means or source of obtaining water for irrigation of its own area or any part of said area, save and except that said irrigation district possessed a pumping plant from which water was and is pumped from wells sufficient in quantity to supply water for domestic and garden use to a part, but not all, of the platted town lots of the unincorporated town of Cardiff, which was included within said irrigation district; that said Cardiff irrigation district, before the inclusion of said annexed land, did not own or possess water or source of water supply for the irrigation of said lands described in said petition and sought to be annexed, or any part thereof; that the only sources of water supply that could be obtained for the irrigation of any part of said annexed territory are outside of and several miles distant from said original Cardiff irrigation district; and that said Cardiff irrigation district has not now and never had or possessed any right or interest in said sources of water supply."

Appellants argue that the plain intent of the sections of the act which relate to inclusion is that the only legitimate purpose of a petition of landowners to have their land included in an irrigation district is that they may share in the water supply and works for the irrigation of land; that therefore it is only irrigation districts having adequate water supply and works to irrigate additional territory which have the capacity to entertain or the competency to grant any petition to enlarge their boundaries to include new territory; that an inclusion proceeding under the statute is contractual, and the subject of the contract is an admission to rights in an existing water system of the district; that, since this district has no irrigation system, there exists no subject-matter of the contract, and therefore no basis for the proceeding.

Pursuing their argument further, appellants direct attention to the provisions of the statute which outline the procedure subsequent to filing of a petition for such inclusion of additional territory; and they contend that the effect of such procedure, if enforced, is such that nonpetitioning owners of land within the territory sought to be brought into the district will be deprived of their property, or have burdens imposed thereon, without their consent and without due process of law. In support of this contention it is claimed that the procedure thus required and observed did not give to nonpetitioning owners any notice of the proposed inclusion of their lands; did not vest in the board of directors any jurisdiction to determine whether those lands would be benefited by being included in the district; did not provide for such nonpetitioning landowners any opportunity to vote upon the proposition; and, further, that the board of directors was disqualified, and particularly that Cullen, the president of the board, was disqualified to act in the matter, because Cullen, as owner of some of the land sought to be included, was the chief promoter of the plan and was one of the signers of the petition. All of these claims are contested, although Cullen's relation to the matter is admitted to have been in fact as stated. Assuming, however, for the moment, that the statute does not provide for notice to nonpetitioning owners, or give them any opportunity to be heard upon their objections to the matter proposed, respondent relies upon the fact that the district is a public and municipal corporation, and upon those numerous decisions which hold that in the creation of such corporations, and in annexation of territory to such corporations, laws which omit to provide for notice and a hearing and judicial determination of the question of benefits do not infringe upon the right of the landowner to be protected against the taking of his property without due process of law; that it is only when the corporation, by some process of taxation or assessment, seeks to impose a lien upon land, or to collect such tax or assessment, that the property owner may insist upon the right to have the validity thereof subjected to judicial inquiry.

[1-4] It is no longer open to doubt that the legal status of an irrigation district is that of a municipal corporation. Although its duties and powers are of narrower scope in the subjects of their action than in the case of a city, or other general municipal organization, nevertheless the affairs concerning which such district does act are those "of a public corporation to be invested with certain political duties which it is to exercise in behalf of the state." In re Madera Irrigation Dist., 92 Cal. 296, 323, 28 Pac. 272, 278 (14 L. R. A. 755, 27 Am. St. Rep. 106). This being so, it has been held that—

"So far as proceedings for the organization are concerned, we think that a reasonably liberal rule of construction should be adopted to carry out the wise purposes of the law." Irrigation Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825.

For like reasons, the same rule of construction should be applied to the provisions of the statute which cover the changing of boundaries of a district and the annexation of additional territory. The Irrigation District Act provides (section 85):

"The boundaries of any irrigation district now organized or hereafter organized under the provisions of this act may be changed in the manner herein prescribed."

Nowhere is there any stated limitation upon the exercise of the right thus given other than that there must be an existing district to which the annexation or inclusion may be made. Whether the purpose contemplated in such inclusion proceeding looks toward an extension of water service from the district water supply to the additional territory, or whether the purpose be to provide for the district sources of supply which otherwise it

could not have—under either of these conditions, or both of them, if we are to take the statute as it reads—the power is equally given to extend the limits of the territory within which such public corporation lives, moves, and has its being. As for the manner in which these things are to be done, the Constitution of California provides that corporations for municipal purposes shall be organized under such general laws as the Legislature shall provide. We have before us the procedure which the Legislature has prescribed. So far as the constitutional objection herein presented by appellants is concerned, the short and sufficient answer is given in People ex rel. v. City of Ontario, 148 Cal. 627, 632, 84 Pac. 205, 208:

"We do not understand that the requirement as to due process of law gives a property owner an absolute right to notice and hearing before his property may be included within the limits of a municipality."

Without attempting to offer an extensive review of the leading decisions on the subject—a work which has been done thoroughly and often by courts of the highest authority—we hold that the proceedings in question here, so far as they have relation to the constitutional rights relied upon by counsel for appellants, have not been conducted in violation of those rights.

Section 86 of the Irrigation District Act reads as follows:

"The holder or holders of title, or evidence of title, representing one-half or more of any body of lands adjacent to the boundary of an irrigation district, which are contiguous, and which, taken together, constitute one tract of land, may file with the board of directors of said district a petition, in writing, praying that the boundaries of said district may be so changed as to include therein said lands. The petition shall describe the boundaries of said parcel or tract of land, and shall also describe the boundaries of the several parcels owned by the petitioners, if the petitioners be the owners, respectively, of distinct parcels, but such descriptions need not be more particular than they are required to be when such lands are entered by the county assessor in the assessment book. Such petition must contain the assent of the petitioners to the inclusion within said district of the parcels or tracts of land described in the petition, and of which said petition alleges they are, respectively, the owners; and it must be acknowledged in the same manner that conveyances of land are required to be acknowledged."

Appellants contend that the petition for inclusion of these lands as part of the Cardiff irrigation district is void on its face for the reason that the description of the boundaries of the land proposed to be included, as set forth in the petition, clearly exhibits the fact that the lands to be included are not contiguous and do not, taken together, or at all, constitute one tract of land. If the fact be as thus claimed it must result that the filing of the petition did not vest in the board of directors any jurisdiction over the proceeding, and that the order of inclusion, as well as the intervening steps in the proceeding, must be held to be void. In People v. City of Monterey Park, 40 Cal. App. 715, 181 Pac. 825, this court had under consideration certain proceedings for the annexation of land to the city of Alhambra; the proceedings being conducted under a statute providing for the annexation of inhabited territory. From the description contained in the annexation petition it appeared that several distinct portions of the territory were not inhabited. Therefore it was held that the petition was on its face not sufficient, and for that reason no valid annexation proceeding was pending. It was contended by appellants in that case that the defense based upon the validity of the annexation proceedings could not be maintained because such defense came by way of collateral attack in a quo warranto case. But the court held, for reasons there stated more at length, that such claim of want of jurisdiction may be asserted in an action of this nature where the facts which make the proceedings void appear in the petition by which they were initiated.

It is contended by appellants that this area of 25,751 acres, sought to be annexed to the Cardiff irrigation district, consists of not less than six large areas comprised in the description contained in the petition (and, for illustrative purposes, shown on the map received in evidence herein), separated from each other by five natural features consisting of deep indentations of salt water lagoons of the Pacific Ocean. These areas for convenience are numbered consecutively from 1 to 6. Nos. 1 and 2 lie south of the old district, and the other divisions lie north and east thereof. Assuming, without deciding, that areas numbered 1 and 2 might reasonably be held to constitute one tract of land, and that the remaining areas taken together might constitute one other tract of land, it seems clear to us that Nos. 1 and 2 are in all respects a different tract of land from the remaining portion of the territory sought to be included. This is so by reason of the fact that there is no connection whatever between parcels 2 and 3, which, on the contrary, are so separated from each other that we are unable to find any justification for the claim that they should be considered as one parcel or body of land. While the description, as written in the petition, is continuous, we find that the calls thereof leave parcel 2 and run around the southeasterly boundary of the old district about a third of a mile before they touch and begin to run around the boundaries of parcel 3. The connecting line thus written into the description bounds no part of the lands sought to be included. As to them it

is purely a mathematical abstraction, unrelated to any material thing. Covering nearly the entire width of the district at that point, parcels 2 and 3 are separated by a lagoon, known as the San Elijo lagoon, which appears to be, roughly speaking, from a quarter of a mile to three-quarters of a mile in width. Counsel for respondent point out that the nature of the land underlying this lagoon is such that it could not appropriately be made part of an irrigation district; that, if it had been included in the district, justice would have required that it be immediately excluded therefrom by proceedings for that purpose, and argue that therefore the lagoon should not count as an element in determining the contiguity or noncontiguity of the lands north and south thereof. We must reply that the question here to be answered should not turn upon the narrowness or liberality of definition of the word "contiguous." The statute was carefully written so as to govern the use of that word by providing for the inclusion in the district of only such lands as "are contiguous and which taken together constitute one tract of land." And since these lands, as they lie, are separated by a great and conspicuous natural feature, to such a degree that it is admitted that the intervening territory could not appropriately have been brought within the district, we are constrained to hold that they are not "one tract of land" within the meaning of the statute. To the suggestion that this would be a very technical construction of the words used, the obvious reply is that the opposite construction might easily frustrate the purpose of the limitation expressed in the right of petition which the statute has granted. It was not intended that the more numerous owners of one parcel of land should have the power, on their own volition, to initiate a proceeding to bring in their less numerous neighbors in an entirely different parcel, jointly involving all of them together in an annexation petition. Our conclusion is that the board of directors did not acquire jurisdiction to proceed on the petition filed, and that the order of inclusion is void.

The judgment is reversed.

I concur: JAMES, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [5, 6] In denying a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, we desire to say that our denial is based solely upon that portion of the opinion which deals with the point upon which the judgment of the superior court is reversed, and entirely without regard to the views of the District Court of Appeal as to other questions discussed, concerning which we are not to be understood as intimating an opinion.

The application for a hearing in this court is denied.

All concur, except SLOANE, J., absent.

51 Cal. App. 304

GRAY v. CARDIFF IRR. DIST. OF SAN DIEGO COUNTY et al. (Civ. 3404.)

(District Court of Appeal, Second District, Division 1, California. Feb. 7, 1921. Hearing Denied by Supreme Court April 7, 1921.)

1. Waters and water courses ⊜226—Individual may not attack validity of enlargement of irrigation district having at least a de facto existence.

An action could not be maintained by a landowner individually or on behalf of other landowners to have it determined that proceedings for the enlargement of an irrigation district were void, and that an assessment levied by such district upon plaintiff's property in consequence was invalid, since such an action may only be maintained at the instance of the people of the state; such a cause of action not relating to matters of irregularity in the proceedings of the district for which property owners within the district might have a right of action under Irrigation District Act, §§ 68, 69 (Deering's Gen. Laws 1915, p. 696).

On Hearing in Supreme Court.

2. Appeal and error ⊜1084—Moot questions not decided on petition for hearing in Supreme Court.

On petition for a hearing in the Supreme Court in bank after a decision by the District Court of Appeal, a hearing will be denied where the case has become moot in view of a decision in a companion case.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by John F. Gray against the Cardiff Irrigation District of San Diego County and others, as directors of said district. From a judgment for defendants, plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

George H. Stone and Haines & Haines, all of San Diego, for appellant.

Claude L. Chambers, of San Diego, and Henry J. Stevens, of Los Angeles, for respondents.

PER CURIAM. This action was brought by plaintiff to have it determined that proceedings for the enlargement of defendant irrigation district were void, and that an assessment levied by the defendant district upon plaintiff's property, in consequence, was

invalid. Plaintiff purported to sue on his own behalf and also on behalf of approximately 1,000 landowners situated similarly to himself and having property within the Cardiff district, upon which an assessment had been levied. The grounds alleged, generally stated, were that fraud had been committed by the promoters of the plan by which the boundaries of the original Cardiff irrigation district had been extended to include the land of the plaintiff and of others. We need not here enter into a more particular statement of the grounds of the petition. A demurrer was interposed to the complaint, and the point was urged, among others, that plaintiff had not the capacity to sue for the relief demanded, for the reason that an action such as this could only be maintained at the suit of the people of the state. The court sustained the demurrer, and the plaintiff appealed from the judgment of dismissal which followed.

[1] We think that the court did not err in sustaining the demurrer. From the allegations of the complaint it appears that the proceedings for the annexation of territory to the Cardiff irrigation district were regular in form, and that the district had assumed to exercise authority over the annexed land. The district had at least a de facto existence, and that was enough to make it immune from an attack by an individual property owner or any number of such owners. The cause of action does not relate to matters of irregularity in the proceedings of the district, for which cause the property owners within the district might have a right of action under sections 68 and 69 of the Irrigation Act. Deering's Gen. Laws 1915, p. 696. It calls into question the existence of the district itself and denies the right of the district to exercise its corporate authority over the annexed territory. Such a cause of action may only be maintained at the instance of the people of the state. Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514, 777; Reclamation District v. Turner, 104 Cal. 334, 37 Pac. 1038; Hamilton v. County of San Diego, 108 Cal. 273, 41 Pac. 305; Keech v. Joplin, 157 Cal. 1, 106 Pac. 222. In another case, People v. Cardiff Irrigation District, 197 Pac. 384, this day decided, Civil No. 3403, which was properly brought as a quo warranto proceeding, we have considered the main questions affecting the same district, which is attempted to be raised on this appeal. As to this action, however, it is plain that the plaintiff has not the capacity to sue for the relief demanded.

The judgment is affirmed.

Opinion of Supreme Court in Bank Denying Hearing.

[2] Whether or not under some circumstances a property owner included in an irrigation district may attack an assessment by the district on the ground that his property was erroneously included in the district in the first instance, or whether, if this can be done under some circumstances, such circumstances exist here, need not be determined. The case is now moot in view of the decision of the District Court of Appeal in the companion case of People v. Cardiff Irrigation District, L. A. No. 6463, 197 Pac. 384, holding upon quo warranto that the defendant district had not properly been enlarged to include the plaintiff's land, a decision which has now become final by our refusal this day to grant a hearing before this court.

The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, is denied.

All concur, except SLOANE, J., absent.

51 Cal. App. 672

WESTERN INDEMNITY CO. v. WASCO LAND & STOCK CO. (AUSTIN, Intervener.) (Civ. 3485.)

(District Court of Appeal, Second District, Division 1, California. March 5, 1921. Hearing Denied by Supreme Court May 2, 1921.)

1. Highways ⊂⊃166—Where several vehicles are pulled by a tractor, red light should be exhibited at rear; "motor vehicle."

Under Motor Vehicle Law, § 1, declaring that the term "motor vehicle" shall include all vehicles propelled otherwise than by muscular power except vehicles run on rails or tracks and that any motor vehicle drawing a trailer shall be deemed an automobile, a train of vehicles drawn by a motor tractor must be deemed a motor vehicle and a red light should be exhibited on the rear vehicle.

2. Highways ⊂⊃184(3)—Whether driver of vehicle train drawn by tractor was negligent as to rear light or in failing to leave road entirely held for jury.

In an action for injuries received when the motor car plaintiff was driving struck a vehicle train drawn by a tractor to the side of the road, whether the driver's failure to light the rear vehicle with a red light, or to leave the paved roadway entirely when the tractor failed to work satisfactorily was negligence, *held* for the jury.

3. Master and servant ⊂⊃404—Subrogated compensation insurer's policy admissible.

Where an insurance carrier who paid compensation on behalf of the injured employee brought an action against a third person on the ground that it was subrogated to the employee's cause of action, the policy was admissible in evidence.

4. Appeal and error ⊂⊃1058(2)—Exclusion of question harmless error in view of other testimony of witness.

In an action by an insurance carrier which had paid compensation to an employee, brought

against a third person asserted to have negligently caused the employee's injury the exclusion of the question whether the employee had been receiving after the accident more or less money than before was harmless, where the witness had already testified that when he went back to work he received the same wages as before the injury.

5. **Appeal and error ⊂⊃702(1)—Refusal of instructions cannot be reviewed where charge was not brought up.**

The refusal of instructions cannot be reviewed where neither in the briefs or in the typewritten record was there a full statement of the charge.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by the Western Indemnity Company, a corporation, against the Wasco Land & Stock Company, in which Wilbur Austin intervened. From a judgment for plaintiff, defendant appeals. Affirmed.

E. J. Emmons, of Bakersfield, for appellant.

Anderson & Borton and R. B. Lambert, all of Bakersfield, for respondents.

JAMES, J. This appeal is taken from a judgment entered in favor of the plaintiff against the defendant corporation for the sum of $2,727.50. The recovery was awarded because of injuries suffered by one Austin through the alleged negligence of defendant corporation. Austin was employed by a laundry company doing business in and about the city of Bakersfield, and, while engaged in his employment as a driver of a motor vehicle, suffered the injuries for which compensation was allowed. The plaintiff, Western Indemnity Company, was the insurance carrier for the laundry company employer, and assumed the liability of the latter toward the employee. Upon making such assumption of liability it became subrogated to the rights of the insured, which included the right to bring action against the corporation alleged to have been at fault.

The contentions advanced by appellant in the brief of its counsel are: (1) The verdict of the jury was not warranted by the evidence; (2) that the court erred in rulings upon the introduction of evidence; (3) that the court erred in its instructions to the jury. A consideration of the first proposition requires a brief statement to be made of the evidence offered in support of the plaintiff's claim. In the month of January, 1917, an employee of appellant was traveling on a public highway toward the city of Bakersfield. He was in charge of a tractor motor which was propelled by a gasoline engine. To this motor was attached, first, a wagonload of grain, and behind this an oil wagon, and to the latter a cookhouse. The cookhouse was built upon a truck platform. As evening came on the engine of the tractor failed to work satisfactorily, and the employee of appellant conducted his train of vehicles to the side of the highway, leaving, however, the left wheel of the tractor upon the paved portion of the highway; the tractor wheels being 28 inches wide. From front to rear the train of vehicles covered a distance of about 85 feet. When the train was stopped, as has been noted, with the left wheel of the tractor upon the paved highway, the rear of the train and the left-hand corner of the cookhouse projected to a distance of about 3½ feet upon the pavement. The paved highway at that point was of sufficient width only to allow two vehicles to pass conveniently with a 2-foot clearance between. The accident, of which a description follows, occurred at about 7 o'clock in the evening. It was dark and foggy. The employee of appellant had before that time lighted three lanterns, one of which he placed at the top of the engine, one in the middle of the second wagon, and one on the left-hand corner of the cookhouse or last vehicle of the train. These lanterns were ordinary oil lanterns and emitted a white light. No colored lights were set on any part of the train.

[1] It becomes important here to consider whether the law requiring the display of lights upon motor vehicles demanded that a colored light should have been placed at the rear of the train of vehicles. Appellant contends that such was not the requirement of the law, but we think as to that matter it is mistaken. Section 1 of the motor vehicle law, Statutes of 1915, p. 397, in defining what shall be considered a motor vehicle, declares that such designation shall include all vehicles propelled otherwise than by muscular power, except vehicles which run upon rails or tracks, and provides further:

"That any motor vehicle which shall be operated on the highway drawing a trailer or other vehicles shall be deemed to be an automobile for all the purposes of this act."

Other parts of the act required the display of a red light at the rear of all motor vehicles during the night time.

[2] At the outset, then, it must be considered that appellant was negligent in not displaying a red light at the rear of its motor train; and this condition alone furnishes a sufficient reason why, upon the evidence, this court must conclude that the verdict of the jury should be sustained. Austin, the injured party, testified that he was driving the automobile of the laundry company on a return trip to the city of Bakersfield on the evening in question; that just before reaching the point where the train of appellant was standing the glare of a passing automobile struck upon the windshield; that he ob-

served no lights ahead of him and that as the automobile mentioned passed him he observed the rear of appellant's train immediately in front, and too late to avoid a collision with it. Appellant insists that under this statement of the complainant it is made to appear that the accident was caused wholly by the glare from the headlights of the automobile which passed Austin immediately before the occurrence of the collision. We are not authorized and neither was the jury required to draw such conclusion from the evidence. Had a red light been exhibited on the rear of appellant's train, for aught that appears, the warning of this light might have been made appreciable to Austin in time to have stopped his vehicle and avoided a collision. In a consideration of the evidence another important matter presents itself: It was shown that appellant's driver might have, without the contour of the ground preventing him from so doing, removed the train of vehicles entirely off the paved portion of the roadway before stopping. He gave as his reason for not so doing that the ground was somewhat wet and he was afraid the tractor wheels might slip. It was for the jury to determine whether his act in this, as in other regards, was consistent with the exercise of a reasonable degree of care. The evidence, in our opinion, was sufficient to sustain the verdict.

[3] Appellant objected at the trial to the introduction of the policy of insurance issued by the plaintiff to the employer of the injured person. We think there was no error in the ruling of the court in allowing the document in evidence. One of the conditions which was a prerequisite to the right of the plaintiff to appear in the action was that it was the insurance carrier for the laundry company.

[4] Appellant, on cross-examination of the witness Austin, inquired as to whether Austin had been receiving after the accident less or more money than he had received before. The objection was sustained. Assuming that the direct examination of this witness was given such a scope as to include the subject-matter of the question objected to, the error was harmless. This witness had, before the question was asked, already testified that when he went back to work he received the same wages as he had received before the accident.

[5] Error is predicated upon the further claim that the court should have read to the jury certain instructions offered by appellant. It would be useless to enter upon any analysis of the instructions offered to determine whether they stated a relevant proposition of law, for the reason that nowhere in the briefs, nor in fact in the typewritten record brought up, is there a full statement of what the charge was as given by the court. It may well be the fact that the court sufficiently covered all the propositions contended for in the instructions offered, in other instructions given.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

51 Cal. App. 569

RHODES v. FIRESTONE TIRE & RUBBER CO. (Civ. 3526.)

(District Court of Appeal, First District, Division 1, California. Feb. 25, 1921. Rehearing Denied March 25, 1921. Hearing Denied by Supreme Court April 25, 1921.)

1. Municipal corporations ⟸706(5)—Evidence held to justify finding driver of defendant's truck responsible for collision.

In an action for damages caused by accidental collision between auto trucks of the parties, evidence *held* sufficient to justify the conclusion of the trial court that the driver of defendant's truck was responsible for the collision.

2. Negligence ⟸72—Person in peril not required to exercise normal care.

A person in great peril, where immediate action is necessary to avoid it, is not required to exercise all the presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances.

3. Evidence ⟸121(13)—Statement of driver of defendant's auto truck properly admitted as res gestæ.

In an action for damages caused by an accidental collision between the auto trucks of the respective parties, a statement of the driver of defendant's truck, made practically simultaneously with the accident, was properly admitted as part of the res gestæ.

4. Trial ⟸59(2)—Order of proof discretionary.

The order of proof was within the discretion of the trial judge, particularly as to the admission of evidence of the cost of repairs of plaintiff's truck collided with by defendant's without first showing the value of the truck immediately after the accident.

5. Damages ⟸113—Measure of damages for injury to personalty is diminution in value unless repairs will cost less.

Where personal property, as an automobile or motor truck, has been negligently injured, but is susceptible of repairs, the measure of the owner's damage is the difference in value immediately before and immediately after the injury, subject to the proviso that, if it can be entirely repaired at a less expense than the diminution in value because of the injury, the measure of damages is the reasonable cost of repairs.

6. Damages ⟸163(2)—Burden on defendant to show diminution in value less than cost of repairs.

In an action for damages to plaintiff's auto truck in a collision with defendant's, if the

amount of the repair bill, considered alone, was not the true and exclusive measure to apply in the ascertainment of the damages, it was incumbent upon defendant to have offered proof showing that the diminution in value on account of the injury would be less than the cost of such repairs, thus limiting the damages to a sum not greater than the diminution in value.

7. Damages ⊂⊃163(2)—Showing of cost of repairs made prima facie showing of damages subject to reduction or mitigation by defendant.

When plaintiff, suing defendant company for damages to her motor truck in collision with its truck, established by her proofs that the repairs were necessary and the cost thereof reasonable, she completed a prima facie showing of her damages, and if the diminution of the value of the injured truck was less than the repair bill, the defendant should have shown that fact in reduction of the damages claimed by plaintiff, for the burden to show matters in reduction or mitigation of damages rests on defendant.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Susan Ethel Rhodes, doing business under the firm name and style of D. H. Rhodes, against the Firestone Tire & Rubber Company. From judgment for plaintiff, defendant appeals. Affirmed.

Willard P. Smith, of San Francisco, for appellant.

Waldo F. Postel, of San Francisco, for respondent.

BARDIN, Presiding Justice pro tem. This is an action for damages caused by an accidental collision between auto trucks of the respective parties to the action, near the intersection of Polk and Ellis streets in San Francisco. Immediately prior to the accident an employee of defendant was driving an auto truck of the defendant in a northerly direction on the east side of Polk street, and at the same time the driver of plaintiff's truck was proceeding in a southerly direction on the west side of the same street but northerly from the intersection of the streets referred to. On reaching Ellis street the auto truck of the defendant came into collision with a touring car of a third party, which was being driven westerly on Ellis street. The driver of the touring car, in endeavoring to avoid collision with defendant's truck, turned to the right into Polk street, but was unable to avoid contact with defendant's truck. The truck of the defendant became disengaged without coming to a stop and a very short time thereafter came into a head-on collision with the truck of the plaintiff at a distance, the court found, in excess of 100 feet northward from the intersection of the two streets referred to.

The court found that the said collision between the two trucks was caused solely by reason of the negligence of the defendant, and also found substantially to the following effect: That immediately prior to the collision the employee of the defendant was operating defendant's auto truck at a speed in excess of 15 miles per hour, and on the wrong side of the street; that after the collision with the touring car already referred to, the driver of defendant's auto truck swerved over to the west side of Polk street and continued in a northerly direction on the west side of Polk street and the sidewalk thereof; that the driver of the plaintiff's auto truck immediately before the collision of the two trucks drove plaintiff's truck to the extreme westerly side of Polk street and partly on the westerly sidewalk thereof to avoid a collision with the truck of the defendant; that the two trucks met head-on on the west side of Polk street partly on the sidewalk and on the extreme westerly side of the street; and that the truck of the plaintiff had come to a complete stop prior to the collision, with all brakes firmly set.

[1] A number of points are relied on by the appellant for a reversal of the judgment the major portion of which relate to arguments in support of the defendant's theory that the defendant was not guilty of negligence in the operation of the auto truck at the time of the collision and that the driver of plaintiff's auto truck at said time was himself guilty of contributory negligence in not taking the proper precautions to avoid the collision between the two trucks. In answer to the criticism that the evidence does not support the findings of the court in relation to the negligence of defendant, it will be sufficient to say that the record shows an abundance of evidence sufficient to justify the conclusion of the trial court that the driver of defendant's truck was responsible for the collision between the two trucks. The arguments set forth in the appellant's briefs in exposition of the reasons why the defendant was not at fault, while proper to have been addressed to the trial court are, in the face of the conflicting evidence, of no avail here. The credibility of the witnesses and the weight of the evidence were matters for the determination of the trial court.

[2] It is contended by appellant that the defendant is not answerable for the results of an accident brought about through stress of a sudden emergency created through no fault of its own. While it is true, as stated in Harrington v. Los Angeles Railway Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85, that "a person in great peril, where immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances," nevertheless,

while the collision between the two trucks would probably never have occurred except for the presence of the touring car under the circumstances already indicated, the court was justified in concluding, as it must have done, that the driver of defendant's auto truck had ample time and space to have avoided the collision with plaintiff's truck, after becoming disengaged with the touring car. And the trial court may have concluded, and it would have been fully warranted in so doing, that the negligent driving of defendant's employee began at a time and place antecedent to the collision with the touring car and continued without intermission until the collision had occurred between the two trucks.

[3] The contention that the evidence fails to show that the driver of defendant's truck was an employee of defendant is manifestly without merit, as is also the claim that the court committed error in admitting in evidence the statement of the driver of defendant's truck made practically simultaneously with the accident, and therefore properly considered by the trial court to be a part of the res gestæ.

The defendant interposed the defense of contributory negligence, and in behalf thereof alleged that the plaintiff was guilty of contributory negligence in that the driver of plaintiff's truck carelessly and negligently ran the truck of plaintiff into the truck of defendant, and also carelessly and negligently failed to control said truck, or apply the brakes thereof, at or before the time of the accident. It is claimed that the court failed to find on these material issues, and for that reason the judgment should be reversed. An examination of the findings of the court discloses, however, that the court specifically found that the obverse of these particular allegations was true, and further found that the collision between the two trucks was caused solely by the negligence of the employee of defendant.

[4] We come now to the consideration of defendant's claim that the court below committed error in two respects with reference to the damages awarded to the plaintiff by its judgment, namely: (1) That it was error to admit any evidence as to the cost of the repairs of plaintiff's truck, without first showing the value of the truck immediately after the accident; and (2) that the proper measure of damages was not applied in the case. The first objection, at most, goes merely to the order of proof, as will presently more clearly appear and may therefore be summarily dismissed with the comment that the order of proof was within the discretion of the trial judge.

We gather from the complaint that the plaintiff originally intended to endeavor to recover as compensation for the damages she had suffered by reason of the collision referred to, the aggregate sum of $1,240.45, made up of the following items: $394.45 on account of moneys, claimed to be reasonable in amount, expended in making necessary repairs to plaintiff's truck; $750 on account of the depreciation in value of said truck beyond the amount expended in repairing it; and $96 expended in hiring a substitute truck while the injured truck was undergoing repair. No evidence was presented in support of the allegation that the injured truck had depreciated in value beyond the amount of the repair bill. The court found that plaintiff expended the sum of $394.45 to repair the damages resulting from the said collision and that such sum was a reasonable and necessary sum to have been expended for said repairs which were actually made and were made necessary by reason of the negligence of defendant, and that plaintiff had expended, in procuring the hire of a substitute truck while the injured one was being repaired, the sum of $96. Judgment followed in favor of plaintiff in the sum of $490.45. Inasmuch as the defendant has made no objection to the allowance of the amount paid for truck hire, that item need receive no further consideration from us.

[5] This brings us to a consideration of the proper measure of damages to apply in negligence cases such as this, where the injured vehicle is susceptible of repair. According to some authorities the measure of damages in such instances is the cost of repairing the injured personal property, together with the value of the use of the property while undergoing repair. 17 C. J. 877; Weleetka Light & Water Co. v. Northrop, 42 Okl. 561, 140 Pac. 1140; McGuire v. Post Falls Lumber & Mfg. Co., 23 Idaho, 608, 131 Pac. 654. The usual measure, however, to apply in the ascertainment of damages in cases where personal property has been negligently injured but is susceptible of repair, and the one we prefer to follow, is that which makes the measure of damages the difference in value immediately before and immediately after the injury, subject, however, to the proviso that if it can be entirely repaired at a less expense than the diminution in value because of the injury, the measure of damages is the reasonable cost of repairs. Kincaid v. Dunn, 26 Cal. App. 686, 148 Pac. 235; Huddy on Automobiles, § 719; Babbitt on Motor Vehicles (2d Ed.) § 1740.

[6] While the complaint was drawn on the theory that the injuries to plaintiff's truck exceeded the amount of the cost of repairs, the case was actually tried on the theory that the truck was susceptible of being entirely repaired. No evidence was produced by the plaintiff as to the diminution in value of the truck by reason of the collision. Whether or not the plaintiff was actuated in presenting her proof by an erroneous idea as to the proper measure of damages to apply is not important, for if the amount of the repair bill, considered alone, was not the true

and exclusive measure to apply in the ascertainment of the damages plaintiff had suffered, it was incumbent upon the defendant to have offered proof showing that the diminution in value on account of the injury would be less than the cost of such repairs; thus limiting the damages to a sum not greater than such diminution in value. Kincaid v. Dunn, 26 Cal. App. 686, 148 Pac. 235; Huddy on Automobiles, § 720.

[7] When the plaintiff established by her proofs that the repairs were necessary and the cost thereof reasonable, she completed a prima facie showing of her damages. If the diminution in value of the injured truck was less than the repair bill, the defendant should have shown that fact in reduction of the damages claimed by the plaintiff, for the burden of showing matters in reduction or mitigation of damages rested upon the defendant. The reasonable cost of making necessary repairs in such cases as this has been accepted as a proper element in determining the amount recoverable as damages in many other jurisdictions, as has already been pointed out, and we think it proper to accept it as such in the establishment of a prima facie admeasurement of damages, subject to the right of the adverse party to apply to it the test as to whether or not the diminution in value by reason of the injury was less than the repair bill, and if so, to reduce the damages recoverable to equal the sum representing such difference in value.

The defendant, having failed to make any showing in reduction of damages, cannot now be heard to complain.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(51 Cal. App. 532)

WESTPHAL v. ARNOUX. (Civ. 3611.)

(District Court of Appeal, First District, Division 1, California. Feb. 24, 1921. Rehearing Denied March 25, 1921. Hearing Denied by Supreme Court April 25, 1921.)

1. Adverse possession ⇐112 — Possession within five years held shown prima facie.

The requirement of Code Civ. Proc. § 318, that to maintain action for recovery of real property it must appear that plaintiff or his predecessor was seized or possessed of the property within five years before commencement of the action, is prima facie satisfied by showing that plaintiff had been invested with the legal title; section 321 declaring the person establishing a legal title is presumed to have been possessed of the property within the required time; so that defendant must dissipate the presumption.

2. Limitation of actions ⇐76(2)—Statute for recovery of real estate continues to run against infant if started against predecessor in title.

If the possession of the person under whom an infant claims title was invaded, thus setting in operation the statute of limitations for recovery of real property, it continues to run after the title passes to the infant, notwithstanding Code Civ. Proc. § 328, excepting from the time for an infant to commence action, the years of his disability.

3. Adverse possession ⇐45—Running of statute for recovery of real property interrupted by litigation between the parties over the title.

The running of the statute for recovery of land is interrupted by pendency of actual litigation in court between the parties, of the title and every incident of ownership, including the right of possession.

4. Limitation of actions ⇐105(1) — Statute for recovery of real estate did not run against plaintiff and his devisor, where latter died after judgment adjudging title in him, but before denial of new trial, and plaintiff was minor.

As against rights created by a judgment adjudging land to be the property of plaintiff's devisor, the statute of limitations for recovery of real estate did not begin to run till after the judgment became a final determination of the controversy by denial of new trial, so that, the devisor having died between judgment and denial of new trial, the statute did not commence to run against devisor, and therefore, under Code Civ. Proc. § 328, not against plaintiff, a minor, during disability.

5. Appeal and error ⇐174—Objection that action was by guardian instead of by infant held too late on appeal.

Objection that action was by guardian, as such, and not by infant, by her guardian, cannot be raised for the first time on appeal, the case having been tried on the theory that the minor was the real party in interest, and that it was her title and interests that were being litigated, and the judgment will be construed as for the infant.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by Cora A. Westphal, as guardian of Agatha Lawrence, against J. A. Arnoux. Judgment for plaintiff, and defendant appeals. Affirmed.

Vincent Surr, of San Francisco, and Harry M. McKee, of Fresno, for appellant.

Ernest Klette, of Fresno, and Manning & Thompson, for respondent.

BARDEN, Justice pro tem. This is an action wherein there is involved the question of the ownership of a parcel of land in Fresno county. The complaint, drawn in the usual pattern of an action in ejectment and for mesne profits, alleged ownership and right to

possession in the plaintiff of the real property referred to. The defendant, by way of answer, controverted the plaintiff's allegations of ownership and right of possession, and pleaded, in bar of recovery, the statute of limitations, and also by cross-complaint asserted ownership in himself of said real property by reason of his adverse possession thereof.

The plaintiff was successful at the trial, and the defendant has appealed from the judgment.

The controversy now before the court is the outgrowth of marital differences and litigation between the defendant and his now deceased wife involving the title to the same parcel of land. Arnoux was married in the year 1907 to Anna Lawrence, a widow and the mother of Agatha Lawrence, then a child of five years of age and the ward in whose behalf the present action was begun. Four years later, for a sufficient consideration, he conveyed the said property to his spouse. In March of 1913 he filed an action against his wife for the annulment of their marriage, and sought in the same action the decree of the court canceling the said deed and reinvesting him with title to the said property. The prayer of his complaint was predicated upon the allegations that Mrs. Arnoux had committed a fraud upon him by pretending to be a widow at the time of their marriage and that, believing her to be his lawful wife, he had made the said transfer of property to her. Mrs. Arnoux denied these allegations and filed her cross-complaint seeking, not only a decree of divorce, but also a decree in legal effect quieting her title to the said property. Upon the issues thus joined the parties went to trial, and the resulting judgment granted neither an annulment of the marriage nor a divorce; but the judgment which was entered on March 9, 1914, did determine that the real property there involved was the separate property of the wife and upheld the validity of the deed.

No appeal from the judgment was ever taken, and on March 12, 1915, a motion for a new trial was denied. Meanwhile, on May 6, 1914, Mrs. Arnoux died testate, and on July 8, 1917, there was distributed to Agatha Vivian Lawrence the premises here involved.

The present action was commenced on September 15, 1919. At the trial the defendant sought to invoke, in aid of his defense to the action, the provisions of section 318 of the Code of Civil Procedure, under the theory that neither Agatha Lawrence, nor her mother, had been seized or possessed of the property in question within five years before the commencement of the present action on September 15, 1919.

[1] While it is true that before the plaintiff could be permitted to prevail, it was necessary that it be made to appear that either Agatha Lawrence, or her mother, was seized or possessed of the property in question within five years before the commencement of the action (section 318, Code Civ. Proc.), yet this requirement was properly satisfied when it was established that Agatha Lawrence, in consequence of the death of her mother, had been invested with the legal title. And when that fact was made to appear, as it was, by the stipulation of the parties, the burden was thereupon cast upon the defendant to dissipate such presumption by showing that he had held and possessed the property adversely to such legal title for five years before the commencement of the action. Section 321, Code Civ. Proc.

During the course of the trial the defendant undertook to show facts tending to support the affirmative allegations of his answer and cross-complaint having relation to the nature of his hostile possession of the premises in suit.

Objection to this line of testimony was sustained by the court upon the theory that the action between Mr. and Mrs. Arnoux had the legal effect of interrupting the statute of limitations, and that no period of time, either antecedent to the finality of judgment in that case, or subsequent thereto, could be made available to defendant either in support of the bar of the statute of limitations, or of his claim to title by adverse possession.

It must be remembered that pending the hearing of the motion for a new trial, and less than two months after the rendition of judgment, Mrs. Arnoux became deceased, leaving as her sole heir and descendant Agatha Lawrence a minor.

[2-4] It is, of course, true that if the possession of the ancestor had been invaded before death, the statute of limitations, thus set in motion, would not be suspended in favor of a minor taking title from such ancestor, but would continue to run against the minor. McLeran v. Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814; Alvarado v. Nordholt, 95 Cal. 116, 30 Pac. 211; Castro v. Geil, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84. But where the ancestor died before her rights were invaded, the minor might commence her action within the period prescribed by the statute (section 328, Code Civ. Proc.) after the removal of disability.

That the litigation between the two spouses had the effect of interrupting the statute of limitations seems clear. Gower v. Quinlan, 40 Mich. 572; Oberein v. Wells, 163 Ill. 101, 45 N. E. 294. While the husband may have been in the physical possession of the premises, asserting some sort of dominion over it, for the requisite time, he was not, during the period of the litigation between the spouses, in the peaceable and undisputed possession thereof. Estate of Richards, 154 Cal. 478–488, 98 Pac. 528; Read v. Allen, 56 Tex. 176–180. The title and every incident of ownership, including the right of posses-

sion, were being then actually litigated in court. And as the statute of limitations would not begin to run against the rights created by the judgment rendered in favor of the wife and vesting the real property in her as her separate property, until that judgment had become a final determination of the controversy between the parties litigant (Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164; Feeney v. Hinckley, 134 Cal. 467, 66 Pac. 580, 86 Am. St. Rep. 290), and as the day on which the judgment did become a final determination found the mother deceased and Agatha Lawrence still a minor and within the protection of section 328, Code of Civil Procedure, the trial court was right in its conclusion that the defendant must of necessity fail in his affirmative defense and upon his cross-complaint.

In Kirsch v. Kirsch, supra, as in this case, the husband and wife became involved in litigation affecting their marital relation and the title to certain real property standing in the name of the wife and which she claimed as her separate property, but which subsequently was awarded to the husband on the theory that it was community property. The wife appealed from the judgment, entered in 1887, and remained in possession of the property. The judgment was affirmed in 1890. A writ of assistance to recover possession of the real property was granted to the husband in 1893, and from the order granting the writ an appeal was taken, in which appeal it was claimed by the wife that she had, subsequent to the entry of the judgment and prior to the issuance of the writ of assistance, acquired a new title to the real property by adverse possession. In denial of this claim the court held that the original action was pending until 1890, when the judgment became final by the affirmance of that court, "and while it was pending she could not acquire title by adverse possession, since during the pendency of the appeal, all rights under the judgment were suspended. As Kirsch, while the appeal was pending, could enforce no rights under the judgment, per contra, the possession of the wife during that period could not be held to be adverse to her husband."

Whether or not Arnoux and his wife were living separate and apart at any time following their marriage does not appear. No suggestion has been made, however, that the husband was precluded, on account of coverture, from invading the possession of the wife of said real property (Madden v. Hall, 21 Cal. App. 541, 132 Pac. 291), and because the point has not been raised, we have refrained from discussing that question.

[5] This action was brought by Cora A. Westphal, as guardian of the estate and person of Agatha Lawrence. The point is now raised, and for the first time, that the suit should have been brought in the name of the minor, by her guardian. That the minor should have been named as the plaintiff cannot be questioned. Fox v. Minor, 32 Cal. 111–117, 91 Am. Dec. 566; Justice v. Ott, 87 Cal. 530, 25 Pac. 691; O'Shea v. Wilkinson, 95 Cal. 454, 30 Pac. 588; Dixon v. Cardozo, 106 Cal. 506, 39 Pac. 857.

But the record shows that neither in the pleadings, nor in the evidence, nor in any part of the proceedings below, did the defendant make any objection in the behalf now stated, nor so much as allude to the error which it is now claimed is fatal to the judgment. We are well satisfied that this belated objection cannot now be interposed, for notwithstanding the defect in naming the guardian as plaintiff, the case was actually tried on the theory that the minor was the real party in interest and that it was the minor's title and interests that were being actually litigated. The answer of defendant admits that Agatha Lawrence was a minor, and that Cora A. Westphal had been duly appointed the guardian of her person and estate, and had qualified as such; it denies that any damage resulted to said minor. It contains the averments that the hostile possession of defendant was known by said minor, and that the claim and possession of defendant commenced before said minor claimed any interest in the premises in controversy. The cross-complaint of defendant contains the following introductory language:

"And for a further defense to the complaint of plaintiff filed herein, and for a cross-complaint, the defendant herein complains of Agatha Lawrence, the said minor, and of Cora A. Westphal, as guardian of the person and estate of said Agatha Lawrence, * * *" and prays that the title of defendant be quieted against "said plaintiff and said minor."

In the stipulation of counsel during the course of the trial as to certain facts, Agatha Lawrence was referred to as "the claimant in this action."

This case, having been tried upon the theory that the pleadings were of such form and substance as to properly frame the issues that were actually tried, comes well within the rule:

"That where a case is tried upon the theory that the issues are properly joined in the trial court, and no objection or exception is taken there, it is too late to raise such objections here." Kirsch v. Kirsch, 83 Cal. 633, 23 Pac. 1083.

See, also, People v. Reis, 76 Cal. 269, 18 Pac. 309; Haines v. Stillwell, 5 Cal. Unrep. 27, 40 Pac. 332; Hill v. Nerle, 29 Cal. App. 473, 156 Pac. 981.

We construe the judgment to be in favor of Agatha Vivian Lawrence (known also as Agatha Lawrence), who was treated as, and who, for the purpose of giving effect to said

judgment, must be held to be, the real plaintiff in the action.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

51 Cal. App. 634

PYRAMID LAND & STOCK CO. et al. v. SCOTT et al. (Civ. 2660.)

(District Court of Appeal, Third District, California. March 3, 1921. Hearing Denied by Supreme Court May 2, 1921.)

1. Waters and water courses ⟸138—Lower riparian owner cannot acquire by prescription or appropriation rights against upper riparian owner.

Though rights to take water from a stream can be acquired by prescription as against riparian owners, or by the upper riparian owner against a lower riparian owner, a lower riparian owner cannot acquire, either by prescription or appropriation, any rights to the use of the water as against an upper riparian owner, since the upper riparian owner is not injured by any use of the water by the lower owner and, therefore, has no legal right to prevent such use.

2. Appeal and error ⟸1011(1)—Appellate court does not resolve conflicts in the evidence.

It is not within the province of the appellate court to resolve conflicts in the evidence on issues of fact or, in other words, to examine conflicting evidence to determine whether the conclusion arrived at below should have been different.

3. Waters and water courses ⟸152(8)—Evidence held not to show user by upper owner was adverse to lower owner.

In an action by lower riparian owners against upper owners to quiet title to water rights, evidence by defendants themselves that they recognized that the lower owners had some rights to the water and had made an agreement, the terms of which were not in evidence, regulating the use thereof, *held* not to sustain a finding that the upper owners had acquired by prescription a right as against the lower owners to use specified quantities of water.

4. Waters and water courses ⟸40—Riparian rights are parts of lands, not mere appurtenances.

The riparian rights of owners of lands bordering upon a stream are parts and parcels of the lands and of the ownership, not mere easements or appurtenances to the lands.

5. Adverse possession ⟸114(1)—Plea of prescription must be sustained by clear and satisfactory proof.

Since the presumption of a grant on which the plea of prescription is sustained is not true in fact in most of the cases in which real property is claimed by adverse possession, the plea of adverse possession must be sustained by the clearest and most satisfactory proof to warrant depriving a person of his property.

6. Waters and water courses ⟸44—Riparian owners on a stream insufficient to irrigate all lands simultaneously should rotate use.

Both the upper and lower riparian owners have reciprocal rights in the common stream to the reasonable use of the water thereof, and where the flow is insufficient to irrigate all the riparian lands simultaneously, such rights should be regulated by applying the doctrine of rotation in use.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Pyramid Land & Stock Company, a corporation, and others against C. A. Scott and another, to quiet title to water right. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Dodge & Barry, of Reno, Nev., for appellants.

Pardee & Pardee, of Susanville, and R. M. Rankin, of Orland, for respondents.

HART, J. This action was brought by plaintiffs to quiet their title as against defendants to the water of Long Valley creek, a creek flowing northerly through the lands of all of the plaintiffs and defendants, and thence into Honey Lake, in Lassen county, California.

Plaintiffs in their complaint claim as appropriators and as riparian proprietors. Defendants claim as appropriators and as riparian proprietors, and by amendment to their answer claim prescriptive rights.

The court found that defendant Scott had an adverse right to 90 inches of the waters of the creek and defendants Galeppi had an adverse right to 310 inches of the waters of the creek. The court failed to find that the plaintiffs were appropriators, but did find that both the plaintiffs and defendants were riparian owners, and as to this the court found that plaintiff Pyramid Land and Stock Company has 1,200 acres of land riparian to said Long Valley creek; that plaintiff F. M. Rowland has 400 acres of land riparian thereto; that plaintiff A. J. Hall has 560 acres of land riparian to said creek; that defendant C. A. Scott has 1,120 acres; and defendants Galeppi have 400 acres of land riparian thereto.

It was further found that the several defendants and their predecessors in interest have taken, ever since the year 1861, out of said stream, and used for the necessary irrigation of their said lands, all the water required to produce agricultural crops thereon; that the quantity of water so taken by defendant Scott and his grantors was 90 miner's inches, and that the water so taken and diverted by the defendants the Galeppis, and their predecessors in interest, was 3,500 gallons per minute, or 310 miner's inches;

that said several defendants have used the respective quantities of water mentioned for a useful and necessary purpose upon their respective lands, and have "severally been in the open, notorious, continuous, exclusive, uninterrupted, and adverse possession and use of said water, and all thereof, as aforesaid, holding and using the same adversely to the plaintiffs and each of them, and adversely to all other persons, for more than five years before the commencement of this action; that neither nor any of said plaintiffs was or were seised or possessed of the right to use said water or any part thereof within more than five years before the commencement of this action;" that the holding and use of said water was under a claim of right and title by said defendants, and exclusive and hostile to any right, title, or claim of possession or use by said plaintiffs or either of them, or their predecessors in interest or grantors, etc.; that said defendants have during all of said period paid all taxes of whatsoever kind or nature levied or assessed upon said lands and water rights, etc.

The evidence shows, and, indeed, it is practically, if not expressly, admitted that Long Valley creek is one of those so-called wet season streams that flow an enormous lot of water at the high-water season and towards the end of the season run down to almost nothing—in other words, it is what is sometimes called a torrential mountain stream.

It was expressly stipulated by the parties at the trial that—

"the country in which all of the lands of plaintiffs and defendants are situated is an arid country, and that artificial irrigation is necessary."

The judgment is that defendant Scott was entitled to 90 miner's inches of water from the creek and defendants Galeppi to 310 miner's inches from said creek, and that the "plaintiffs take nothing by their action."

The plaintiffs appeal from said judgment. The points urged for a reversal are: (1) That the court erred in failing to make any finding as to the claims of the plaintiffs as appropriators; (2) that there is no evidence to support the finding that the defendants have acquired a right to use the water by prescription; (3) that there is neither evidence nor any finding which supports that part of the judgment that the "plaintiffs take nothing by their action."

[1] The failure of the court to find upon the claim of plaintiffs, the lower riparian owners, that they had appropriated respectively a certain specified number of miner's inches of the waters of Long Valley creek is not material, since it is the settled law in California that, while the right to take water from a stream, as against riparian owners, may be acquired by prescription (Gallaher v. Montecito Valley Water Co., 101 Cal. 245, 35 Pac. 770; Bathgate v. Irvine, 126 Cal. 144, 58 Pac. 442, 77 Am. St. Rep. 158; Arroyo D. & W. Co. v. Baldwin, 155 Cal. 280, 285, 100 Pac. 874), no such right may be acquired either by prescription or by appropriation by a lower as against an upper riparian owner in the same stream. In view, however, of the fact that the decree complained of here is grounded upon findings of a prescriptive title in the defendants to certain specified quantities of water in the creek in question, as against the riparian rights of the plaintiffs, it is proper to say that the rule has been declared to be different as to upper riparian proprietors. In Bathgate v. Irvine, 126 Cal. 135, 140, 58 Pac. 442, 444, 77 Am. St. Rep. 158, the law upon this proposition is thus stated:

"Plaintiffs contend that as lower riparian proprietors they acquired the right to all the waters of the creek by prior appropriation, notwithstanding defendant and his predecessors in interest were upper riparian owners long before plaintiffs made their appropriation. We understand the rule to be settled, and is no longer open to discussion in this state, that such right cannot be thus acquired. Hargrave v. Cook, 108 Cal. 72. And it is equally well settled that no right to the water can be acquired by prescription where the lower riparian proprietor has taken the water out of the stream at a point on his own land and has used such water only as the upper riparian proprietor permitted it to pass down through his land to the lower owner; such use by the latter is not adverse in the sense required to give a right by prescription. Hargrave v. Cook, supra. Nor can the nonuser of the water by the upper riparian owner of land be invoked to strengthen the claim of appropriation or prescription by the lower riparian owner under like circumstances. Hargrave v. Cook, supra. In appropriating the water which flows across his land, the lower appropriator invades no right of the upper riparian proprietor. The latter has no right of action to prevent such use, for he is in no wise injured, and the former should not be permitted to acquire a right in this manner which the latter is powerless to prevent. The case is quite different where the upper owner appropriates the water. The lower owner is injured at once and the law gives him a remedy, and, if he fails to avail himself of it, the appropriation may, by lapse of time, ripen into an absolute right."

The essential theory of the decision is that the plaintiffs permitted their riparian rights to be invaded by the defendants and failed to take timely steps towards invoking the remedy available to them for preventing the ripening of the wrong into a right, and we shall, upon that theory, consider the case.

As stated, plaintiffs, with respect to the defendants, are lower riparian owners, and their lands are commonly known as the "Constantia Ranch," the "Rowland lands," the "Friday field" and the "Doyle lands." The plaintiff Pyramid Land & Stock Company is the owner of the so-called Constantia properties, the plaintiff Hall of the Doyle and Friday lands and the plaintiff F. M.

Rowland of the Rowland lands. It appears from the testimony presented by the plaintiffs that these lands have for many years been used for growing hay and other agricultural products, and that, being located in a section of great aridity, are wholly unavailable for any such use without the aid of irrigation. As the court found, and as is conceded, said lands, as well as those of the defendants, are riparian to Long Valley creek, from which both the plaintiffs and the defendants claim to have, for many years, by means of ditches, taken and used the waters of said creek for the irrigation of their several tracts of land.

As we have seen, the court found that the defendant Scott had, ever since the year 1861, taken and used 90 miner's inches of the waters of said creek for agricultural purposes and that for a like number of years the defendants Galeppi had taken and used for a like purpose 3,500 gallons per minute, or 310 miner's inches of said waters, and that all said defendants had severally so diverted and used said waters and been in the open, notorious, continuous, exclusive, uninterrupted possession and use of the same, adversely to the plaintiffs and to all other persons, "for more than five years before the commencement of this action," the action having been commenced in the year 1916. As also seen, the court, from its findings, concluded as a matter of law that the plaintiffs were entitled to take nothing by their action. In other words, the necessary effect of the decree is, from the findings and conclusions of law, that the defendants had acquired a prescriptive right to all the waters of Long Valley creek, and that therefore the plaintiffs have lost their riparian rights in said creek, and, consequently, have no rights in the waters thereof as to which an adjudication is necessary or required.

[2] It is not within the province of this court, as is obvious, and as has often been pointed out by the decisions, to resolve conflicts in the evidence addressed to issues of fact, or, in other words, to examine conflicting evidence with a view of determining whether the conclusion arrived at below should have been different or in accord with the evidence presented by the opposing litigant. In this case, however, an examination and analysis of the evidence presented by the plaintiffs in support of their several and respective claims, in connection with a like consideration of the evidence presented by the defendants, have convinced us that, upon the all-important issue in this case there is really no conflict in the evidence. Hence, it is proper, as well as important, in disposing of this appeal, to consider herein the evidence presented by the plaintiffs.

The plaintiff A. J. Hall testified that he farmed the Constantia ranch continuously for five years, from 1905 to 1910; that he superintended the irrigation of said ranch with the waters of Long Valley creek; that there were at that time two ditches used for the purpose of irrigating the Friday lands, and, that, during the entire period of time he was at Constantia, "we always had water for the Friday field"; that about 150 acres of the Friday field were irrigated, and that "no one ever interfered with our use of the water." He further testified that from said creek he had irrigated about 200 acres of the Doyle tract since 1910. Hall testified that either in the year 1913 or 1914 the defendants Galeppi installed a pumping plant for the purpose of pumping water from the creek into their ditches, and that they commenced pumping in the year 1915. "Previous to that," he continued, "there was a difference in the way the waters flowed down to me. In the morning I would have a good head of water in the ditch, and along towards night it would be down, and the next morning it would be up again. When they put in the pump it shut off and no more came after that."

C. C. Rowland, son of the plaintiff Rowland testified that the Rowland lands are and have been irrigated with the waters of Long Valley creek for about 30 years, he having known the said lands for that period of time; that there were two ditches by means of which such irrigation was done, and that through those ditches have said lands been irrigated every year, "except a few dry years when there was no water." He testified that he remembered when the Galeppis commenced pumping—his best memory was that it "was last year and this year." (This action was begun in the year 1916, and the trial had in the year 1917). "I remember last spring," the witness proceeded to testify, "we were getting a good head of water until the pump was started, and then we didn't get any more. Previously to the time they started pumping we got water later in the season, except, of course, the year before they started to pump, they had a dam in the stream and that stopped the water. We have raised mostly grass hay and pasture."

R. C. Turritin, general manager of plaintiff Pyramid Land & Stock Company testified that, as a representative of the Nixon National Bank of Reno, which corporation owned the controlling interest in the Pyramid company in the year 1911, he looked over the Constantia and other properties of said plaintiff, and that from that year since he has known that said Constantia Ranch and the Friday field were irrigated with the waters of the creek in question. The witness early in the year 1914 took possession of the Pyramid's properties (the Constantia and the Friday) and down to the time of the trial had had such possession continuously, and he testified that during all that time the lands named were each year irrigated by

means of ditches connecting with Long Valley creek. He continued:

"We raised alfalfa, grain, and wild hay. On the east side we had a ditch that irrigated the Friday field. We raised alfalfa and some grain on the east side. A portion of the lands we were still to irrigate for the second crop. We have been able to irrigate the Friday field twice."

The witness stated that the Galeppis commenced pumping in the year 1916, and that from and after that time the water would be "shut off" so that it would not reach the lands of the plaintiffs—very often, or generally, that condition would last for 12 hours. In the year 1915, he said, 1,250 tons of hay were raised on the Pyramid's lands. At that time the Galeppis were not pumping. Since that year the average number of tons of hay produced on said plaintiff's lands was about 700. Turritin said that the only interference there had been with his water supply had been due to the pumping by the Galeppis.

Other witnesses corroborated the above testimony in so far as it relates to the claim of the several plaintiffs that they had always, and without interruption, except when interfered with by the pumping of the water of the creek by the Galeppis into their ditches, used the waters of said creek for the irrigation of their respective tracts of land. Adverting now to the testimony received in behalf of the defendants, we find this to be about the substance thereof: That since the year 1879, the lands now owned by the defendants have been irrigated from Long Valley creek; that the lower riparian proprietors, or the owners of the lands now owned by the plaintiffs, never interfered with the use of the said waters by defendants; that there were times when all the waters of the creek were necessary for the irrigation of the lands of defendants, and the latter would then use all said waters for that purpose. The witness, defendant Scott, testified that he had, by means of a ditch, diverted water onto his lands from the year 1901, in which year he became owner of said lands, down to the year 1916, without interruption or protest from any person. "My ditch," he said, "comes out of the creek just below where the Hot Springs come in. I think those springs flow in the neighborhood of 90 inches. * * * The ditch was there when I first knew the place. The capacity of the ditch is about the same now as when I took it. * * * The springs that I spoke of are close to the creek. I diverted the water by damming the channel of the creek; that catches the water of the creek, also the waters of the spring. I tried to turn it all. * * * The creek is not in view of the road. To find out I was taking the water they would have to go up the creek and see my dam and ditch, the Constantia people. * * * I never saw them up there before this spring. * * * I never knew of their being up there." Scott further said that he lost approximately 25 per cent. of the water he attempted to divert to his ranch; that he measured the water as it was flowing onto his ranch; and, that he found that it amounts to "something around 100 inches." He continued:

"Before this I measured it as it went off, and there was 150 inches going off. The engineer said we were losing 25 per cent. Under these conditions, I don't think the people below would ever know we were using it. I don't think I ever told Hall or Rowland or the Pyramid people that I claimed the right to divert all the waters of the stream. Most generally after the flood waters quit after the 1st of June, I would hold them until the 1st of October, except at haying time, when it was turned loose. There was always water flowing off my ranch. I never claimed the right to deprive those people of water below me all the time. I understood they had rights."

Frank Galeppi, one of the defendants, testified that a centrifugal pump, operated by steam, with a pumping capacity of 3,500 gallons per minute, was installed in the year 1916 for the purpose of pumping water from the creek onto the Galeppi lands. "At that time," he proceeded, "there was about three times more water in the creek than the pump could throw. We had a five-foot dam in the creek. We couldn't lower the water with the pump. * * * When we started the pump we ran not to exceed 12 hours. After the water got low, by changing the dam we could save the water a little longer than 11 hours. * * * We took the water out on both sides of the creek, and used it in the old ditches. We started to pump this year the 20th of May. Under the contract we made we ran it up to the 25th of June; then we had to lay off for a while. We laid off for five days, I think. We ran it according to the time stated in the stipulation. They (the Constantia people) had it from the 30th of June to the 7th of July. From July 8th to July 13th it was not operated. The water was permitted to flow down the creek. On the 13th of July we were privileged to close the gate so as to raise the water in the dam sufficiently for us to use the pump, and we ran it then to the 18th—that is the last day I pumped."

Charles Galeppi, son of defendant Rosa Galeppi, C. E. Jones, David Cameron, and William Galeppi, also son of Rosa Galeppi, gave testimony for the defendants, but, reduced down to its real scope and purport, none of it amounted to more than the mere statement that the lands of the defendants had for many years been irrigated by waters diverted by one means or another from Long Valley creek. It should be stated, however, that, on cross-examination, Charles Galeppi said that—

"There was always lots of water went down to the plaintiffs every year—that is, when the water was high, not when the water was short."

He further testified, on cross-examination:

"We never told these people that we owned all the water and that they had no rights, those people below. We never at any time claimed all the water in the creek."

On redirect, however, the witness qualified that testimony by saying:

"All the water was in the creek, we didn't claim it all but what water during the time we needed it. My understanding with regard to our water rights was at low water stages we took it all. I understood we had the right to take it all."

Thus we have set out, largely in synoptical fashion, all that was offered and received in the matter of proof in support of the respective claims of the parties to this action, and, as declared in the outset, we are unable to perceive any conflict in the evidence, as it was presented by both sides, upon the substantial or vital issue submitted for adjudication herein.

[3] The differences arising between the upper and lower riparian owners seem to have occurred shortly before the institution of this action, and were due to the installation of the pumping system on the lands of the Galeppis to pump the waters of the creek onto their lands, thus causing, as was claimed by plaintiffs, such a diminution in the usual flow of the waters of the stream as practically to deprive the plaintiffs of the quantity of the waters ordinarily passing down, and so becoming available for use on their property, and thereby depriving them of the necessary use of said waters. The witnesses, it will be noticed, referred to an agreement entered into between the Pyramid representatives and the Galeppis, under and by the terms of which the Galleppis were to cease pumping for a certain number of days during a specified month of the irrigating season. The said agreement is not in the record, and we are consequently without light as to its specific terms, but from the testimony relating to it we may infer that its purpose was to facilitate a reasonable use of the waters of the stream by both the lower and upper riparian proprietors. From the whole situation as it is shown by all the evidence, we may well assume that the object of the agreement was merely to adjust the use of the waters by all the parties so that all might have an opportunity, in the exercise of their rights as riparian owners, to as reasonable a use of the waters of the creek for the irrigation of their lands as the existing conditions would permit. But, be that as it may, it is very clear to our minds that, upon the testimony presented by the defendants, the finding of a prescriptive title in them to all the waters of Long Valley creek cannot justly be predicated. In the first place, we are justified in observing that the evidence produced by the plaintiffs that they had for many years continuously used the waters of said creek for the irrigation of their lands, and that they had constructed and maintained lateral ditches for that purpose, is not only not directly contradicted by, but in no way conflicts with, any testimony presented by the defendants. The defendant Scott and the witness Charles Galeppi, whose testimony was the strongest of any given in behalf of the defendants, each declared, as shown, that the defendants at all times recognized that the plaintiffs had rights in the waters of the stream, and that they had never intended depriving the latter of their rights. This testimony, considered without regard to the uncontradicted proofs made by the plaintiffs, is itself sufficient to demonstrate that the defendants never at any time used said waters in hostility to the rights of the plaintiffs, under a claim of right, much less for the statutory period prescribed for the establishment of title to real property by prescription or adverse possession. Moreover, we have found no evidence clearly warranting the finding that the defendant Scott has the right to the use of 90 miner's inches and the Galeppis to 310 miner's inches of the waters of said creek. There is no testimony which shows that exact or any proper measurements had been made of the respective quantities of waters used by the defendants. Scott merely expressed the opinion—that is, it amounted to no more than an opinion—that 90 miner's inches of water had usually been diverted through his ditch to his lands from said creek—some of this, however, from what was known as the "Hot Springs." The only testimony which could by any possibility be said to support the finding that the Galeppis had used as much as 310 inches of water is that describing the pumping capacity of the pump installed on their lands about a year before the commencement of this action. That testimony falls quite short of showing that 310 miner's inches of waters had for over five years been habitually used by the Galeppis or that that quantity of water was necessary for their purposes.

[4] It must be borne in mind at all times that the decree here, should it be permitted to stand, will deprive the plaintiffs of their riparian rights—rights which do not involve mere easements or appurtenances to their riparian lands, but which are parts and parcels of their lands and of the ownership thereof. Hargrave v. Cook, 108 Cal. 72, 77, 41 Pac. 18, 30 L. R. A. 390; Duckworth v. Watsonville, etc., Co., 150 Cal. 520, 89 Pac. 338; Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062; opinion of Supreme Court denying petition for hearing in Peake v. Harris, 192 Pac. 310, 317 et seq.

[5] It is safe to say that in nearly every case where title to real property is sought to be established by adverse possession or prescription, which is based entirely upon the presumption of a grant of such property to the party so claiming it or to his predecessors in interest, there has in point of fact never been a grant or conveyance to the adverse claimant or his predecessors for a consideration. Hence, no person should be deprived of his property rights upon the plea of adverse possession or prescription unless such plea is sustained by the clearest and most satisfactory proof. Indeed, the proposition as thus stated has been plainly and positively declared in the cases.

In Clarke v. Clarke, 133 Cal. 667, 669, 66 Pac. 10, 11, it is said:

"The law will not allow the land of one person to be taken by another, without any conveyance or consideration, upon slight presumptions or probabilities"—citing Niles v. Los Angeles, 125 Cal. 576, 58 Pac. 190.

Again, in the same case, the proposition is thus stated:

"The burden is upon the party who claims title by prescription to clearly prove by competent evidence all the elements essential to such title. The user must have been adverse to the true owner and hostile to his title. It must have been actual, continued, open, and under a claim of right. It must have all the elements necessary to acquire title by adverse possession"—citing Thomas v. England, 71 Cal. 459, 12 Pac. 491.

Testing the undisputed facts of this case by the principles enunciated in the above-named cases, it is manifest, as we have already declared, that the finding that the defendants have by prescription or adverse user acquired the riparian rights of the plaintiffs in the stream in question (and such is the effect of the finding and the decree) cannot stand.

We think that a fair and reasonable interpretation of the whole evidence justifies the conclusion that the court in this case should have adjusted the differences between the parties to this suit upon the basis of their riparian rights, and, that therefore it was error for the court to conclude as a matter of law that the plaintiffs were not entitled to have their rights in the stream specifically fixed.

[6] The rule as to the reciprocal rights of upper and lower riparian owners in a common stream is that each has the right to the reasonable use of the waters thereof, and we think it is clear that, upon the evidence, as it is disclosed by this record, the decree should have been framed in accord with that principle. And, in view of a new trial, we suggest, if it be found that there cannot be, by reason of the insufficiency of the flow of water in the creek at times when irrigation is required in that section, a simultaneous use of part of the waters of the stream by both the upper and lower riparian owners, that the doctrine of rotation be applied, as it is explained in Hufford v. Dye, 162 Cal. 147, and the cases cited on page 161 of that case, 121 Pac. 400, on page 406, as applicable to riparian proprietors as well as to appropriators where such a condition is found to exist.

The judgment is reversed, and the cause remanded.

We concur: PREWITT, Presiding Justice pro tem.; BURNETT, J.

(51 Cal. App. 492)

LOS ANGELES COUNTY v. DODGE.

CITY OF LOS ANGELES v. SNYDER, Mayor.

(Civ. 3382, 3383.)

(District Court of Appeal, Second District, Division 2, California. Feb. 23, 1921. Hearing Denied by Supreme Court April 23, 1921.)

1. Constitutional law ⟸70(1)—Assumption by Legislature, supervisors or council that matter is one affecting public interests conclusive on courts.

When the Legislature or a board of supervisors or a city council engaged in the exercise of legislative functions proceeds on the assumption that the matter concerning which it acts is one affecting the public interest or designed to promote the general welfare, the assumption is conclusive upon the courts, unless it is plainly apparent to them that the view is without just foundation.

2. Municipal corporations ⟸268—Stadium to be erected as consideration for lease from county and city held to be instrument to effectuate trust, and within charter powers.

Projected stadium, to be erected by a development association on land leased to it by the city and county of Los Angeles, the city and county contributing thereto, *held* to be an instrument through which the trust originally imposed on the land, as well as the purposes named in the proposed lease, might be discharged for the promotion of the public welfare.

3. Municipal corporations ⟸994—Right to determine price of improvements subject to no greater interference from courts than question of improvements itself.

If a city council and county board of supervisors may determine what improvements are calculated to advance the public interest, subject to interference by the courts only when it is plainly apparent that such improvements are not so calculated, it must necessarily be true that they may determine what price should be paid for the improvements, subject to no greater right in the courts to interfere.

4. Municipal corporations ⟸994—Price paid by city and county for improvements held not so great as to subject transaction to court interference.

Expenditure by city and county of Los Angeles of $950,000, one half from each, in pay-

ment for a stadium on land of an agricultural association leased by it to the city, and by the city and county to a development association, ownership of the building to vest finally in the agricultural association, possession in the city and county *held* not so great a price on the part of the county for the public benefits to it as to subject the transaction to the interference of the courts.

5. Agriculture ⊂⊃1—Acts empowering agricultural association to lease construed.

St. 1909, p. 982, § 7, empowering agricultural associations to sell, lease, beautify, improve, and dispose of real property, etc., *held* merely clarified or supplemented, and not repealed, in its general power to lease, by St. 1909, p. 1082, empowering agricultural associations to lease lands to any municipal corporation, county, or city and county, etc.

6. Municipal corporations ⊂⊃721(1)—Athletic field not a "park" within charter provision.

A playground and athletic field is not a "park" within the meaning of city charter of Los Angeles, § 119b, providing that property dedicated for the use of the public as a public park shall forever remain to such use inviolate, a "park" being a piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open air recreation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Park.]

7. Municipal corporations ⊂⊃62—Lease to development association for erection of stadium held not a delegation of public duty to private agency.

Proposed lease from city and county of Los Angeles to a development association for erection of a stadium thereon for agricultural exhibits and athletic contests, the city and county to furnish funds for the erection *held* not to constitute a delegation by the city of performance of its public duty to a private agency.

Applications for writs of mandate by the County of Los Angeles against Jonathan S. Dodge, as Chairman of the Board of Supervisors of the County and by the City of Los Angeles, a municipal corporation, against Meredith P. Snyder, as Mayor of the City. Writs granted.

A. J. Hill, Co. Counsel, and Edward T. Bishop, Asst. County Counsel, both of Los Angeles, for petitioner Los Angeles County.

Charles S. Burnell, City Atty., W. P. Mealey, Asst. City Atty., and J. H. O'Connor, Deputy City Atty., all of Los Angeles, for petitioner City of Los Angeles.

O'Melveny, Millikin & Tuller, Sayre Macneil, and John A. Powell, all of Los Angeles, for respondents.

WORKS, J. These proceedings were instituted to compel the respondent Dodge, as chairman of the board of supervisors of the county of Los Angeles, and the respondent Snyder, as Mayor of the city of Los Angeles, to execute a certain lease on behalf, respectively, of the two bodies politic, the board of supervisors of the one and the city council of the other having ordered such execution, and the respondents having refused to obey the orders. The petitions in the two proceedings allege the same facts, and the return in each is identical with that in the other. These returns are in the form of general demurrers to the petitions. The entire controversy may therefore be resolved from the faces of the petitions, and the two proceedings may be treated as one.

In addition to the county and the city, there are two organizations which find frequent mention in the petitions. One of these is the Sixth District Agricultural Association, "a public corporation of the state of California, to wit, an agricultural district." The other is the Community Development Association, "a nonprofit co-operative corporation duly organized and existing under and by virtue of the laws of the state of California, with the power and for the purpose of holding and maintaining industrial exhibitions, agricultural fairs, street pageants, athletic exhibitions and other performances designed to foster, promote and promulgate [sic] the industries and industrial welfare of the people of the state of California, and to lease and rent lands and construct buildings thereon for any or all of said purposes, and to lease out such buildings when constructed."

The agricultural association is the owner of Exposition Park, in the city of Los Angeles, but that ownership is charged with a trust thus specified in the deed through which the association derives its title:

"The said lands * * * shall be held in perpetuity as a place for holding agricultural exhibitions or fairs, and shall be managed and controlled by the association for that purpose; and also for the purpose, so far as consistent therewith, of leasing or otherwise managing the same so as to raise a revenue for meeting the expenses of holding such exhibitions or fairs; and especially, so far as consistent with the above purposes, for the purpose of holding exhibitions of horses, cattle, and other stock, and of the agricultural, horticultural, viticultural, mechanical, manufacturing and domestic products" of the sixth agricultural district.

On May 21, 1912, the agricultural association leased to the city a part of the land owned by it as above stated. There were two parcels covered by the lease, but one of them, however, designated as parcel B, being of interest in this controversy. Parcel B is appropriately described in general terms as the tract inclosed by the race course in Exposition Park, and it is the identical land proposed to be demised by the lease which it is the purpose of these proceedings to compel the respondents to execute. The city held an earlier lease to the land, dated February 23, 1910, and the lease of May 21, 1912,

somewhat different in terms, supplanted the former instrument. The second lease was for a term of 50 years, running from the date of the first, with a right of renewal, on the part of the city, for a second 50 years. By the terms of the lease the city "agrees to lay out and improve the parcel of land herein designated as 'Parcel B' as and for a public playground and athletic field in accordance with plans prepared by the board of playground commissioners, or by such officer or board as may succeed to the powers and duties of said board of playground commissioners by law hereafter, subject however, to the approval of said plans" by the agricultural association, "and to provide the necessary apparatus for an athletic field and to keep and maintain the same for said purposes during the term of this lease." It was provided, in another part of the instrument:

"That said parcel of land herein designated as 'Parcel B' shall be under the control and direction of the board of playground commissioners of the city of Los Angeles or such officer or board as may succeed to the powers and duties of said board by law hereafter, and said board shall have the right to make and enforce such reasonable rules and regulations for the government of said athletic field or playground and said parcel of land shall be open at all times, except as herein otherwise provided, for the use of the public."

The exception mentioned in the last two lines of the quotation refers to certain reservations made in the lease in favor of the lessor, the nature of which it is not necessary to state. The lease also provided:

"That said parcels of land hereby demised shall at all reasonable times be open to the public as a place for exhibiting agricultural, horticultural and botanical products and for the recreation and enjoyment of all persons desiring to avail themselves of the opportunity therefor."

The consideration paid by the city for the lease was the sum of $10,000, the receipt of which was, by the terms of the instrument, acknowledged by the agricultural association, and the agreement of the city to expend $100,000, within 10 years, in improvements on parts of the demised property other than Parcel B.

We now come to a statement of the terms of the instrument which it is sought to require the respondents to execute. The agricultural association, not being a party to the lease, has in writing consented to its execution and it already has been executed by the Community Development Association. That association, the city, and the county are the prospective parties to the instrument. By the proposed convention between these parties, speaking in the present tense and not prospectively, the city leaves Parcel B to the development association, the "principal consideration" passing from the latter being the "erection and construction" of a certain stadium, which is hereafter referred to with greater particularity, the leasehold interest, and the life of the instrument generally, to terminate February 23, 1960. It is to be noted, however, that, as will more fully appear below, the interest of the development association under the lease is to be, after 10 years from its date, merely nominal.

By the terms of the instrument now under our inspection the development association agrees to construct, on Parcel B, according to the plans of a certain architect, which plans are by reference made a part of the agreement, a stadium capable of seating 75,000 persons "suitable for exhibitions of productions hereinabove mentioned, including all manner of games, parades or other exhibitions in furtherance of the purposes hereinabove stated." By way of elucidation of the terms of this quotation it is to be stated that the "exhibitions * * * hereinabove mentioned," and the "purposes hereinabove stated," appear in earlier portions of the lease in the following language:

"Agricultural exhibitions or fairs, * * * exhibitions of horses, cattle and other stock, and of agricultural, horticultural, viticultural, mechanical, manufacturing and domestic products," and "industrial exhibitions, agricultural fairs, street pageants, athletic exhibitions and other performances designed to foster, promote and stimulate the industries and the industrial business and commercial welfare of the people of the state of California."

The instrument further provides "that for and in consideration of the right to use said stadium, its accessory buildings and grounds at the times * * * herein provided during each year of the term" of the agreement, the city and the county will each pay to the development association $50,000 within 6 months after the commencement of the construction of the stadium, $62,000 within 30 days after its completion, $68,000 1 year after the date of the last preceding payment, $65,000 2 years after that date, $62,000 3 years after that date, $59,000 4 years after that date, $56,000 5 years after that date, and $53,000 6 years after that date, or the total sum of $475,000 from each of said bodies politic, being a grand total of $950,000 from the two together. It is further agreed that for a period of 10 years from the date of the lease the city and the county will each pay to the development association, each year, a sum equal to the tax collected by it, the respective body politic, during such year.

It is further provided by the lease that during the first 10 years of the life of the instrument the county "may have the use, possession and enjoyment of said stadium and its accessory structures or buildings, or any part thereof, for public purposes not inconsistent with the purposes for which the said land is held in trust" by the agricultural association, during a consecutive period, to be

selected in a certain manner by the county of 15 days in the months of January, March, May, July, September, and November of each year; and the city is to enjoy a like and equal privilege, upon the same conditions, during February, April, June, August, October, and December of each year. After the expiration of the 10 years the city and the county are each to use and enjoy the property half of the time, under a scheme of division provided by the convention. During the 10-year period except for the above-mentioned rights of the city and the county, the possession and use of the stadium are, of course, to be in the development association, and it may charge an admission fee for exhibitions and performances given under its auspices, but it agrees to maintain the property and keep it in good condition and repair during that period, and "all revenues derived by said association from the same during said period shall be applied by said association to the expense of maintenance of said structures and the accompanying grounds, and the remainder of said revenue shall be used in carrying out those purposes of the association" which are mentioned in the lease. In furtherance of this last clause it is provided that the association shall, during the 10-year period, render to each the city and the county, semiannually, full and complete accounts of its financial operations, receipts, and disbursements under the lease. After the expiration of the 10 years the expense of the maintenance of the property is to be borne equally by the city and the county.

Another provision of the proposed lease is couched in these terms:

"Said stadium and its accessory buildings, when constructed, shall be and become the property of said association, and said association shall have the title to the same, separate and apart from the land; that said association shall have the right to withdraw from this agreement at any time after ten years from the date of its execution, upon written notice of its intention so to do delivered to each of the parties hereto thirty days prior to such termination, in which event the title to said stadium and its accessory buildings shall immediately vest in the said district, subject to all the other provisions of this agreement."

The proposed lease concludes with an agreement upon the part of the development association to vacate the demised premises at the expiration of the 10-year period, and to deliver possession to the city and to the county, with provisions securing and protecting the two bodies politic in the event that the stadium is not constructed, and with a clause providing for the nonassignability of the instrument.

[1, 2] One of the objections made by the respondents to the proposed lease is that it cannot be authorized by the legislative bodies of the city and the county, for the reason that the money proposed to be paid by them for the construction of the stadium would not be expended for a public purpose. We may premise a consideration of this question by the statement of a well-established rule bearing upon the sanctity surrounding action by the legislative department of government and the comparative freedom which that branch enjoys from interference by the judicial department, especially as that rule will be found to have a bearing upon other questions which we shall discuss below. The doctrine to which we refer has been stated in various ways in the many cases in which it has received the attention of the Supreme Court (three of which are Stockton Railroad Co. v. City of Stockton, 41 Cal. 147, 168, 175; Daggett v. Colgan, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474, 27 Am. St. Rep. 95; Application of Miller, 162 Cal. 687, 696, 124 Pac. 427), and it may be restated, in language fitting to the present occasion, thus: When the Legislature, or a board of supervisors or city council engaged in the exercise of legislative functions, proceeds upon the assumption that a matter concerning which it acts is one affecting the public interest or designed to promote the general welfare, the assumption is conclusive upon the courts, unless it is plainly apparent to them that the view entertained by the legislative body is without just foundation. Here, if we accord to them the honesty of purpose which must be conceded to them and the assumed existence of which largely supports the rule we have just stated, the board of supervisors and the city council, in ordering the execution of the proposed lease, proceeded upon the assumption that it is calculated favorably to influence the public welfare. Can we say that they were not justified in that view? The respondents, in insisting that they were not, contend that, while the county is expressly authorized by law to acquire real property "for a courthouse, jail, hospital, * * * art gallery, art institute, stadium and almshouse, public pleasure ground, public parks and other public purposes" (section 4041, subdivision 6, Pol. Code), the city has not the power to enter into the field now proposed to be invaded. The respondents quote from the Los Angeles city charter (subd. 4, § 2, art. I) the provision to the effect that the city may acquire property for "libraries, reading rooms, art galleries, museums, assembly or convention halls, schools, kindergartens, parks, playgrounds, gymnasiums, baths, * * *" etc., and that it may acquire buildings and establishments "necessary or convenient for the transaction of public business or for promoting the health, morals, education or welfare of the inhabitants of the city or for their amusement, recreation, entertainment or benefit," and point to it as insufficient to authorize the acquisition of a stadium. Fur-

ther, the respondents contend that no adjudicated case can be found which upholds an appropriation of public funds for the construction of a stadium, and, having in mind the trusts imposed upon Parcel B by the deed under which the agricultural association holds title, as well as the broad purpose stated in the proposed lease, and commenting upon a definition of the word "stadium" as set forth in the brief of one of the petitioners, they say:

"Certainly the idea of using stadiums for the purpose of holding agricultural exhibitions or live stock shows was foreign to the conception of the ancient Greeks, and the attempt to attach such purposes to the use of the building contemplated by the lease agreement here involved requires a stretch of imagination and a straining of the reasonable construction of the terms used which it is unpleasant to contemplate."

This reference to the Greeks is most unfortunate for the respondents' cause, and is plainly made at random, not from an accurate reading of Grecian annals. It may be confounded by quotation from a standard history of Greece. After describing the stadium used for the Olympic games and after chronicling the rise of the Pythian, Nemean, and Isthmian games, all patterned upon the great original, Grote says:

"The sacred games and festivals, here alluded to as a class, took hold of the Greek mind by so great a variety of feelings, as to counterbalance in a high degree the political disseverance, and to keep alive among their widespread cities, in the midst of constant jealousy and frequent quarrel, a feeling of brotherhood and congenial sentiment such as must otherwise have died away. * * * Nor must we forget that the festival afforded opportunity for a sort of fair, including much traffic amid so large a class of spectators, and besides the exhibitions of the games themselves, there were recitations and lectures in a spacious council room for those who chose to listen to them, by poets, rhapsodes, philosophers, and historians—among which last, the history of Herodotus is said to have been publicly read by its author. * * * Kylon, whose unfortunate attempt to usurp the scepter at Athens has been recounted, had gained the prize in the Olympic stadium; Alexander, son of Amyntas, the prince of Macedon, had run for it. The great family of the Diagoridæ at Rhodes, who furnished magistrates and generals to their native city, supplied a still greater number of successful boxers and pankratiasts at Olympia, while other instances occur of generals named by various cities from the lists of successful Olympic gymnasts; and the odes of Pindar, always dearly purchased, attest how many of the great and wealthy were found in that list."

It is apparent from this passage that the Greeks used their stadiums in exactly the manner in which the one in contemplation by the city and the county is expected to be used by them, considering the difference between the ancient and the modern civilizations; and we have given space to the quotation because it is authority, in the present discussion, of equal value with the opinion of a court upon the subject, which, according to respondents, we must seek in vain. In connection with the striking recital of Grote and with the knowledge which all possess as to the form and character of a stadium and the general uses to which such a structure and the space it surrounds may be put, we may, however, quote with profit from Egan v. City and County of San Francisco, 165 Cal. 576, 133 Pac. 294, Ann. Cas. 1915A, 754:

"The trend of authority in more recent years has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment. * * * Generally speaking, anything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes."

The board of supervisors and the city council were amply justified in indulging the assumption upon which we have said their approval of the lease was predicated. We have no doubt that the projected stadium is well designed as an instrument through which the trust imposed upon Parcel B, as well as the purposes named in the proposed lease, may be discharged and effectuated, that its construction and maintenance will in an immense degree promote the public welfare, and that the power to construct and maintain it are well within the provisions of the charter.

In further pursuit of the contention that the city and the county propose to disburse the public funds for other than a public purpose, the respondents assert that, during the parts of the period of 10 years following the date of the proposed lease when the stadium is not in the possession of the city or the county, the development association is privileged to derive a revenue from the property by making charge for admissions to exhibitions or performances held under its auspices. This point is effectually disposed of by the express terms of the lease itself. We have seen that the money resulting from the charge for admissions must be expended in the maintenance of the property, and that such reports are to be made by the development association to the city and the county as will enable them to see to it that it is so expended. Under such circumstances neither the association nor its members may derive a profit from the use of the stadium. In this respect, also, then, the use of the public funds in the erection of the structure is not a use for a private purpose.

Another assault which the respondents make upon the contemplated lease agreement is that the county, under its terms, would acquire too intangible an interest in the stadium and in the land upon which it is

to be erected to justify the proposed expenditure of county funds. This contention, although directed alone at the contemplated entry of the county into the arrangement, is based upon the idea that neither the city nor the county would obtain under the agreement more than an option or license to use the property. Respondents cite no authority in support of this contention, for the case of Emerson v. Bergin, 76 Cal. 197, 18 Pac. 264, mentioned in their brief, decides only that a license, in respect to real property, is "an authority to do a particular act, or series of acts, on another's land without possessing any estate therein," while the question here is whether, under the proposed lease, the county would acquire an estate or a tangible interest in Parcel B and in the stadium proposed to be erected upon it.

Notwithstanding the failure of counsel to present authority in support of their position, it must be conceded that, at least upon a superficial examination, the situation presents some difficulties, in view of the fact that the city and the county propose to expend the considerable sum of $950,000, one-half to come from each, in payment for the erection of a structure upon the land of the agricultural association, the ownership of the building to vest, in the final outcome, in that corporation. We propose, therefore, to analyze and consider the question made by the respondents with enough care to demonstrate that the difficulties mentioned are more apparent than real. It is evident that the prospective rights of the city and the county under the lease are quite different in fact, whether or not they are so in legal effect. The city already has, under the lease of 1912, an estate for years in the soil, subsisting until 1960, with a right to extend that estate for further 50 years. Under the proposed lease the city and the county may each occupy and use the property, including the stadium, after it is completed, for one-fourth of the time during 10 years from the date of the execution of the instrument, and for one-half of the time from thence forward until 1960. Thereafter, if the city exercises its option to renew under the lease of 1912, it may exclusively occupy and enjoy the property for an added 50 years. The right of the city under the proposed lease is, then, of more value, and is of a higher quality than that of the county. The holder of an estate for years, it is probably at the same time landlord to the development association, although we need not be at pains to define, in exact terms, its relationship to that corporation, nor need we attempt to give a name to the rights to be enjoyed by the county. It might be a work of some nicety to characterize fittingly the respective situations of the parties under the proposed arrangement, and it is not necessary for us to undertake the task. The lease agreement seems to be novel in form, and by that expression we do not adversely criticize it, for it is admirably conceived and admirably phrased. Whether or not it is to be regarded as creating the technical relationship of landlord and tenant between the city and the development association, or between the city and the county, or whether it makes each of the bodies politic but a tenant of the private corporation, for a time, in the stadium, it certainly creates clearly and definitely expressed contractual obligations between the parties. A very substantial consideration is to be paid by the city and the county for what rights each is to enjoy, and those rights cannot be misapprehended by a reader of the proposed agreement, nor can they be abridged nor taken away. No court can regard them lightly, for they are fixed and determined in apt and accurate language.

[3, 4] We have already said that the rights of the city under the agreement are of more value and of greater quality than those of the county, but that is not to say that the county is not justified in expending as much money as the city under the arrangement. The city is already master of the situation under its lease of 1912. It has a thing of great value under the instrument. It has, in common parlance, something to sell to the county, and it is these two who are to negotiate the terms of the sale. It is for the city to determine what consideration it will accept for the thing offered, and it is for the county to determine whether it can justly pay the price demanded. Surely, the authorities we have noted early in this opinion (Stockton Railroad Co. v. City of Stockton, supra, and the other cases cited with it), and the principle we have there stated, must have a direct application here. If a city council and a board of supervisors may determine what improvements are calculated to advance the public interest, subject to interference by the courts only when it is plainly apparent that such improvements are not so calculated, it must necessarily be true that they may determine what price shall be paid for these improvements, subject to no greater right in the courts to interfere. We cannot say that the county proposes to pay too great a price for the acquisition of the rights to be conferred upon it by the proposed lease, and we are therefore bound to declare, upon the judgment of the board of supervisors, that what it is to get is worth what it proposes to pay.

[5] The most determined objection made by respondents to the validity of the proposed lease agreement is that by its terms an attempt is made by the city to delegate to a private corporation, the development association, nondelegable public functions. Several lines of argument are addressed to this general question. It is first claimed that, under the original deed by which it holds, the ag-

ricultural association could not have leased to the development association, and that therefore the city, taking under the lease of 1912 no greater rights than the agricultural association possessed, cannot lease to the development association. By an act approved April 17, 1909 (Stats. 1909, p. 982, § 7), the Legislature empowered agricultural associations, among other things, to "sell, lease, beautify, improve and dispose of" real property, "and do any and all acts and things necessary to carry out the objects and purposes for which said associations are formed." This language would seem to confer the power to lease to a private corporation, and we do not understand that the respondents oppose this view. In fact, they refer to this statute as conferring a "general power" to lease. They do contend, however, that the authority thus given was removed by a statute approved 5 days later, April 22, 1909 (Stats. 1909, p. 1082). This latter act empowers an agricultural association "to lease lands owned, managed or controlled by said association, whether in trust or otherwise, not needed for the permanent use of said association, to any municipal corporation, county, or city and county, in which said lands are located for a period of not to exceed 50 years, for purposes not inconsistent with the objects and purposes for which said association is formed and for which said lands are held, owned or controlled by it." The enactment contains a provision to the effect that "all acts and parts of acts in conflict with this act are hereby repealed," and it is by means of this clause that the respondents contend that the power conferred by the act of April 17 was taken away, for they say that the act of April 22 does conflict with the earlier act. Considering, which is the fact, that the act of April 17 was one defining the territorial limits of the 45 agricultural districts of the state, that it provided the machinery for the formation, organization, and powers of agricultural associations in the various districts, that it authorized the granting of financial aid by the state to the associations, and that it required an annual report from each association to the state board of agriculture, while the act of April 22 is devoted to the single purpose indicated by the quotations we have made from its provisions; considering, also, the fact that the second act sprang into being but 5 days after the first—we should expect to find a plain and decisive inharmony between the respective provisions which are now in question before we could hold that a conflict exists. We actually, however, perceive a contrary situation. Without reference to the considerations just mentioned, and having regard alone to the subject-matter of the two provisions which it is claimed are in conflict, it is apparent that the conflict is not present. The first act conferred a general leasing power. The Legislature, evidently fearing that some doubt might exist as to whether agricultural associations could execute leases to cities, counties, or to a city and county under the general language of that act, passed the act of April 22. The second act merely clarifies or supplements the first. We are convinced that the agricultural association could have leased directly to the development association.

[6] Continuing their contention that the city proposes to delegate the performance of its public functions to a private corporation, the respondents call attention to the fact that the lease of 1912 demised Parcel B to the city for use as a public playground and athletic field and for the holding of the various kinds of exhibitions mentioned in the instrument, and that the municipality bound itself thereby to keep the property open to the public at all times for those purposes and to operate and maintain it under the control of the board of playground commissioners. It is, upon this premise, insisted by the respondents that Parcel B was by the lease dedicated to a specific public use, that the city is bound, under that dedication, to continue the land in that use, and that the proposed lease agreement amounts to an abrogation or violation of that duty. In support of their contention the respondents first cite section 119b of the city charter of Los Angeles, which is to the effect that property "set apart or dedicated for the use of the public as a public park or parks shall forever remain to the use of the public as such park or parks inviolate, and no part of said land or real property shall ever be used or occupied for any other purpose." It is apparent to us that this section does not support respondents' position. A playground and athletic field is not a park within the meaning of the prohibition enforced by the section. None of the many decisions throughout the country which we have discovered, and in which the word "park" is defined, apply that designation to a public playground. A number of these decisions adopt the definition of the Century Dictionary to the effect that—

> "A park is a piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open air recreation."

With that definition we are satisfied, and a public playground does not come within it. We are aware that it has been determined that the setting aside of a part of a park as a playground is not inconsistent with park purposes (Caulfield v. Berwick, 27 Cal. App. 493, 150 Pac. 646), but that is far from saying that a playground is itself a public park. In fact, the case cited indicates the contrary, for it is to the effect, the italics being ours,

that "the devotion of *a reasonable portion* of a public park to tennis courts, croquet grounds and children's playgrounds" comes within the uses for which public parks are created.

In further support of their contention that the city proposes, by the contemplated lease agreement, to delegate its public functions to a private corporation, respondents cite City of Oakland v. Carpentier, 13 Cal. 540, Scollay v. County of Butte, 67 Cal. 249, 7 Pac. 661, Knight v. City of Eureka, 123 Cal. 192, 55 Pac. 768, Thompson v. Board of Trustees, 144 Cal. 281, 77 Pac. 951, Egan v. City and County of San Francisco, 165 Cal. 576, 133 Pac. 294, Ann. Cas. 1915A, 754, and Galindo v. Walter, 8 Cal. App. 234, 96 Pac. 505. As these cases all announce a like principle, and as respondents place great reliance on the latest of them, Egan v. San Francisco, our view that all are inapplicable to the present controversy may properly be presented by considering that one, as compared with other authorities which we shall cite and with the facts which are now before us. In the case relied on the municipality owned a block of land, being part of a tract which had been set apart as a civic center. The city had the power under its charter to erect and conduct an opera house, but a private corporation agreed to expend $750,000 in the construction and equipment of such a building on the block in question, title to the structure to vest in the city and the building to be used for the production of operas and other musical and dramatic performances. The opera house was to be managed and controlled in perpetuity by a board of trustees, composed of nine members, and these trustees were to prescribe the quality of the performances to be given in the building and to fix the prices of admission to them. A citizen brought suit to enjoin the carrying out of the agreement and the Supreme Court determined that he was entitled to the relief demanded, upon the ground, in effect, which respondents invoke in opposition to the lease inveighed against in the present litigation. It is obvious from the above statement that the city of San Francisco, in the case cited, had attempted to barter away its public duty and responsibility, but is that case at all kindred to the present one? Note the difference between the two situations. Here, there is no final abdication of the functions of the city, if, in view of what we shall hereafter say, there can be said to be any abdication of its functions at all. It is true that the development association is to have the use of the property half the time for something less than 10 years, as the period of construction, fixed by the lease agreement at a year and a half, with a right to extensions of time for cause, is to be deducted from the 10 years; but the revenue to be derived from that use is to be expended for the maintenance of the property. The use of the property, without expense to either public treasury for maintenance, then, for nearly 10 years, is to be enjoyed by the city and the county the remaining half of the time for that period, and for all the time thereafter until 1960, with the city's right of renewal under the lease of 1912 yet to be considered. Allowing to the members of the city council and of the board of supervisors the honesty of purpose which we must accord to them and the soundness of judgment which we must attribute to them, under authorities already twice mentioned in this opinion, we are bound to consider, not only that the stadium is necessary to the needs of the people of the city and the county, but that the two bodies have adopted an available means for its procurement, unless their want of honesty or lack of judgment in those matters is apparent to us.

The rights secured to the development association by the proposed lease are temporary only, and their comparatively brief exercise is to be followed by a long and beneficial use and enjoyment of the property by the city and the county. Except for the mere power to present and to superintend presentation of performances and exhibitions, the rights of the development association are shadowy and unsubstantial, with the city and county at all times present and apparent as the substance behind the shadow. The development association is but the representative of the city and the county in the construction, in the maintenance and in the collection and disbursement of funds for the maintenance of the stadium. In its financial operations, under the system of reports provided for in the lease, it is subject to the rigid scrutiny and control of both bodies politic. Does this temporary interposition of the development association into the proposed enterprise, granted that the corporation may, during its intermittent and comparatively brief tenure, regulate the giving of performances and exhibitions; does that interposition, we say, bring the arrangement within the condemnation of the cases, including those cited by the respondents, which are undoubtedly and clearly to the general effect that a public entity cannot delegate the performance of its governmental duty or functions to a private agency? There are many decided cases which establish a rule of law not in opposition to that applied in Egan v. San Francisco, supra, and the other cases relied upon by respondents, but they are based in each instance upon a state of facts essentially different from that presented in those cases. To which of these different lines of facts is our present case most clearly akin? In Worden v. City of New Bedford, 131 Mass. 23, 41 Am. Rep. 185, the municipality had leased a room in its city hall to a private association for the holding of a poultry show, upon a compen-

sation paid for the use of the room, including lighting and heating and the services of a janitor who was regularly in the employ of the city and under whose charge the city hall was. Through the negligence of the janitor a person who was apparently in attendance upon the poultry show was injured, and suit was brought against the city to recover for the resulting damage. The court said:

"The city could not erect buildings for business or speculative purposes, but having a city hall, built in good faith and used for municipal purposes, it has the right to allow it to be used incidentally for other purposes, either gratuitously or for a compensation."

Upon this reasoning a verdict for the plaintiff was sustained. The Supreme Court of Wisconsin impliedly recognizes the power of a municipality to lease park property for other purposes, if the use under the lease be not destructive of its use for park purposes. In passing upon such a lease it was said, in Gilman v. City of Milwaukee, 55 Wis. 328, 13 N. W. 266:

"It may be a question of fact whether such use is inconsistent with its use for a park, such use being to some extent public. If, however, as seems to be implied by the complaint, such use is entirely inconsistent with the use of these grounds for the purpose of a public park, and destructive of such use, then certainly such a diversion of the grounds is unlawful, and a lease for that purpose void."

The rule we have in mind has also been applied by the Supreme Court of the United States. In City of New Orleans v. Louisiana Construction Co., 140 U. S. 654, 11 Sup. Ct. 968, 35 L. Ed. 556, it appears that a certain tract of land along the Mississippi river had long been used as a public landing, the right to such use having been based upon a dedication of the land to the municipality. The city leased the property to a private individual for a term of 25 years, and he erected certain structures upon it, which were used for the landing and storage of sugar and molasses, that having been the purpose to which the tract had been theretofore devoted. In passing upon the validity of the lease the court said:

"The city has not undertaken to alienate or sell the ground under the sheds, but has only leased it for a term of years, reverting at the end of that term, with the sheds built thereon, to the city for the benefit of the public. The ground has no more ceased to be devoted to the public use by the making of the lease and the erection of the sheds, than if the city had itself built and managed the sheds for the promotion of commerce and the benefit of the city and its inhabitants."

In Bryant v. Logan, 56 W. Va. 141, 49 S. E. 21, 3 Ann. Cas. 1011, a similar question was under review. The result of the opinion there rendered is thus expressed in the syllabus prepared by the court:

"A lease for the term of 1 year, with a right to extend it 5 years, by a city, of a part of a public park, to improve it, and use it at times for training and running race horses, for a rental to the city, reserving access at times to the public for riding and driving on the track, is not an unlawful diversion of such park from its legitimate use, and the lease is not void."

Before turning to the decisions of our own state, we cite other cases as illustrating the doctrine upon which the foregoing quotations are based: Little v. City of Holyoke, 177 Mass. 114, 58 N. E. 170, 52 L. R. A. 417; Davis v. Inhabitants of Rockport, 213 Mass. 279, 100 N. E. 612, 43 L. R. A. (N. S.) 1139; Dodge v. North End Improvement Association, 189 Mich. 16, 155 N. W. 438, Ann. Cas. 1918E, 485.

[7] In Harter v. City of San Jose, 141 Cal. 659, 75 Pac. 344, the Supreme Court passed upon the validity of a lease by a city to a private individual of a portion of a public park for hotel purposes. After discussing the question whether there was an express authority in the city to make the lease, the court upheld the instrument upon the broad general principles underlying the decisions from other states to which we have referred in our discussion of this question. In Egan v. San Francisco, supra, which is relied on so strongly by respondents, the court, in connection with its refusal to uphold the agreement then in suit, says:

"There may, of course, be power to lease public property, but the agreement under consideration does not purport to be a lease."

The petitioners and the respondents are in disagreement upon the question as to what is meant by this utterance. Without repeating their arguments upon that matter, we are confident that the expression had its use in a consideration of the principles illustrated and supported by the authorities we have above cited. Certainly, the part of the statement concerning the power to lease has ample foundation in those authorities, and is well justified by them. We are convinced, as well, that the validity of the lease agreement now in question is firmly established by them, and that they, instead of Egan v. San Francisco, in the main doctrine presented by it, and other cases like it, rule the point now under discussion. The line of cases upon which we rely, leading up to Harter v. San Jose, supra, and to the detached expression in Egan v. San Francisco, established the rule that a city may lease property devoted to a public use for purposes not inconsistent with such use when there is no public need therefor, and that it may also lease such property for purposes which conduce to or aid in the discharge of such public use. Under the line of cases which we have already referred to so often (Stockton Railroad Co. v. City of Stockton, supra,

and other cases cited with it), it is within the province of the city legislative body to determine that its property devoted to a public use is not needed for such use, either for a limited time, or as to a part of its acreage, and to determine what purposes, to be administered by private agencies, will aid in the discharge of such use, and to make leases thereof accordingly. When that body has solved such a question the courts must be satisfied with the solution, unless it is plainly apparent to them that it is unjustified.

Such a condition is far from apparent to us in this instance, and we now determine that the claim of the respondents that the city is about to delegate the performance of its public duty to a private agency is unfounded and unwarranted.

The demurrers to the petitions are overruled, and a peremptory writ of mandate will issue in each of the proceedings, the one requiring the respondent chairman of the board of supervisors and the other the respondent mayor to execute the proposed lease agreement.

We concur: FINLAYSON, P. J.; CRAIG, J.

51 Cal. App. 630

ALGUIRE et al. v. RIVERSIDE SHEET METAL WORKS. (Civ. 341.3.)

(District Court of Appeal, Second District, Division 1, California. March 3, 1921.)

1. Appeal and error ⇐931(1)—Findings construed favorably in support of judgment.

Findings should be construed most favorably in support of the judgment.

2. Sales ⇐442(2)—Measure of damages for breach of warranty as to fitness of heating plant stated.

In action for breach of warranty as to fitness of heating system to produce a sufficient amount of heat for the rooms in plaintiff's building, the measure of damages under Civ. Code, §§ 3313, 3314, was the difference between the value of the heating system and what its value would have been had it complied with the warranty but if the plant was of no value whatever for the purpose contemplated, the measure of damages would be the difference between the amount paid therefor, where that amount was the value of the system if it had answered the warranty, and the actual value of the different articles which entered into its construction and were retained by plaintiffs.

3. Sales ⇐441(4)—Evidence held insufficient to sustain finding as to damages sustained for breach of warranty.

In action for breach of warranty as to capacity of heating plant, evidence *held* insufficient to sustain finding as to the amount of damages sustained.

Appeal from Superior Court, Riverside County; Pat R. Parker, Judge.

Action by Urban Alguire and another against the Riverside Sheet Metal Works. Judgment for plaintiffs, and defendant appeals. Reversed.

Thomas T. Porteous, of Riverside, for appellant.

Raymond Best, of Riverside, for respondents.

SHAW, J. Defendant appeals from a judgment entered in favor of plaintiffs in an action to recover damages for the breach of a warranty.

As appears from the complaint, defendant, for an agreed price of $576, performed the labor and remodeled a heating system in plaintiff's rooming house, in connection with which it furnished and installed a furnace, oil burner, oil tank, grills, coils, and necessary connections, and guaranteed that the system as installed and completed would "produce sufficient heat for all the rooms at present connected with the old system, and to deliver heat to these rooms with the exception of any above the first floor that may have an obstruction in the air pipe or a faulty installation."

Plaintiffs alleged facts showing a breach of the warranty in that, while they had operated the heating system—

"in accordance with the direction of defendant, it did not produce sufficient heat for all the rooms at the time of the purchase aforesaid connected with the old system and it did not deliver heat to those rooms, with the exception of any above the first floor that may have an obstruction in the air pipe or a faulty installation."

Admitting the terms of the warranty, defendant denied the breach thereof, and alleged that it duly performed all the conditions of the contract on its part to be performed. As to this issue, the court made an adverse finding to defendant. Appellant attacks this finding, claiming that it is not responsive to the issue.

[1] The rule of law is well settled that findings should be construed most favorably in support of the judgment, and, so construed, we deem it sufficient in form and substance.

It is also contended that the evidence is insufficient to support the finding in that the system as installed was connected with a coal furnace theretofore used by plaintiffs, and appellant claims that the guaranty contemplated and was based upon the use of the coal furnace in connection with the oil furnace so installed by it. Conceding this to be true, there is evidence tending to prove that the coal furnace was so used as an auxiliary to the oil furnace without any

appreciable result in the production and distribution of heat to the rooms.

It appears that plaintiffs paid defendant the sum of $351 and made and delivered their promissory note in the sum of $225 covering the balance of the contract price, no part of which was paid. In addition to its answer, defendant filed what it designates a cross-complaint for recovery upon the promissory note so executed by plaintiffs.

Upon these facts, and having found there was a breach of the warranty, the court found "that the furnace and all equipment furnished by the defendant to plaintiffs herein under the terms of the said contract were at the time of delivery to plaintiffs of the value of $265 and no more," and "that said articles would have been of the value of $576 if they had answered the warranty in the said contract contained," thus fixing plaintiffs' damage at $311 less the amount of $225 specified in the promissory note; and as a conclusion of law found that plaintiffs were entitled to recover judgment for $86.

[2, 3] The law as to damages which may be recovered in a case of this kind is declared in the Civil Code as follows:

"The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time." Section 3313.

"The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which is defined by the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose." Section 3314.

The warranty in question was as to the fitness of the heating system for the purpose of producing and distributing a sufficient amount of heat for the rooms in plaintiffs' building, and under the above sections of the Code the burden was upon plaintiffs not only to show a breach of the contract, but the difference in the value of the heating system for the particular purpose for which it was intended and its actual value at the time when delivered to them (Scurich v. Ryan, 14 Cal. App. 750, 113 Pac. 123; Vol. 30 Am. & Eng. Encyc. of Law, p. 231), and this can be done only by evidence of facts and figures from which the amount of damage can be determined. As alleged in the complaint, the furnace, burner, tank, grills, coils, and necessary connections were at the time of delivery to plaintiffs of the value of only $50. This allegation was denied, and the only evidence which the record discloses as having been produced in support of the allegation was the testimony of William Copley, who testified that the value of the castings of the furnace was $90, and that the oil burner installed therewith was of the value of $125, making a total of $215 for these two articles. He further stated:

"There were a great many things connected with the furnace besides the mere castings; that the furnace did not constitute half the labor or anything, or half the price of the job; that there was a brick-set furnace which cost a lot of money, and a hot-air coil in the furnace."

In addition to this testimony, it is alleged in the complaint that, other than the furnace and oil burner, defendant furnished and installed an oil tank, grills, coils, and necessary connections, title to all of which was adjudged to plaintiffs, and as to the character or value of which not a scintilla of evidence was offered. Moreover, the court was left entirely to conjecture as to what constituted the "necessary connections" mentioned in the complaint. If the heating system as installed was of less value to plaintiffs than the amount which they agreed to pay, then the difference in its value as a heating system and what it would have been had it complied with the warranty, would constitute plaintiffs' damage. If, on the other hand, it was of no value whatever for the purpose contemplated, then the difference between $576 paid therefor and the actual value of the different articles which entered into its construction and retained by plaintiffs, would constitute their damage. While in fixing the actual value of the articles the court, in addition to the $215 fixed by Copley as the value of the furnace and burner, charged plaintiffs with the further sum of $50, there is no evidence upon which to base such a charge. If intended to cover the value of "the oil tank, grills, coils, and necessary connections," as to which no evidence was offered, the finding must be deemed based upon the merest conjecture, and not upon proof of facts, without which the damage could not be estimated.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(51 Cal. App. 606)

CALIFORNIA NAT. SUPPLY CO. v. O'BRIEN et al. (Civ. 3240.)

(District Court of Appeal, Second District, Division 2, California. March 1, 1921. Hearing Denied by Supreme Court April 28, 1921.)

1. Appeal and error ⊂⊃762—Contention made on recent decision properly urged in reply brief.

A contention, based on a decision of the Supreme Court rendered since the submission of appeal, will be considered by the appellate court, where urged in reply brief though not in original brief.

2. Corporations ⊂⊃244(7) — Transferees of watered stock, unaware thereof, not liable to creditors extending credit on faith of the fictitious capitalization.

Where a corporation issued stock for property grossly or fraudulently overvalued, transferees of such stock, who did not participate in the transaction, and took their stock unaware thereof, are not liable to corporate creditors, who extended credit on faith of the fictitious capitalization.

3. Pleading ⊂⊃403(2)—Averments in answer not admission so as to supply omissions in complaint.

Where the Supreme Court did not determine until after submission of appeal that transferees of so-called watered stock are not liable to creditors unless they took with knowledge, *held* that allegations in the answers of stockholders, sued by a creditor of the corporation which had taken property at a gross overvaluation, should not be deemed admissions that the stockholders took with knowledge, judgment for the creditor supplying the complaint, plaintiff having neither alleged nor proved that fact.

4. Corporations ⊂⊃240(1) — Creditor who knows of overvaluation of property taken for stock cannot recover from stockholders.

Though property was received in exchange for corporate stock at a fictitious or fraudulent overvaluation, a creditor, who knew of the overvaluation, cannot recover from stockholders, for the recovery is based on principles of fraud, and a creditor who knew of the overvaluation was in no wise defrauded.

5. Corporations ⊂⊃240(1) — One extending credit on faith of fictitious capitalization may recover despite constructive notice.

One who extends credit to a corporation in reliance on fictitious capitalization, property having been exchanged for stock at a gross overvaluation, may recover, notwithstanding he had constructive knowledge of the facts, and by diligent inquiry might have ascertained the overvaluation.

6. Corporations ⊂⊃271—Whether creditor was deceived by fraudulent capitalization, question of fact.

Whether a creditor was deceived by fictitious capitalization, property having been exchanged for stock at a gross overvaluation, is a question of fact.

7. Corporations ⊂⊃271 — Findings as to constructive notice and credit on faith of fictitious capital held not inconsistent.

In an action by a corporate creditor against stockholders, where he asserted that property was received under gross and fraudulent overvaluation, a finding that the creditor relied on the fictitious capitalization is not nullified by a further finding that he had knowledge of facts sufficient to put him on inquiry, and that by diligence he might have discovered the fictitious capitalization.

8. Corporations ⊂⊃232(3)—Stock held to be based on fictitious capital, and not issued by failing corporation.

Where stock of corporation was given promotor in exchange for property grossly overvalued; and he returned a portion to the treasury, the shares, when issued, cannot be deemed the shares of an insolvent corporation, or one whose capital was impaired, but must be deemed stock issued in pursuance of the original scheme of the promoters to create a fictitious capital.

9. Corporations ⊂⊃99(2)—No exception as to mining or oil and gas companies permitting fictitious capitalization.

There is no exception in favor of mining or oil and gas companies allowing them to accept property in lieu of stock at a fictitious overvaluation.

10. Appeal and error ⊂⊃843(3) — Particular questions of fact not reviewed, where cause is remanded.

Where judgment must be reversed and cause remanded the question of sufficiency of the evidence to establish a particular fact will not be determined, as the evidence might not be the same on retrial.

11. Corporations ⊂⊃170, 174 — Relation of stockholder is one of contract, and exists only when party expressly or impliedly consents.

The relation of stockholder to a corporation is one of contract, and exists only when a party expressly consents to become a stockholder, or his conduct is such that his consent can be implied, and he cannot be made a stockholder merely because some corporate officer has entered his name on the books as such, and caused stock to be issued in his name.

12. Corporations ⊂⊃170—One cannot become corporate stockholder by ratification unless there is meeting of the minds.

Ordinarily, ratification, like a contract, includes within it an intention, and one to whom corporate stock was issued without his authority, does not become a stockholder by ratification, unless it clearly appears that there was some conscious and intended approval of the issuance of the stock in his name.

Appeal from Superior Court, Los Angeles County; E. P. Shortall, Judge.

Action by the California National Supply Company, a corporation, against Robert F. O'Brien and others. From a judgment for plaintiff, defendants appeal. Affirmed as to

defendant O'Brien, and as to other defendants reversed, with directions.

W. N. Goodwin, John A. Powell, and Goodwin & Morgrage, all of Los Angeles, for appellants O'Brien and others.

C. C. Mishler, of Los Angeles, for appellants C. H. Post and others.

Haas & Dunnigan and J. J. Wilson, all of Los Angeles, for appellants May and Dinsmore.

Hanson, Hackler & Heath, of Los Angeles, for appellant J. P. Couse.

E. W. Miller and Flint & Mackay, all of Los Angeles, for respondent.

FINLAYSON, P. J. Plaintiff, a judgment creditor of the Panama Oil Company, a California corporation, brought this action against certain of the stockholders of that company to collect what are claimed to be the unpaid balances on the par value of their shares. Plaintiff had judgment and defendants appeal.

In so far as is material to our inquiry, the case, as disclosed by the findings of the trial court, is substantially this: The Panama Oil Company was incorporated with an authorized capital stock of $2,000,000, divided into 2,000,000 shares of the par value of $1 each. At the first meeting of the board of directors, held May 24, 1912, J. B. Hedrick, the president of the company and a leading spirit in its incorporation and organization, presented to the board a written offer to convey to the corporation certain properties, consisting of a lease of certain land supposed to be oil-bearing, certain shares of stock of the Daybreak Oil Company, and an option to purchase certain shares of stock of the Midnight Oil Company, for the sum of $2,000,000, to be paid by delivery of the company's 2,000,000 shares to Hedrick or his order—the shares to be issued as fully paid. This offer was accepted by the board and Hedrick thereupon transferred the properties to the corporation. Three days later, viz. May 27, 1912, Hedrick delivered to the company a written order wherein he directed the corporation to issue to himself 1,000,000 of its 2,000,000 shares of capital stock, and the remaining million to certain of these defendants. Thereupon a certificate for 1,000,000 shares was issued to Hedrick himself, and, at the same time, certificates were issued to such of these defendants as were designated by Hedrick in his order on the company. On the same day a written agreement was entered into between Hedrick and the corporation whereby the former agreed to return to the company, to be held by it in trust, the 1,000,000 shares that had been issued to him, to be disposed of by the corporation for the benefit of its stockholders "with a view to securing the necessary funds with which to carry on the business of said Panama Oil Company, and provide a working capital therefor." Hedrick thereupon indorsed and surrendered the certificate for the 1,000,000 shares that had been issued to him, and a new certificate was issued, certifying that the "treasury" of the corporation is the owner of the 1,000,000 shares. The findings of the lower court refer to the 1,000,000 shares so returned by Hedrick to the corporation as "trust fund stock," also as "treasury stock." Subsequently shares of this "trust fund" or "treasury" stock were issued to certain of the defendants for sums considerably less than the par value.

The actual value of the properties transferred by Hedrick to the Panama Oil Company in exchange for all of its 2,000,000 shares of capital stock was $500,000, and no more. The lower court found that Hedrick and the directors of the Panama Oil Company knew that the properties received by the corporation in exchange for its 2,000,000 shares did not exceed $500,000 at the date of the exchange, and that they caused the 2,000,000 shares to be issued "with the intent to have them appear to have been fully paid for upon their being issued by said corporation."

Thereafter plaintiff sold and delivered to the Panama Oil Company certain goods, wares, and merchandise, for the value whereof it subsequently obtained judgment against that corporation—a judgment for $8,050.56. The Daybreak Oil Company, all of whose issued capital stock was taken over by the Panama Oil Company shortly after the latter's organization, was indebted to plaintiff in the sum of $21,978.31. The Panama Oil Company assumed this indebtedness, and gave to plaintiff its promissory notes therefor. These notes were not paid when they fell due, and plaintiff, accordingly, instituted an action thereon, obtaining a judgment against the Panama Oil Company for $26,561.53. Execution having been issued upon each of these two judgments and returned nulla bona, plaintiff brought this action against the stockholders of the Panama Oil Company to make good its two judgments out of what it claims to be the unpaid balances on the par value of their shares.

At each of the times when it extended credit to the Panama Oil Company, which was subsequent to the issuance of the 2,000,000 shares to Hedrick or his order, plaintiff had no actual knowledge of the facts and circumstances under which the 2,000,000 shares had been issued in exchange for properties of the value of $500,000. Neither the Panama Oil Company nor its officers nor any person made any actual disclosure to plaintiff of the difference between the par value of the 2,000,000 shares and the value of the properties received in exchange therefor; nor did plaintiff give credit to the Panama Oil Company with any actual knowledge of any such difference in valuation. So the trial court found. In addition to the findings,

thus showing that plaintiff had no actual knowledge of the fraudulent transaction whereby shares of the par value of $2,000,000 were issued for properties worth but $500,000, the trial court further found that at the times when it extended credit to the Panama Oil Company plaintiff and its officers and agents "had knowledge of facts and circumstances sufficient to put it and them upon inquiry as to conditions and circumstances attending the issuance of all of the capital stock of the Panama Oil Company on May 24, 1912, as in these findings hereinabove fully set forth, and the execution by J. B. Hedrick of the contract dated May 27, 1912, * * * and that had plaintiff and its officers and agents prosecuted such inquiry it and they would have learned all of the facts concerning the issuance of said stock and the acquisition of said properties by the Panama Oil Company, * * * and such knowledge would have been acquired by it prior to the time it advanced the aforesaid credit to the Panama Oil Company."

The four points made by appellants in their opening briefs are: (1) According to the trial court's findings, plaintiff had constructive notice of all the facts and circumstances under which shares of the par value of $2,000,000 were issued as fully paid in exchange for properties of the value of $500,000; such constructive notice, so it is claimed, was equivalent to actual notice; therefore it must be held, as a matter of law, that plaintiff did not extend credit to the Panama Oil Company in reliance upon any presumption that the full par value of the 2,000,000 shares had been or would be received by the corporation. (2) Those defendants who hold shares issued from what the court in its findings denominated "trust fund" or "treasury" stock—the 1,000,000 shares that were redelivered to the corporation by Hedrick and later issued as from its treasury—cannot be held liable because, so it is claimed, those shares were issued from the treasury of the corporation for their fair market value to enable the corporation to prosecute its business and develop its properties. Hence, it is argued, those shares are within the doctrine enunciated in such cases as Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; and J. F. Lucey Co. v. McMullen, 178 Cal. 425, 173 Pac. 1000. (3) The case is within the rule of the South Mountain Mining Co. Case (D. C.) 5 Fed. 403, wherein it was held, in effect, that the stockholders of a mining corporation are not liable to the corporation's judgment creditors even though their shares were issued as fully paid in exchange for mining properties taken at an overvaluation. (4) The evidence is insufficient to support the finding that defendant Wilbert Morgrage is the owner of shares of the capital stock of the Panama Oil Company, and as such liable to judgment creditors of the corporation for the unpaid balance of the par value of the shares standing on the books of the company in his name.

[1] The foregoing are the only points made for reversal in appellants' opening briefs. Since the first submission of the case, however, appellants, by letter addressed to the court, and, later, by oral argument, have made an additional point, presently to be considered—a point based upon the decision of the Supreme Court in the case of Rhode v. Dock-Hop Co., 194 Pac. 11, handed down by that court some time after the first submission of this case. Under the circumstances, there was, we think, good reason for appellants' failure to make this point in their opening briefs, and we, therefore, are of the opinion that it is within the exception mentioned in Hibernia Sav. & L. Soc. v. Farnham, 153 Cal. 584, 96 Pac. 9, 126 Am. St. Rep. 129, and that the point should be considered.

[2] Passing now to a consideration of appellants' five points: We shall address ourselves to the point last mentioned, since it seems to be the one that necessitates a reversal of the judgment. And since the four points raised in appellants' opening briefs present questions that will arise on a retrial, it becomes our duty likewise to pass upon those questions for the guidance of court and counsel.

1. In Rhode v. Dock-Hop Co., 194 Pac. 11, it is held, for the first time in this state, that where stock is issued as fully paid in exchange for property grossly or fraudulently overvalued (commonly known as watered stock), a transferee of such stock, who did not participate in the transaction whereby it was originally issued, and who took his stock unaware of the character of that transaction, is not liable to a judgment creditor of the corporation for any part of the difference between the par value of the stock and the actual value of the property exchanged therefor; and, further, that it is incumbent upon the plaintiff, in an action by a judgment creditor against a transferee of such watered stock, to allege in his complaint and prove at the trial that such transferee, when he acquired his stock, was fairly chargeable with knowledge of the fraudulent transaction whereby the stock, issued as fully paid, was issued in exchange for the overvalued property.

In the instant case all of the defendant stockholders, with the exception of the defendant Robert F. O'Brien, appear to be within the reason of the rule announced in the Rhode Case, irrespective of whether technically they are "transferees" or not. And if within the reason of the rule, then such defendants must be held to be within the rule itself. Civ. Code, § 3511. The reason for the rule enunciated in the Rhode Case is substantially this: Where a person acquires and accepts stock which purports to be fully

paid, but which, in fact, is not, i. e., where the stock has been watered, the liability of the stockholder to a judgment creditor of the corporation is grounded on fraud, actual or constructive; the liability exists by virtue of the principle that one giving credit to a corporation is entitled to rely upon its ostensible capitalization as the basis for the credit given, and when the corporation issues watered stock, thereby creating the appearance of a capitalization in excess of its real assets, the transaction necessarily involves the misleading of subsequent creditors; and the transaction, therefore, whether done with that purpose actually in mind or not, is at least a constructive fraud upon such creditors. It thus will be seen that a stockholder's liability to a judgment creditor of the corporation is based, not upon his relation to the corporation as a stockholder, but upon a fraudulent transaction—a fraudulent device to evade the law and defeat its useful and wholesome requirements. It follows, therefore, that because fraud, actual or constructive, is the basis of the stockholder's liability one who did not participate in the original fraudulent transaction, or who acquired his stock in ignorance of that transaction, and who is not fairly chargeable with knowledge thereof, taking his stock in the bona fide belief that it had been fully paid for, cannot be held liable.

In the case before us the immediate parties to the original fraudulent transaction—fraudulent in its purpose and effect, in so far as it created an ostensible capitalization of the Panama Oil Company in excess of its real assets—were Hedrick, on the one hand, and, on the other hand, the corporation itself and its seven directors, one of whom was the defendant O'Brien. With the exception of O'Brien it does not appear that any of the defendants was directly a party to, or participated in, the original fraudulent transaction. It follows, therefore, that, with the exception of O'Brien, none of the defendants should be held liable unless it can be alleged and proved that he or she acquired his or her stock under such circumstances as to make him or her fairly chargeable with knowledge of the fraud with which the original transaction was infected. The complaint is wholly void of any allegation purporting to connect any of the defendants with knowledge of the fraudulent transaction that resulted in the issuance of the watered stock, although demurrers, general and special, were interposed and overruled.

[3] It is claimed by respondent that certain averments in the answers of some of the defendants, upon which the court made findings favorable to plaintiff and responsive to the issues thereby tendered, are sufficient to supply the averment, omitted from the complaint, that defendants had knowledge of the nature of the original fraudulent transaction. The answer of the defendants Webb, Fisher, and Levy may be taken as a sample. After denying that they are the owners of any shares of stock in the Panama Oil Company, the answer filed by the defendants Webb, Fisher, and Levy alleges that they are innocent pledge holders for value and in good faith, "and without notice of any amount due or to become due upon the shares of stock of said corporation, * * * and without notice of any claim of plaintiff against defendants or any of them, and without notice of any amount due or claimed to be due for unpaid subscriptions." We do not think that these affirmative averments in the answer of Webb, Fisher, and Levy were intended to be, or were ever understood by any of the parties to be, the equivalent of an allegation that, when they acquired their stock, those defendants had knowledge of the nature of the fraudulent transaction pursuant to which the 2,000,000 shares were originally issued—1,000,000 to Hedrick himself (subsequently transferred to the treasury of the corporation), and the remainder to persons designated by Hedrick. This conclusion is fortified by the consideration that it is fairly apparent from the record that neither court nor counsel ever had in mind the difference between the liability of a subscriber who was a party to the original fraudulent transaction and that of a transferee of such subscriber. Indeed, counsel for respondent expressly concede that the case was neither tried nor decided, nor were any of the briefs written, with the doctrine of the Rhode Case in mind, or with the idea that the law is as there declared, or that it is applicable to the present case. The answer of the defendant Couse, as well as that of the defendants Dinsmore and wife, presents the issue of knowledge somewhat more directly and explicitly than does that of the defendants Webb, Fisher, and Levy. But regardless of what construction may fairly be placed upon the averments in any of the answers respecting defendants' knowledge of the original fraudulent transaction between Hedrick and the corporation, we think that where, as here, it is fairly apparent that neither court nor counsel ever had in mind the difference between the liability of those who were parties to the original fraudulent device and that of subsequent stockholders acquiring their stock without notice thereof, a new trial, where that distinction is observed, is desirable, and that in such case the affirmative averments of the answers should not be deemed to supply the omission of a necessary allegation in the complaint. It would shock all sense of justice to permit an averment in the answers to relieve plaintiff from the effect of its failure to make an essential allegation in its complaint, when no party to the action, not even the plaintiff itself, ever gave to such averment in the answers the value or effect that would have been given it by all the parties

had the averment been pleaded by the plaintiff in its complaint with the intent and purpose that that party now seeks to attribute to it as it is pleaded in certain of the answers.

Our conclusion that a new trial should be had, and plaintiff be permitted to amend its complaint, should it be so advised, accords with what was said by Mr. Justice Wilbur in the opinion filed by him in the Rhode Case:

"I think," says Mr. Justice Wilbur, "that the finding that Knapp was the agent of the defendants in purchasing the capital stock is sufficiently sustained by the evidence and the inferences properly deducible therefrom. In view of the fact, however, that the finding is a general one, and that it is fairly apparent from the record that neither court nor counsel had in mind the difference between the liability of the subscribers and transferees for the unpaid subscriptions resulting from the overvaluation of the property received in exchange therefor, I am satisfied that a new trial, where that distinction is observed, is desirable."

For these reasons we are satisfied that, except as to the defendant O'Brien, who unquestionably was a party to the original fraudulent transaction, the judgment should be reversed with leave to plaintiff, should it be so advised, to amend its complaint to conform to the rule enunciated in the Rhode Case.

[4] 2. It cannot be held, as a matter of law, that the finding that plaintiff had knowledge of facts sufficient to put it upon inquiry respecting the fraudulent issue of the 2,000,000 shares of overvalued properties counteracted the trial court's other finding that plaintiff extended credit to the Panama Oil Company without any actual knowledge of that fraudulent stock transaction. There are, it is true, some loose expressions used by certain of the text-writers to the effect that the issuance of watered stock is binding as against subsequent creditors with constructive notice of the facts. But no case squarely in point has been called to our attention; and we think that, on principle, creditors who extend credit to the corporation with only constructive notice of the fraud practiced upon them are not necessarily precluded from a recovery.

Whether a recovery from the stockholders can be had by a creditor who, without any actual knowledge of the circumstances of the fraudulent transaction that resulted in the issuance of the watered stock, had notice, nevertheless, of facts sufficient to put an ordinarily prudent person upon inquiry, that is, whether a recovery can be had by a creditor who had constructive notice only, presents a question that must be determined in accordance with principles that are a part of the body of the law of fraud. The reason why a subsequent creditor who has actual notice of the real state of affairs cannot disturb the arrangement between the company and its stockholders is that one who has such notice cannot claim that he was deceived by the false representation as to the amount of capital available for the satisfaction of the company's debts. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. Persons deal with the corporation and give it credit on the faith of its ostensible capital—on the strength of the appearances created by its articles of incorporation whereby it proclaims to the world that it is capitalized for a certain amount. Persons extending credit to the corporation have the right to assume that it has paid-in capital to the amount which it represents itself as having; and if they extend credit on the faith of that representation, and if the representation is false, a fraud is thereby perpetrated upon them—as much so as if the corporation's officers had secured the extension of credit by the direct and express representation that all subscribed stock had been issued for its full par value in money or money's worth. If the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, "Make that representation good by paying for your stock." It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases. It follows, therefore, that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the stockholders. It is impossible for creditors with actual notice of the circumstances under which the watered stock was issued, and of the value of the property taken in exchange therefor, to have acted on and trusted appearances rather than the true condition of affairs. It is impossible that creditors with such notice could have been deceived. And since fraud is the sole basis of the right of recovery in such cases (Rhode v. Dock-Hop Co., supra), there can be no recovery by a creditor who was not deceived by the corporation's apparent or ostensible capitalization. Such creditor is not defrauded by the taking of overvalued property in payment for stock (Sherman v. Harley, 178 Cal. 584, 174 Pac. 901, 7 A. L. R. 950; Lea v. Iron Belt Mercantile Co., 147 Ala. 421, 42 South. 415, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93; Hospes v. Northwestern Mfg. Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637).

[5] Though a creditor cannot claim to have been deceived if, when he extended the credit to the corporation, he had actual knowledge of all the facts connected with the fraudulent issue of the watered stock, it does not necessarily follow that a creditor who possesses only notice of facts sufficient

to put an ordinarily prudent person upon inquiry was not in fact deceived. Such a creditor, notwithstanding his knowledge of facts sufficient to have put an ordinarily prudent person upon inquiry, may, nevertheless, be actually deceived—he may be deceived by appearances, i. e., by the corporation's ostensible capitalization.

There is a strong line of modern authority to the effect that the doctrine of constructive notice can never be so applied as to prevent a defrauded party from recovering for fraudulent misrepresentations. The rule is stated in Ruling Case Law as follows:

"The law of constructive notice can never be so applied as to relieve a party from responsibility for actual misstatements and frauds." 12 R. C. L. p. 376.

The Kentucky Court of Appeals, in Trimble v. Ward, 97 Ky. 755, 31 S. W. 866, quotes Mr. Bigelow as follows:

"If the representations were of a character to induce action, and did induce it, that is enough; for it is not just that a man who had deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or 'You, yourself, were guilty of negligence.' "

In Western Mfg. Co. v. Cotton & Long, 126 Ky. 749, 104 S. W. 758, 12 L. R. A. (N. S.) 427, the court says:

"The rule of law is one of policy. Is it better to encourage negligence in the foolish, or fraud in the deceitful? Either course has most obvious dangers. But judicial experience exemplifies that the former is the least objectionable, and least hampers the administration of pure justice."

In Ruhl v. Mott, 120 Cal. 676, 53 Pac. 307, cited with approval in Teague v. Hall, 171 Cal. 668, 671, 154 Pac. 851, 852, the court says:

"It is true that where one is justified in relying, and in fact does rely upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case, no duty in law is devolved upon him to employ such means of knowledge."

However impelling to inquiry the facts may be that put a defrauded party upon inquiry, he may, nevertheless, be put off his guard and misled by the very representation of which he complains.

"Whether the victim is actually misled is always an essential inquiry, and that the means of knowledge were open to him, were indeed easily available, and nothing but gross negligence would have failed to discover the falsehood, do not prevent an inquiry into the truth as to whether he in fact had the knowledge, and was in fact misled by the stratagem of his adversary." Western Mfg. Co. v. Cotton & Long, supra.

In Fargo Gas & Coke Co. v. Fargo Gas & Electric Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593, it is said:

"The general rule is, and, upon principle, must be, that the question is one of reliance by the buyer upon the false statement of the seller. Whether it was wise for him to rely upon it, whether he was prudent in doing so, whether he is not chargeable with negligence in a certain sense in not investigating—these inquiries are, in general, immaterial, provided the purchaser has in fact been deceived."

Mr. Bigelow, after citing many cases illustrative of the principle here stated, sums up thus:

"The result appears to be, not only in principle but by the weight of authority, that the party to whom the representation is made is affected by means of knowledge, or by notice, only where the language or conduct was not of a kind to withdraw his attention from what otherwise he would be bound to know, i. e., only where the representation was not calculated to put him off his guard, as in cases of representations of value or opinion." Bigelow on Fraud, vol. I, p. 528.

To use the language of another author:

"The doctrine of notice has no application where a distinct representation has been made. A man to whom a particular and distinct representation has been made is entitled to rely on the representation and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn." Kerr on Fraud and Mistake, p. 80.

The true principle as to the applicabilty of the doctrine of constructive notice in cases of fraud is well put by Mr. Pomeroy in his Equity Jurisprudence (vol. 2, § 895) thus:

"The *mere existence of opportunities* for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact."

Undoubtedly, where there has been no misrepresentation, a knowledge of facts sufficient to put a person upon inquiry amounts in law to constructive notice of facts which might have been learned by such inquiry reasonably prosecuted; but the fraudulent representation of a fact cannot be counteracted by any such implication of notice. The doctrine of constructive notice is therefore inapplicable to persons who have extended credit to a corporation whose stock is watered, for, as said in the Rhode Case, an action against the holder of watered stock is "essentially one to compel the defendant to make good *a false representation* in defraud of the plaintiff." (Italics ours.)

[6, 7] Our conclusion is that the effect of the finding that the plaintiff extended credit to the Panama Oil Company without actual knowledge of the fraudulent transaction, pursuant to which the watered stock was issued, is not, as a matter of law, overcome

by the other finding that the plaintiff had notice of facts sufficient to put it upon inquiry. The ultimate question, a question of fact for the trial court, to be determined from a consideration of all the circumstances and the inferences reasonably deducible therefrom, is this: Can it fairly be presumed that at the times when plaintiff extended credit to the Panama Oil Company it relied upon the company's ostensible capitalization? Can plaintiff be fairly presumed to have relied upon the misrepresentation of fact arising out of the deceptive appearances created by the apparent existence of an amount of capital greater than that which the company really possessed?

[8] 3. There is no merit in the claim that the stock which is a part of the 1,000,000 shares that Hedrick turned back into the treasury, and which later was issued by the corporation for sums less than par, is within the doctrine of Clark v. Bever, Fogg v. Blair, Handley v. Stutz, and J. F. Lucey Co. v. McMullen, supra. These shares, when issued, were not the shares of an insolvent corporation, received by a creditor in payment and discharge of his debt, at less than par, and at a value in excess of the actual market value—as was the case in Clark v. Bever. Neither in Clark v. Bever nor in Fogg v. Blair was the stock taken in any sense as an investment, but was accepted by the creditor, in each instance, as the best settlement obtainable from an insolvent corporation. Neither is this the case of a going corporation whose capital stock has become impaired or diminished by losses or misfortunes. It is true that in some sense the Panama Oil Company had been doing business in a small way for a month or more before all of this so-called "treasury" stock had been issued; but there is no evidence that its capital had been impaired by losses. These shares, whether the purchasers thereof knew it or not, were sold by the corporation in accordance with the original scheme of the promoters. The purchasers of this "treasury stock" bought their shares as an investment in a corporation that had hardly begun the business for which it was organized. The arrangement by which these shares were to be sold by the corporation for less than their par value was therefore subject to the contingency that, in the event of the insolvency of the corporation, the holders of the stock, if fairly chargeable with knowledge of the original fraudulent transaction, would be liable to creditors who became such in ignorance of the arrangement, and who might rightfully assume that the stock had been fully paid up or would be subject to call.

[9] 4. The doctrine enunciated in the South Mountain Con. Mining Co. Case (D. C.) 5 Fed. 403; Id. (C. C.) 14 Fed. 347, has never been approved by the courts of this state. With respect to the character of liability here sought to be enforced, mining corporations are not at the present day sui generis. Notwithstanding the frequency with which corporations incorporated to exploit oil-bearing lands are organized with a fictitious capital, persons who have occasion to deal with them are not bound to anticipate such a condition of affairs, but may assume that the capital is what it purports to be. The idea that the capital of a mining corporation is a football, to be thrown into the market for the purpose of speculation, is an invention that, though often resorted to by stockholders to escape liability, has always been rejected by our state courts; and the rule stated by the federal courts in the South Mountain Mining Company Case no longer expresses the rule in force in California. Hasson v. Koeberle, 180 Cal. 359, 181 Pac. 387.

[10-12] 5. It will not be necessary to consider whether the evidence supports the finding that defendant Morgrage is a stockholder of the Panama Oil Company; for, on a retrial of the case, the evidence may not be the same, with respect to this issue, as that now presented to us by the record on this appeal. The principles by which court and counsel should be guided on the retrial of this issue appear to be few and simple. The relation of a stockholder to a corporation is one of contract, either express or implied. It exists only when a party has expressly consented to become a stockholder, or his conduct is such that in law his consent will be implied. He cannot be made a stockholder without his consent, simply because some officer of the corporation, without authority, has entered his name upon the books as a stockholder and caused stock to be issued in his name as such. To establish the relation of a stockholder, it must appear that the minds of the parties met; that the one to whom the stock was issued agreed to be and became a stockholder in the corporation, with the privileges and responsibilities of that relation; and that the corporation accepted him as such. The former could not be put in that position against his will, or without his consent, by the unauthorized and unratified act of a third person; for in such case there would exist no contract relation, no mutuality of agreement, but simply a mistake or a wrong, which the person to whom the stock ostensibly had been issued might ratify and condone, or repudiate and reject. Welch v. Gillelen, 147 Cal. 576, 82 Pac. 248; Glenn v. Garth, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344. If one to whom an unauthorized certificate has been issued without his knowledge and consent, instead of returning the certificate to the corporation, indorses it and delivers it to another for transfer, that act, unexplained, is a recognition of ownership, and conse-

quently, a ratification of the original unauthorized issue. Glenn v. Garth, supra. But to contend successfully that one to whom stock originally was issued without his authority, knowledge, or consent, subsequently became a stockholder by ratifying the unauthorized issue, it must be made to appear satisfactorily that there was a conscious and intended approval of the issuance of the stock in his name. Ordinarily, ratification, like a contract, includes within it an intention. An indispensable element of a contract is a meeting of the minds upon the subject of the contract. And a ratification is the adoption of what would have been a previously formed contract had there been a meeting of minds. Gallup v. Fox, 64 Conn. 491, 30 Atl. 756. Ratification implies a conscious and intended approval of the act done. It rests upon an actual and existing purpose to make such approval. Hence it must occur with full knowledge of all the facts. Glenn v. Garth, supra.

Because plaintiff failed to allege or prove that any of the defendants other than O'Brien participated in or knowingly benefited by or had any notice of the fraudulent transaction whereby the watered stock was issued, it is ordered that the judgment be, and it is, affirmed as to the defendant Robert F. O'Brien, and as to the other defendants it is reversed, and the superior court is directed to permit plaintiff to amend its complaint, should it be so advised.

We concur: WORKS, J.; CRAIG, J.

51 Cal. App. 559

MULCH v. NAGLE et al. (Civ. 3646.)

(District Court of Appeal, First District, Division 1, California. Feb. 25, 1921. Hearing Denied by Supreme Court April 25, 1921.)

1. Dedication ⟸44—Evidence held sufficient to sustain a valid dedication.

Evidence *held* sufficient to sustain a finding of a valid dedication of a strip of land for highway purposes.

2. Dedication ⟸44—Evidence held to warrant finding that use of strip of land was with knowledge of owner of fee.

In an action to enjoin the obstruction of a strip of land claimed as a highway, evidence *held* to warrant the court in finding that the use of the strip in question had been with the knowledge and consent of the owner of the fee.

3. Dedication ⟸44—Knowledge of use of strip of land attributed to owner through employees or agents.

Knowledge of employees or agents on land of an adverse use of a strip thereof as a highway was knowledge of the owner of such use.

4. Dedication ⟸20(2)—Owner must assent to dedication or abandonment under statute.

In order to constitute a dedication of a highway under Pol. Code, § 2618, it is essential that it appear that the owner assented to such dedication or abandonment, and that the public has accepted it.

5. Dedication ⟸37—Acceptance of dedication satisfied by user.

Acceptance of a dedication or abandonment of land to the public as a highway shown by public user satisfies Pol. Code, § 2618.

6. Dedication ⟸17—Intention to dedicate need not be shown by express declaration.

It is not required that the intention to dedicate land for highway purposes under Pol. Code, § 2618, be shown by any express declaration of the owner, and such intention may be shown to have been declared either orally or in writing, or it may be implied from the conduct of the owner, and assent to a dedication may be implied from the acquiescence of owner's land as a public highway.

7. Dedication ⟸44—Degree of proof of knowledge of adverse use as a highway to show dedication stated.

Where a public highway is claimed, not by affirmative act of the owner, but by acquiescence in public use, it is not required that knowledge of the owner of such public use be shown to have actually existed in the sense that it is required to be directly shown, as the facts may be such as to raise the presumption that he had information of the use, and where the claim of the public rests upon a long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication.

8. Dedication ⟸20(2)—Knowledge of use necessary to constitute dedication.

Where it is claimed that a public highway has come into existence, not by virtue of any affirmative act on the part of the owner of the traversed property, but by acquiescence in the use of such property as a highway by the public, knowledge of such use is an important and necessary element, without the presence of which the dedication could not be perfected, under Pol. Code, § 2618.

9. Dedication ⟸12—Opening of land for use by one not owner not dedication thereof.

One who purchased land on a contract, but never became the owner thereof, did not dedicate to the public as a highway a strip of land opened for use.

10. Dedication ⟸51—Statutory requirement of width of 20 feet has no application to highways created by dedication.

While it is provided in Pol. Code, § 2620, that all public highways shall be not less than 40 feet wide, and private roads not less than 20 feet wide, this restriction must be held to have application to such highways only as are laid out by formal act of the proper public authorities, and to have no application to such highways as have been created by dedication or abandonment.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by J. W. Mulch against Caroline Nagle and another. Judgment for plaintiff, and defendants appeal. Affirmed.

H. E. Wilcox and D. M. Burnett, both of San Jose, and A. A. Sanderson, of San Francisco, for appellants.

Walter G. Fitzgerald, of Gilroy, and John P. Fitzgerald, of San Jose, for respondent.

BARDIN, Presiding Justice pro tem. This is an appeal taken by the defendants from a judgment decreeing that a public highway extends along a certain 12-foot strip of land located along the easterly boundary of two lots of land owned by the defendants, whose ownership of said lots was adjudged to be subservient to the rights of the public to use said strip of land as a public highway, and enjoining the defendants from erecting or maintaining any obstruction upon said strip of land in such manner as to interfere with the free use thereof as a highway by the public or by plaintiff as a part thereof.

In response to the issues raised by the pleadings the court found substantially to the effect that a public highway 12 feet wide extended along the easterly line of lots 130 and 131 of the San Martin ranch in Santa Clara county (which for convenience will be referred to as the Nagle property), from Church avenue in a southerly direction 36.60½ chains to Las Llagas creek; that the plaintiff is the owner of a small tract of land facing and bordering on said highway.

Findings numbered IV, V and VI appear as follows:

"IV. That the said highway has constantly and continuously for a period extending over 15 years been used and traveled on foot, in vehicles and otherwise, and kept in repair by the plaintiff herein, his predecessors in interest in the land above described, and by the general public under claim of right, with the knowledge and consent of, and without any objection or hindrance by the owners of said lots 130 and 131 of the San Martin ranch during all of said time, except as hereinafter in these findings set forth."

"V. That ever since the year 1898 the said strip of land above described as a highway has been continuously, openly, and under claim of right adverse to defendants been traveled on foot, in vehicles and otherwise by the plaintiff herein, his predecessors in interest, and by such portion of the general public as had occasion to use the same; that during all of said time there was a well-defined and marked roadway thereon, and that the same was kept in repair and repaired at various times by the general public; that during all of said time no permission was asked or granted for the use of said strip of land as a highway, or was any objection made by the owners of said lots 130 and 131 or those in charge thereof to the use of said strip of land as said highway, or any obstruction placed thereon, except as hereinafter stated."

"VI. That on or about the 31st day of January, 1916, the defendants unlawfully and without right so to do obstructed the said mentioned highway so that it could not be traveled, by placing a gate across the same at a point where said road connects with said Church avenue, without plaintiff's knowledge or consent, and do now threaten and intend to maintain said gate and prevent plaintiff, his agents and employees, and the public from using said road, highway, or right of way, and will continue so to do unless restrained by this honorable court."

Thence follow other findings of fact to the effect that the obstruction of said road is specially injurious to plaintiff; that, if the defendants are not restrained from obstructing said highway, the plaintiff's and the public's use thereof will be prevented, and that the ownership of said lots 130 and 131 is subject to and subservient to the use of said strip as a public highway.

The main burden of defendants' contentions on this appeal is that the findings do not find proper support in the evidence, and that particularly the portion of finding numbered IV relating to the use and repair of said highway "with the knowledge and consent of and without any objection or hindrance by the owners of said lots 130 and 131" is objectionable. In order to clearly understand the nature of this use and whether or not the court was justified in finding as it did, it will be proper to make a detailed search of the record and to briefly state the facts and circumstances surrounding the alleged highway and its use from the time that it came into existence down to the interruption of travel thereon by the acts of the defendants.

The record shows that Santa Clara Land Company acquired title to the lots upon which said disputed road is located, on December 14, 1900, and on April 22, 1902, conveyed the property to D. Guillermo Stein, who in turn conveyed it to Anna B. Glover on November 21, 1911. Glover conveyed to one Olds in July, 1913, and the Olds' ownership passed to one O'Donnell in April of 1915, who in turn conveyed to Caroline Nagle, one of the defendants herein, on July 29, 1915.

Ellis W. Harrison, a witness called on behalf of the plaintiff, testified substantially to the effect that in 1898 he bought the property now owned by the defendant Caroline Nagle on a contract, but that he never became the owner thereof; that while he was in possession of the Nagle tract he entered into an arrangement with two neighbors who owned property south of Las Llagas creek, to extend a road from Church avenue, which marks the northerly end of the disputed strip of land, to Lena avenue; that he continued in the possession of the Nagle property for about two years; that the strip of land in controversy here was opened as a road in 1898, and the public were allowed to

through; that no objection was ever raised to his knowledge to the opening of the road, and that it was maintained as a public road as soon as it was opened and traveled continuously: that it was maintained and kept up and repaired by the people living in that neighborhood; that neighbors living to the south of the property desired a way to reach Church avenue lying north of the Nagle property; that he wanted a convenient exit from his property to the south; and that the road thus opened would also be convenient for the accommodation of one Whitney, who then owned and occupied the property now belonging to the plaintiff.

Benjamin Fuller testified that he was familiar with the disputed highway from 1900 to 1907, and that from 1902 to 1907 he was roadmaster of the particular district within which the disputed highway was situate, and had never heard any one question the right of the public or any one to travel the road in question: that it was well-defined and a hard well-traveled road, kept in repair by neighbors, and that he had personally gone over the road and repaired it; that where it crossed Las Llagas creek it was accustomed to be washed out every year during winter, and as roadmaster of the district he fixed the crossing and kept it in repair; that Mr. Whitney (predecessor in interest of plaintiff) used the road every day. He testified further that, when the Nagle place was set out to vines in 1904 or 1905, the roadway was not interfered with in any way, at which time the Nagle property was in charge of a Mr. Cook and a Mr. Caselano; that no objection was ever made by any person in charge of the place to the maintenance of the road; that he had been with the superintendent of the property during Stein's ownership at the time certain repairs were made on the road, but no objection was made because of such repair work. During all the time the witness was there, with the exception of when the washouts occurred, there was an attempt made to keep a road absolutely open and clear at that place, being maintained as such and traveled by the general public. The highway was generally known in the neighborhood as Murphy avenue.

Enos Bechis testified that he acted as superintendent of the Nagle property and at a time when the title to said property was vested in Stein, for a period of five or six years, beginning in 1906 or 1907; that he did not know of any objection having been made by the company he directly acted for, or the people they represented (referring presumably to Stein), relative to maintaining the driveway; that in his capacity as superintendent he raised no objection to the maintenance of the roadway, and permission to use the same was never requested of him by any one.

Charles Curtis testified that he had been familiar with the roadway in dispute since 1897, and that the only time that he had known it to be closed was when the obstruction complained of by plaintiff was placed on the road by the defendants; that from the time he had first known the road it had been traveled as such, open to all who had occasion to use it; that he had hauled gravel on it to repair it while Mr. Fuller was roadmaster; and that he knew of neighbors doing the same.

C. E. Wendell testified:

That he lived in the neighborhood of the strip of land in dispute and he knew that for 16 or 18 years it had been "used generally by the public with wagons hauling produce, delivery wagons, and everything of that character passing over it and anybody that wanted to go by. I never heard at any time of any objection made to its use as a road. So far as I ever heard, it was generally considered in the neighborhood as an open road."

W. E. Sohlke testified that he lived in the vicinity of the roadway in dispute, and that he had known it since the winter of 1913, since which time it had been kept open and maintained as a roadway over which he occasionally traveled, and that there had never been any question or hindrance raised as to his traveling it.

M. E. Mulch testified that he was the son of the plaintiff and had been acquainted with the road in dispute for 11 years, and that it had never been closed until the obstruction referred to in the complaint was placed thereon; that no one had ever questioned his right to travel this road nor did he ever ask any one for permission so to do; that it was a first-class roadway and had never been plowed up; that the plaintiff used the road every day in the year to get mail, haul fruit and produce to town, and for other purposes; that a great deal of travel passes over the road; that the roadway in dispute connects with other neighborhood avenues; and that the plaintiff has no other roadway that is suitable for the ingress and egress of the plaintiff.

The plaintiff testified that he acquired the property occupied by him and fronting on the strip of land in question from one Whitney in 1905, and that at the time he moved on the property Whitney stated that the said strip of land was his road; that plaintiff had used the road thereafter without objection or hindrance until the Nagles had objected to his using it; that the successors in interest of Stein had seen plaintiff use the disputed road; that during the time the Nagle property was in the ownership of Stein it was in charge first of one Casalano and later of Bechis, who knew that plaintiff was using the road, and who did not object to such use, and that plaintiff had never asked any one's permission to use the road.

[1] The foregoing abstract of testimony discloses ample evidence upon which to rest the findings of the court. While it is true that the record does disclose some evidence tending in a weak manner to contradict the testimony thus set out, yet we are well satisfied with the conclusions reached by the trial court that there has been a valid dedication of the strip of land for highway purposes, and that the interference with the plaintiff's use of said road was unwarranted.

[2] It is very earnestly contended by the appellants that the record fails to disclose any evidence which warranted the court in finding that the adverse use of the strip of land in question had been with the knowledge and consent of the owners of the fee thereof. This objection is predicated upon the claim that it was not shown that during the ownership of the Nagle property by Stein he had any knowledge of the adverse use thereof, either by plaintiff or the public. It appears from the record that during the period of time that Stein was the owner of the property referred to he was absent from the state of California and domiciled in Guatemala. It was not affirmatively shown that he had seen the property before he became the owner of it, nor was it shown that any hostile use of the strip of land had ever been actually brought to his knowledge.

[3] There are two answers to the appellants' contention in the behalf last stated. The record shows that there were occupants upon the Nagle property during the Stein ownership who exercised such a continuous dominion and control over the property as to very strongly show that they were not trespassers, but, on the contrary, were accredited representatives of Stein, and either his employees or the employees of his agents. The general adverse use by the public of the highway was under the direct view of these persons. If it be granted that Stein did not know the small tract of land at the time he purchased it, and that a use of a portion thereof in such a manner as to materially affect its value and his own enjoyment of the property was unknown to him during his ownership, we are satisfied that knowledge of the public use of the strip of land must be attributed to him through his employees or agents. Gurnsey v. Antelope Creek, etc., W. Co., 6 Cal. App. 387, 92 Pac. 326; City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658.

[4-8] But the court was justified in reaching the conclusion it did for another and equally potent reason. The plaintiff founds his action upon the theory that the strip of land in question was dedicated to the public use as a highway by the owners thereof. Highways are enumerated by section 2618 of the Political Code as of these general kinds: Those laid out or erected by the public, or, if laid out or erected by others, dedicated or abandoned to the public, or created in actions for the partition of real property. In order to constitute the dedication or abandonment spoken of in the statute, it is essential that it appear that the owner assented to such dedication or abandonment, and that the public has accepted it. Acceptance shown by public user satisfies the statute. Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591; City of Monterey v. Malarin, 99 Cal. 290, 33 Pac. 840; City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658. It is not required that the intention to dedicate be shown by any express declaration of the owner; such intention may be shown to have been declared either orally or in writing, or it may be implied from the conduct of the owner. As stated in Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864:

"The authorities establish the principle that an offer of the owner of land to dedicate it for public use may be established in every conceivable way in which such intention can be manifested."

Assent to a dedication may be implied from the acquiescence in the use of owners' land by the public as a highway. Harding v. Jasper, 14 Cal. 642. Whether a particular strip of land has been dedicated or abandoned to the public for highway purposes depends upon the circumstances of each case. The question of the intention to dedicate private property to the public use must of necessity appear. But this intention, as already indicated, may be manifested as well by conduct as by an express declaration of such an intention. Where it is claimed that a public highway has come into existence, not by virtue of any affirmative act on the part of the owner of the traversed property, but by acquiescence in the use of such property as a highway by the public, knowledge of such use is an important and necessary element without the presence of which the dedication could not be perfected. The owner's knowledge of the use of his property is essential, for he could not well assent or acquiesce in a use concerning which he was ignorant. But it is not required that such knowledge be shown to have actually existed in the sense that it is required to be directly shown. The facts may be such as to afford sufficient ground for the law to raise the presumption that he had information of the use to which his land was devoted. State v. K. C., St. J. & C. B. R. Co., 45 Iowa, 139. In Schwerdtle v. County of Placer, 108 Cal. 589, 593, 41 Pac. 448, 449, it is said:

"But where the claim of the public rests upon long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license."

[9] We are in agreement with the suggestion of counsel for the appellants that the act of Harrison in first opening the traveled highway could not, of itself, under any view of the case, amount to a dedication of the strip of land for public highway purposes for the reason that he was not then or thereafter the owner of the property. 13 R. C. L. 23.

Finding numbered VII was drawn in order to show that the obstruction complained of by plaintiff to the travel of the highway in question was such as to constitute it a public nuisance and thus to permit the plaintiff to maintain his action under the provisions of section 3493 of the Civil Code. We find it to be sufficiently supported in its essential elements by the evidence.

It is our view that the findings, based, as we have found them to be, upon ample evidence, are entirely sufficient to establish a public highway by implied dedication. Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448; Hartley v. Vermillon, 141 Cal. 339, 74 Pac. 987; People v. Myring, 144 Cal. 351, 77 Pac. 975; Fleming v. Howard, 150 Cal. 28, 87 Pac. 908; Leverone v. Weakley, 155 Cal. 395, 101 Pac. 304; City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658.

[10] It is claimed that the law does not sanction or permit a public highway of but 12 feet in width, and that consequently the court was powerless, under any view of the case, to adjudge that the strip of land was subject to the use of the public as a highway. As has already been made clear, the particular highway in question came into existence by reason of the dedication thereof as such, and not by virtue of any steps taken pursuant to the statutes whereby a public highway may be created by the proper authorities. While it is provided in section 2620 of the Political Code that all public highways shall be not less than 40 feet wide, and private roads not less than 20 feet wide, this restriction must be held to have application to such highways only as are laid out by formal act of the proper public authorities, and after the initiation of the requisite preliminary proceedings, and to have no application to such highways, roads or lanes as have been created by dedication or abandonment. 13 R. C. L. 58. The cases cited by the appellants as supporting a contrary view are of no weight here, since they relate solely to public highways sought to be created by formal steps required by statute for laying out a public way by the prescribed public authorities.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

51 Cal. App. 708

TREESH v. STONE. (Civ. 3102.)

(District Court of Appeal, Second District, Division 2, California. March 10, 1921.)

1. Damages ⟹91(1)—Exemplary damages allowable only where defendant guilty of oppression, etc.

Under Civ. Code, § 3294, exemplary damages can be allowed only where a defendant has been guilty of oppression, fraud, or malice.

2. Landlord and tenant ⟹180(3)—Evidence insufficient to justify findings of oppressive conduct against landlord basis of judgment for exemplary damages.

In an action by the tenant of a housekeeping apartment in a hotel against the proprietor on account of an eviction from her apartment when she refused to pay rent for a month, but claimed a credit on account of lost laundry, evidence *held* insufficient to justify the findings of oppressive conduct on defendant proprietor's part on which judgment for exemplary damages against him was based.

3. Appeal and error ⟹1151(2)—Judgment to be reversed rather than modified on account of improper award of exemplary damages.

Where the evidence fails to justify the findings on which judgment for exemplary damages was based, but the trial court found two items of special damage amounting to $14, and there is some evidence in the record from which the court may have determined that plaintiff was entitled to general compensatory damages, the appellate court cannot say how much of the judgment above $14 was intended as compensatory damages, if any, and how much as exemplary damages, so that the judgment must be reversed rather than modified.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Josephine F. Treesh against D. P. Stone. From judgment for plaintiff, defendant appeals. Reversed.

Stephens & Stephens and Chandler P. Ward, all of Los Angeles, for appellant.

H. C. Millsap, of Los Angeles, for respondent.

WORKS, J. This is an appeal by the defendant from a money judgment in favor of the plaintiff. The appellant conducted a hotel, and the respondent occupied a housekeeping apartment in the place under an agreement to pay in advance a monthly rental of $30. As a part of the agreement under which the apartment was let it was understood that respondent might leave at the desk of the clerk of the hotel such apparel as she desired to have laundered from time to time, and that, after it was laundered, it should be returned to her there. On one occasion she left at the desk a parcel for the laundry and it was lost through the fault of the hotel management. This loss occurred in June,

and, respondent having asserted a claim against appellant for the value of the missing parcel, the matter was left in abeyance, at the request of appellant, pending an attempt to locate it; respondent not paying her rent in the meanwhile. On August 21 appellant notified respondent that the parcel could not be found, and on the next day she wrote appellant a note inclosing a list of the articles which had been lost, with an itemized statement of values amounting to $30.25. She also stated her total indebtedness to the hotel for July rent, with certain extras added, at $31.65, and inclosed a check for the balance, $1.40. She also inclosed her check for $30 to cover the rent for August. The note which accompanied these inclosures contained a request for receipts in full for the two months. On August 27, while respondent was absent from her apartment, appellant changed the lock on her door and refused to allow her to enter her rooms on her return. The present suit was the outcome of this chain of events.

The complaint alleged, in addition to the matters above stated, that the eviction of respondent occurred without notice to her of the rejection of the offer contained in her letter, without a return to her of the checks, without giving her a thirty-day notice terminating her tenancy or a three-day notice to pay rent or vacate; that the eviction was made wantonly, willfully, and maliciously, and with intent to compel respondent to pay appellant more than was due him; that appellant advised respondent's friends who came to call upon her that the apartment had been closed and that respondent no longer resided in the hotel; that on September 4, in order to get possession of her property and to avoid further humiliation and annoyance, respondent was forced to and did pay to appellant the sum of $65.30, which included rental to September 1; and that, by reason of the acts of appellant, respondent was damaged in the sum of $30.25, the value of the laundry parcel, and in the further sum of $1,000. The prayer for judgment was for the total of these two amounts.

The trial court found with respondent on the allegations of the complaint, with some exceptions, one of which is below noted, and found that she was entitled to exemplary damages, and that the total of the actual and exemplary damages suffered by her was $300. The judgment was for that amount, with costs.

[1] It is contended by appellant, among other things, that the evidence is insufficient to support the findings of the trial court upon which were based the judgment for exemplary damages. Such damages can be allowed only where a defendant has been guilty of oppression, fraud, or malice. Civ. Code, § 3294. Here, although the complaint alleged that the acts of the appellant were maliciously done, the court declined to so find. There is no fraud in the case, and, in order to justify the judgment, it must therefore appear that the appellant acted oppressively.

There was some conflict in the evidence bearing upon the question whether appellant was responsible for the loss of the laundry parcel, and the finding of the trial court was with him upon the question of the amount of the damage suffered by respondent because of the loss. The parties were at loggerheads over these points for some time, and, when it appeared finally that the parcel was gone beyond recovery, respondent took the matter into her own hands and mailed to appellant her checks for rent, deducting the value she placed on the lost apparel, an amount three times as great as that fixed by the court as her damage in that regard. The note accompanying the checks was not an offer of settlement, as it is styled in the findings. It closed with a demand for a receipt in full, and, under all the circumstances shown by the record, appellant justly regarded it as a refusal to pay more than the amount of the checks; a larger sum being then due him. The rent was past due, and appellant, upon the receipt of respondent's ultimatum, had the right to terminate her tenancy. The findings of the trial court are to the effect that the relation of landlord and tenant existed between the parties, and respondent was therefore entitled to the notice provided by law for the termination of her holding. This notice was not given, but appellant has insisted, from his answer to his final brief on this appeal, that the relationship did not exist, and there is evidence in the record from which the trial court might have found with him on the issue. At any rate, we are satisfied that the defense presented by appellant on the point was made in good faith, and there is nothing in the record from which the trial court could have entertained a contrary view. That being so, appellant's course in attempting to end respondent's occupancy by merely changing the lock on the door was not oppressive. It is generally known that resort is often had to such a course by landlords who evidently deem it justified in order to protect the lien provided by either section 1861 or section 1861a of the Civil Code (as added by St. 1917, p. 1662), both of which give to the lienholder the right to the possession of personal belongings of guests. It is to be remarked that the appellant contends that he was entitled to a lien on respondent's personal property contained in her apartment, and that he had the right to change the lock on her door in order to protect his lien.

The complaint alleges that, after closing the apartment, appellant advised friends of respondent who came to see her that the

apartment had been closed and that respondent was no longer living at the hotel; while the court found that appellant told respondent's friends that the apartment had been closed and that there had been some trouble between the management and respondent. These statements of the complaint and of the findings do not fit together, but, if appellant had made any or all of the statements mentioned, no charge of oppression could be predicated of that fact, as he would have stated but the truth. The apartment had been closed, the respondent no longer lived at the hotel, and there had been trouble between her and the management. Further, and to end the matter, none of these statements was made to the friends of respondent either by appellant or by his agents. The record is searched in vain for them.

It is alleged in the complaint and found by the court that appellant closed respondent's apartment without returning to her the two checks she had mailed with her letter asking for receipts in full. We can see no evidence of oppression in this fact. The checks were returned to the counsel for respondent early in September, and we cannot see that the conduct of appellant in this regard could be said to be oppressive if they were never returned.

It was also alleged and found that the acts of appellant were committed with intent to compel respondent to pay to him a sum not due. We can find nothing in the evidence to support such a finding.

[2, 3] We are satisfied, on the whole, that the evidence fails to justify the findings upon which the judgment for exemplary damages was based. We are now confronted with the question whether the judgment may be modified or whether it must be reversed. The trial court finds two items of special damage amounting to $14. There is, however, some slight evidence in the record from which the court may have determined that respondent was entitled to general compensatory damages. We cannot say how much of the judgment over and above $14, if any, was intended as compensatory damages and how much as exemplary damages.

The judgment is reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(51 Cal. App. 668)

BRINKWORTH et al. v. SAM SEELIG CO.

(Civ. 3493.)

(District Court of Appeal, Second District, Division 1, California. March 5, 1921.)

1. Negligence ⟸32(2), 44—Implied invitation to enter store with safety.

One who during business hours lawfully enters a store to purchase goods does so at the implied invitation of the owner upon whom the law imposes the duty of exercising ordinary care to keep the aisles and passageways of the premises in a reasonably safe condition, so as not unnecessarily to expose the customer to danger or accident.

2. Negligence ⟸136(22, 27) — Storekeeper's negligence and customer's contributory negligence held for jury.

In an action against a storekeeper for injuries to plaintiff customer when she fell over boxes in an aisle, evidence *held* to require submission of the case to the jury, on the theory that in so obstructing the aisle defendant was guilty of a want of ordinary care, and that though plaintiff, had she looked, might have seen the boxes, she was under the circumstances justified in assuming the place was one of safety, so that she herself was not guilty of contributory negligence.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Albert J. Brinkworth and another against Sam Seelig Company, a corporation. From judgment for defendant, plaintiffs appeal. Reversed.

E. B. Drake, of Los Angeles, for appellants.
Hickcox & Crenshaw, of Los Angeles, for respondent.

SHAW, J. Action to recover damages for personal injuries alleged to have been sustained as the result of defendant's negligence.

In its answer defendant denied the imputed negligence and alleged contributory negligence on the part of the plaintiff.

At the close of plaintiff's evidence, defendant moved for a nonsuit upon the ground that the testimony offered on behalf of plaintiff not only failed to show that defendant was guilty of negligence, but established the fact that plaintiff's injuries were the result of contributory negligence. The motion was granted, followed by a judgment from which plaintiff has appealed.

Defendant conducted a store for the sale of groceries, fruits, and vegetables. As shown by a plat received in evidence, the storeroom, on the east side of the street, was about 60 feet square, around the sides and rear of which were counters. In the center of the storeroom was a fruit and vegetable stand, the width of which, fronting the store entrance, was some 12 or 15 feet, and around which were located counters for the display and delivery of goods to purchasers. Around this fruit and vegetable stand there was, for the use of customers, an aisle or passageway, the width of which, in front thereof and next to the entrance, was some 10 feet. At the time in question two boxes, designated as lug boxes, used for bringing vegetables into the store, and which were about 7 inches in depth, 16 inches long and 10 inches wide,

placed one on top of the other, were deposited on the floor of the passageway in front of the vegetable and fruit stand at a distance of some two or three feet from the counter thereof. During business hours, and at about 11:45 o'clock a. m., plaintiff, as a customer, entered the west door of the store and, through the north or left aisle, walked to the rear counter to make a purchase, from which place she retraced her steps to the north side of the vegetable and fruit stand, and, while inspecting the goods on display, walked sideways and fronting the counter around to the front of the stand at a point between the counter and the place where the vegetable boxes were deposited, some 15 feet south of plaintiff's line of travel through the north aisle in reaching the rear counter, where she made a purchase of goods, and upon delivery of the same to her, she, in taking her departure, stepped backwards and fell over the boxes, sustaining the injury complained of. At no time while in the store until after the accident did plaintiff see or know of the existence of the boxes so deposited in the aisle, and which had been placed there about 8 o'clock of the morning of the accident and, contrary to defendant's custom, permitted to remain until 11:45 o'clock without transferring their contents to the counter and removal of the boxes.

[1, 2] In granting the motion the court erred. One who, during business hours, lawfully enters a store to purchase goods does so at the implied invitation of the owner (Herzog v. Hemphill, 7 Cal. App. 116, 93 Pac. 899), upon whom the law imposes the duty of exercising ordinary care and prudence to keep the aisles and passageways of the premises, in and through which, by their location and arrangement, a customer in making purchases is induced to go, in a reasonably safe condition, so as to not unnecessarily expose him to danger or accident (Hart v. Grennell, 122 N. Y. 371, 25 N. E. 354; Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206). It has been frequently declared by the courts

"that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence." Wahlgren v. Market St. Ry. Co., 132 Cal. 663, 62 Pac. 308, 64 Pac. 993.

In Ginns v. Sherer Co., 219 Mass. 18, 106 N. E. 600, it appeared that a store aisle was obstructed by a hat box, 19 inches in width and 9 inches in height, which had been left there for half an hour, and over which the plaintiff in said action fell, sustaining injuries. The court held the facts presented a case for the determination of the jury as to whether leaving the box in the passageway constituted a violation of defendant's duty to plaintiff. In Williamson v. Hardy, 190 Pac. 646, the court upheld a verdict in favor of the plaintiff upon evidence that she slipped and fell upon the floor of defendant's market through having stepped upon a piece of oiled paper made slippery by the adhesion to it of scraps of fresh meat, and, in deciding the case, said:

"It was a question for the jury to determine whether or not the defendant was negligent in permitting such a substance to be lying upon the floor of his market where customers were wont, and were required, to walk while making their purchases therein."

The testimony that plaintiff did not see or know of the existence of the boxes deposited in the aisle is uncontradicted, and the arrangement of the fruit and vegetable stand, upon the counters of which goods were displayed for sale, was such as to induce plaintiff, while looking over and inspecting the articles, to walk sideways. The jury might have properly concluded that in so obstructing the aisle defendant was guilty of the want of ordinary care, and that, although plaintiff, had she looked, might have seen the boxes, she was, under the circumstances, justified in assuming the place one of safety, and hence her failure to observe the obstruction was not negligence on her part.

Respondent, in opposition to the views herein expressed, cites several authorities, in none of which, however, are the facts similar to those involved in the instant case. Hart v. Grennell, supra, was a case where plaintiff tripped over the handle of a truck which was in the rear of the store, and as to which the court, in deciding the case, said:

"It was not exposed in the way of customers visiting the store, as there were no appearances which invited them into that part of the building. The plaintiff had no occasion to go there. * * * Under these circumstances, such an accident as happened was not within the reasonable apprehension of the defendants, and * * * did not expose their customers to hidden or unforeseen dangers."

In Davis v. California, etc., R. Co., 105 Cal. 131, 38 Pac. 647, the defendant, in constructing a street railway, deposited a number of rails upon the sidewalk in front of plaintiff's residence, all of which were removed except one which to plaintiff's knowledge had been lying across the sidewalk for some four weeks. Hearing a call of fire in the night time, plaintiff ran out of the house, and, forgetting the position of the rail, fell over the same and sustained an injury. The court in deciding the case said the fact that the plaintiff forgot the presence of the rail was no excuse, as the circumstances surrounding the accident did not justify her forgetfulness and consequent want of care. Neither line of authorities is applicable to the facts in the case at bar, for the reason that plaintiff's injury was sustained in a part of the store to which she was invited, and, in the absence of

warning, might reasonably expect it to be free of open trapdoors, boxes, or other obstructions endangering her safety; and, since she was ignorant of the fact that the boxes were deposited in the aisle, the accident could not be attributed to her forgetfulness.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(51 Cal. App. 557)

McCORMICK v. FARMERS' GRAIN & MILLING CO. et al. (Civ. 3080.)

(District Court of Appeal, Second District, Division 2, California. Feb. 24, 1921. Rehearing Denied March 24, 1921.)

1. Chattel mortgages ⟸48—Sufficiency of description in crop mortgage; "all crops growing."

The description of a crop in a mortgage is sufficient if it be such that a prudent disinterested person, aided and directed by such inquiries as the instrument itself suggests, is able to identify the property, and a mortgage designating "all crops growing" is good as to crops in the ground when the instrument is executed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Growing Crops.]

2. Chattel mortgages ⟸48, 117—Description held sufficient as to crop in ground, but not to cover a crop not then planted.

A crop mortgage covering "the following growing crops, viz., the crop of barley hay and/or grain and the crop of corn to be grown now being, standing and growing upon that certain piece or parcel of land," etc., should be read as if it were phrased "the crop of corn to be matured which is now being, standing and growing" upon the land, and is not ineffective for uncertainty of description, and is plainly good as to corn in the ground at the time of its execution, but is not good as to corn planted after its execution.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by W. A. McCormick against the Farmers' Grain & Milling Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Benj. W. Shipman, of Los Angeles, John A. Berry, of El Centro, and Henry O. Wackerbarth, of Los Angeles, for appellants.

B. C. Nichols, of San Diego, for respondent.

WORKS, J. This is an appeal by the defendants from a money judgment. On or about January 13, 1917, the respondent leased to one Beretta a certain tract of land and took from him a crop mortgage as security for the payment of the rent provided for in the lease. The instrument was recorded February 10, 1917. By its terms the mortgage covered "the following growing crops, viz., the crop of barley hay and/or grain and the crop of corn to be grown now being, standing and growing upon that certain piece or parcel of land," particularly describing the demised premises. On or about June 29, 1917, Beretta sold to the appellant Farmers' Grain & Milling Company, which had no actual notice of the mortgage to the respondent, a crop of milo maize to be matured on the leased land, agreeing to make delivery on or about November 20, 1917. On that day he refused to deliver, and the Farmers' Company brought a claim and delivery action to recover the crop. Acting under process, the appellant sheriff took possession of the maize December 5, 1917. The respondent made a third party claim to the property, the appellant Farmers' Grain & Milling Company gave bond to secure the officer against the claim, and the respondent commenced the present action as upon a conversion, on April 24, 1918. Judgment was rendered in favor of the respondent for the value of the maize.

[1] A goodly portion of the briefs of the respective parties is devoted to a discussion of the question whether a crop mortgage, in order to be effective, must describe the crop sought to be hypothecated by a mention of the year, or the season of the year, or some definite period of time, during which it is to be grown. The appellants contend that the mortgage now before us is uncertain, in that it does not fix such a period of time in its description of crops and they cite several Iowa cases, headed by Pennington v. Jones, 57 Iowa, 37, 10 N. W. 274, in support of their contention. We need not pursue those cases, and may concede that the fixing of a time during which a given crop is to be raised would ordinarily be a satisfactory method of so describing it as that constructive notice as to the crop intended would thereby be conveyed to the world, but we cannot go further. It is futile to assert that a crop can in no other manner be designated in a mortgage. "The description of a crop is sufficient if it be such that a prudent, disinterested person, aided and directed by such inquiries as the instrument itself suggests, is able to identify the property" (11 Corpus Juris, 468); and one of the cases cited by appellant (Luce v. Moorehead, 73 Iowa, 498, 35 N. W. 598, 5 Am. St. Rep. 695) is authority for the just rule that a mortgage designating "all crops growing" is good as to crops in the ground when the instrument is executed. This rule is in effect supported by Hall v. Glass, 123 Cal. 500, 56 Pac. 336, 69 Am. St. Rep. 77, at least as against the extreme contention of appellant.

[2] The description of the corn intended to be mortgaged by the instrument involved

in this action is to be read as if it were phrased, "the crop of corn to be matured which is now being, standing and growing" upon the land. The mortgage is not ineffective for uncertainty of description, for, within the rule of Luce v. Moorehead, supra, it is plainly good as to corn in the ground, if there was any such, at the time of its execution. The description clearly satisfies, also, the rule we have quoted from Corpus Juris. The question now arises, however, as to whether the crop of milo maize seized by the appellant sheriff was "being, standing and growing" on the land at the time of the execution of the mortgage. As incidental to their presentation of the point that a crop mortgage must fix a period of time during which the crop is to be grown, the appellants remark that the corn taken by the sheriff was not under the lien of the mortgage because it was not planted until after the execution of the instrument. The respondent makes no comment upon this fugitive suggestion of the appellants, and we might assume from that fact that the corn seized was not in the ground until after the mortgage was made; but we have examined the record, and have ascertained as well from the undisputed evidence that it had not then been planted. This being so, it is manifest that the corn taken by the sheriff was not covered by respondent's mortgage.

The judgment is reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

52 Cal. App. 98

STRATEN v. SPENCER et al. (Civ. 2272.)

(District Court of Appeal, Third District, California. March 28, 1921. Rehearing Denied April 27, 1921. Hearing Denied by Supreme Court May 26, 1921.)

1. Appeal and error ⊜1004(1)—Appellate court may set aside verdict on ground of excessive damages where passion or prejudice is shown.

The power of an appellate court to set aside a verdict on the ground of excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury.

2. Damages ⊜132(1)—$5,000 held not excessive for permanent injury to elderly man.

A verdict for $5,000 to an old man with probably few years to live and with small earning capacity was not so great as to show prejudice or corruption on the part of the jury, where he was permanently disabled, suffered a great deal of pain, and incurred a liability of $750 for hospital and medical care.

3. Negligence ⊜82—Contributory negligence must be a "proximate" cause of injury.

The word "proximate," as used in definitions of contributory negligence, should be limited to a proximate cause or to a part of the proximate cause of the injury, since the negligence of plaintiff to bar recovery must concur and co-operate with that of the defendant; the accident being the result or consequence of two causes or elements, the negligence of plaintiff and the negligence of defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate.]

4. Appeal and error ⊜1064(1)—Omission of proper qualifying expression in instruction held not prejudicial.

Plaintiff in negligence case could not be prejudiced by an instruction on contributory negligence which omitted to state that plaintiff's negligence to bar recovery must have been "proximate," where there was no evidence of any remote negligence on the part of plaintiff.

5. Municipal corporations ⊜705(10)—Duty of pedestrian to use ordinary care in crossing street.

It is the duty of a pedestrian to use ordinary care in crossing a street and to reasonably exercise his faculties for his personal safety, and if he fails to do so and is injured by such failure, he cannot recover on account of such injury.

6. Municipal corporations ⊜705(2)—Rights of pedestrians and automobilists at crossings equal.

While pedestrians and drivers of automobiles have equal rights at street crossings, a pedestrian is bound to anticipate that automobiles as well as other vehicles may be approaching the crossing, and, while his right is equal, yet he must not exercise his right recklessly, but must act with such degree of care as is commensurate with the existing danger.

7. Negligence ⊜141(3)—Instruction on contributory negligence held misleading.

An instruction, that plaintiff in negligence case could not recover unless he was free from negligence that contributed to the injury "and was proximate cause thereof," was not an erroneous principle of law, but it did not accurately present the theory of contributory negligence, since to declare negligence to be "proximate cause" necessarily implies that it is the only proximate cause.

8. Negligence ⊜97—Doctrine of comparative negligence not recognized.

In negligence cases, such as an action by a pedestrian against an automobilist for injuries, the law does not recognize the doctrine of comparative negligence.

9. Trial ⊜296(4, 5)—Error in instruction on contributory negligence held not cured by another instruction.

In an action by a pedestrian against an automobilist, an instruction, that a failure to comply with the law respecting the operation of an automobile upon the highway from which an injury results as proximate and direct cause of such failure gives to the injured person a cause of action if his own negligence, did not "materially" contribute to the injury and constitute a proximate cause thereof, was erroneous by reason of the introduction of the element of materiality, and did not cure error in another instruction consisting of omission of "a" before the qualifying expression "proximate cause."

10. Municipal corporations ⊜706(3)—Automobilist swinging to left side of street to avoid pedestrian not presumed guilty of negligence.

Where an automobilist, on seeing pedestrian at crossing starting to cross the street, checked his car to allow the pedestrian to pass, and the pedestrian instead of going on turned back, and the automobilist then proceeded on his way and pedestrian again started across, and, to avoid hitting him, the automobilist

turned to the left side of the street, fact that the automobile was on the left side of the street at the time it struck the pedestrian raised no presumption that driver was guilty of negligence in being there.

11. Municipal corporations ⟸706(8)—Instruction as to justification for swinging car to left on street held erroneous.

An instruction, charging that presence of automobilist on left side of street where he went to avoid striking pedestrian raised no presumption of negligence, but put upon the automobilist the burden of justifying his position, was contradictory and erroneous.

12. Trial ⟸194(16)—Instruction that defendant must offer other evidence held to invade province of jury.

In an action by pedestrian against an automobilist for personal injuries, an instruction virtually stating that defendant must offer other evidence to justify position of automobile on left-hand side of street, defendant having testified that she turned to avoid striking plaintiff, invaded the province of the jury, since the law imposes upon the jurors the duty of determining the weight and effect of the evidence.

13. Municipal corporations ⟸706(6, 8)—Whether automobilist should have stopped machine rather than attempt to avoid pedestrian held a jury question; instruction.

A driver of an automobile should ordinarily stop his machine, rather than take any chances of injuring pedestrian by swinging to the left around him; but it is for the jury to determine in each particular case what the rule of reasonable care requires in that respect, and an instruction "that it is the duty of a person operating an automobile upon the public highway to use reasonable care in its operation, and to move at a rate of speed reasonable under the circumstances and to cause it to slow up or stop, if need be, when danger is imminent and could by the exercise of reasonable care be seen or known in time to avoid injury," although not fatally defective, lacked clearness and was liable to be misunderstood.

On Hearing in Supreme Court.

14. Trial ⟸237(4), 261—Requested instruction that plaintiff must prove case by preponderance of evidence properly refused where not sufficiently clear, provided proper rule was given.

A requested instruction, in an action by a pedestrian against an automobilist, "where the evidence is as consistent with neglect of duty by the injured person as it is with neglect of duty or care on the part of the person charged with causing the injury, the injured party cannot recover in an action for damages for the injuries sustained," although correct in point of law, is not clear, and court could well refuse to give it, provided it gave the rule that plaintiff must prove his case by a preponderance of the evidence.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by John H. Straten against George A. Spencer and others. Judgment for plaintiff, and defendants appeal. Reversed in District Court of Appeal and hearing denied in Supreme Court.

J. W. S. Butler and B. F. Van Dyke, both of Sacramento, for appellants.

J. M. Inman, of Sacramento, and E. Fitzgerald, of Placerville, for respondent.

BURNETT, J. The action was for damages for personal injuries alleged to have been caused by the negligent driving of an automobile by defendant Elizabeth Spencer on the main street of Placerville on August 24, 1918. The machine collided with plaintiff while he was crossing the street on foot. The answer denied any negligence by said defendant, pleaded contributory negligence on the part of plaintiff, and by way of cross-complaint said defendant asked damages from plaintiff for injuries suffered by her in consequence of his negligence. The verdict of a jury was in favor of plaintiff for the sum of $5,000, and the appeal from the judgment is under the alternative method.

Appellants state that the appeal "is based upon the errors made by the court in modifying and giving instructions, and because of the insufficiency of the evidence to justify the verdict and because of excessive damages appearing to have been given under the influence of passion and prejudice."

[1, 2] We may follow the example of appellants and consider first the last-mentioned assignment. There was no motion for a new trial, as is usually the case, and therefore the point was not presented to the trial judge. In considering the contention we must be guided by the rule announced in Bond v. United Railroads, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50, that the power of an appellate court to set aside a verdict on the ground of excessive damages exists only "when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury." Indeed, it is further said in that case that: "Practically, the trial court must bear the whole responsibility in every case." Within the contemplation of this rule it cannot be said that the jury was influenced or controlled by any improper consideration in fixing the amount of damages. We must assume that the verdict was the fair expression of an honest judgment that such amount was merely compensatory for the injury suffered by plaintiff. It is true that he was an old man with probably few years to live and with small earning capacity, but he was permanently disabled, suffered a great deal of pain, and incurred a liability of $750 for hos-

pital and medical care. At any rate, it cannot be said that the award of $5,000 is so great as to shock the conscience or "to suggest at first blush, passion, prejudice or corruption on the part of the jury." Cases from other jurisdictions are cited by appellants wherein similar verdicts were reduced on appeal, but so much depends upon the peculiar circumstances of each case and upon the particular rule prevailing in the appellate practice therein, that we forego any specific notice of these decisions.

The defendants requested the court to instruct the jury as follows:

(1) "The jury are instructed that in an action by a pedestrian to recover damages for an injury from an automobile, there can be no recovery unless the plaintiff was free from negligence which contributed to the injury.

"The law does not recognize degrees of negligence in actions for personal injuries and if you believe from the evidence that the plaintiff in this case failed to use that degree of care and prudence which the ordinary man, under similar circumstances, would have used in this case, and that such negligence on his part contributed in any degree to the accident, the plaintiff cannot recover and your verdict should be for the defendant."

(2) "It is the duty of a pedestrian traveling in or crossing a public street to use ordinary care and to reasonably exercise for his personal safety the faculties with which he is endowed by nature for self-protection; and if he fails to do so and is injured by reason of such failure, he cannot recover on account of such injury.

"And if you believe from the evidence that plaintiff by the reasonable use of the faculties given him by nature for his self-protection could have avoided the accident and that his failure to do so contributed toward the accident then your verdict should be for the defendant."

(3) "You are charged that, while pedestrians and the drivers of automobiles have equal rights at street crossings, a pedestrian seeking to cross a street at such crossing is bound to anticipate that automobiles as well as other vehicles may be approaching the crossing, and while his right at the crossing is equal to that of any other class of travelers, yet he must not exercise his right recklessly, but must act with such degree of care as is commensurate with the existing dangers, and if you believe from the evidence that plaintiff failed to act with the degree of care which the circumstances of the case demanded and that such action upon his part contributed to the accident, your verdict should be for the defendants."

The court gave the first two of these instructions as modified by the expressions which we have italicized as follows:

(1) "The jury are instructed that in an action by a pedestrian to recover damages for an injury from an automobile there can be no recovery unless the plaintiff was free from negligence that contributed to the injury *and was proximate cause thereof.*

"The law does not recognize degrees of negligence in actions for personal injuries, and if you believe from the evidence that the plaintiff in this case failed to use that degree of care and prudence which the ordinary man, under similar circumstances would have used in this case, and that such negligence on his part contributed in any degree to the injury *and was proximate cause thereof*, the plaintiff cannot recover and your verdict should be for the defendants."

(2) "It is the duty of a pedestrian traveling in or crossing a public street to use ordinary care and to reasonably exercise for his personal safety the faculties with which he is endowed by nature for self-protection; and if he fails to do so and is injured by reason of such failure, *and, further, if such failure is proximate cause of injury*, he cannot recover on account of such injury.

"And if you believe from the evidence that plaintiff by the reasonable use of the faculties given him by nature for his self-protection could have avoided the injury and that his failure to do so contributed toward the injury *and was proximate cause* thereof, then your verdict should be for the defendants."

The third was given with a similar modification.

Thus is presented a very important question relating to a prominent feature of the case. One claim of defendants was that, even if the driver of the automobile was not free from blame, plaintiff could not recover by reason of his own negligence; in other words, that it was a proper case for the application of the doctrine of "contributory negligence," as it is known to the law. It will not be doubted that, if there was any substantial basis in the evidence for this theory, the defendants were entitled to a correct instruction as to what conduct on the part of plaintiff would debar him from recovery.

That there was a substantial showing of the want of ordinary care on the part of plaintiff, which might be deemed contributory to the injury, is not disputed, and therefore we need not quote from the testimony.

The question then arises whether said instructions as proposed by appellants presented correctly the legal aspect of "contributory negligence." The doctrine presupposes, of course, negligence of the other party, but precludes recovery on the ground that the injury was partly the result of his own negligence; in other words, that the accident was occasioned by his own carelessness cooperating with that of the other party. Somewhat different phraseology in defining the term is used by different authors, but if it can be seen that the injured party's want of ordinary care was an important element in the occurrence, and that the injury may be attributed to such want of care as well as to the negligence of the other party, then, no doubt, a case of contributory negligence is found. In this connection we may refer to Thompson's Law of Negligence, vol. 1, p. 210, wherein it is said:

"In order, then, to prevent a recovery by reason of contributory negligence, the plaintiff or person injured must have been guilty of a want of ordinary care; and we shall now see that this want of ordinary care must have been a proximate cause of the injury, and not a remote cause or mere condition. If the negligence of the plaintiff was only remotely connected with the injury the plaintiff may recover damages, if notwithstanding such remote negligence of the plaintiff the defendant might have avoided the injury by the exercise of ordinary care. But if a want of ordinary care on the part of the person injured concurs as a proximate cause in producing the injury, the defendant is not liable, although in fault. This doctrine is involved in the meaning of the words we employ to express the negligence on the part of the plaintiff which will bar a recovery—contributory negligence. The negligence of the plaintiff which will bar a recovery of damages for an injury sustained by the defendant's negligence must be such as contributes to the injury complained of; that is, as expressed by a learned and philosophic writer, it 'must be such, that by the usual course of events, it would result, unless independent disturbing moral agencies intervened, in the particular injury.'"

[3] From the various sources, which he has consulted, respondent educes this definition:

"Contributory negligence is the negligence of a person on account of whose injury a suit is brought amounting to a want of ordinary care and prominently contributing to cause said injury."

The only question about this definition arises from the use of the term prominently. That is somewhat confusing. If the negligence of the injured party directly contributes to the cause of the injury, it matters not whether that negligence is prominent or not. Of course, his want of care might be of such trifling importance as to be properly disregarded; but in such case it could not be said that it has contributed to the cause of the injury. It is to be observed that in many of the definitions the term "proximate cause" is used, and this has led to some misunderstanding. The word "proximate," though, is intended to mean direct or immediate as opposed to "remote" and, of course, the negligence of the plaintiff must have a causal connection with the injury in order to constitute a case of "contributory negligence." As thus understood, there can be no serious objection to the use of said expression, but manifestly it should be limited to a proximate cause or to a part of the proximate cause of the injury.

Since the negligence of the plaintiff must concur and co-operate with that of the defendant in order to constitute contributory negligence, it is apparent that in such cases the accident is the result or consequence of two causes or elements, the negligence of plaintiff and the negligence of defendant.

[4] Examining the proposed instructions in the light of these familiar principles, we find the first is open to the criticism that it does not require the negligence of plaintiff to be a proximate or immediate cause of the injury in order to relieve the defendant. But as to this, however, it must be said that under the evidence any negligence of plaintiff must have been proximate and not remote. There being no evidence of any remote negligence on the part of plaintiff, the omission of the proper qualifying expression could not have been prejudicial to him.

[5] The second proposed instruction seems unobjectionable. It is certainly the duty of the pedestrian to use "ordinary care in crossing a street and to reasonably exercise his faculties for his personal safety and if he fails to do so and is injured by reason of such failure he cannot recover on account of such injury." If he is injured by reason of such failure, it, of course, must be a cause of the injury and makes him responsible for it. Furthermore, if the plaintiff by the reasonable use of his faculties "could have avoided the accident and his failure to do so contributed toward the accident," then this conduct reached the full measure of "contributory negligence."

[6, 7] The third proposed instruction also contained a correct principle of law and presented a proper standard of conduct under the circumstances therein detailed.

The trial judge by the modification of these instructions did not erroneously state a principle of law, but the criticism is that he did not accurately present the theory of contributory negligence. The instructions, as modified, amount to this: That if plaintiff was guilty of negligence and that negligence was the sole cause of the injury, then he could not recover. Of course, that is true, but defendants desired to have the court instruct the jury that, if plaintiff's negligence contributed to and was therefore a proximate cause of the injury, he could not recover. True, the court did not use the definite article, but to declare negligence to be "proximate cause" necessarily implies that it is the only proximate cause.

[8, 9] The question then arises whether this action of the court constituted prejudicial error. The answer manifestly depends upon whether the principle was covered by other instructions. The only one which might possibly be so considered is the following:

"A failure to comply with the law respecting the operation of an automobile upon the highway from which an injury results as proximate and direct cause of such failure gives to the injured person a cause of action if his own negligence did not materially contribute to the injury and constitute a proximate cause thereof."

If it had not introduced the element of materiality, this might be deemed a sufficient instruction that plaintiff could not recover

if his own negligence contributed proximately to the injury. But in this state, in actions like this, the law does not recognize the doctrine of comparative negligence. Sego v. Southern Pacific Co., 137 Cal. 405, 70 Pac. 279. The instruction left the jury to speculate as to what extent in comparison with that of defendant the negligence of plaintiff may have contributed to the injury, and they may have concluded that plaintiff was proximately negligent, but that his negligence was not so material as that of defendant and hence he was not entitled to recover. However, the rule is as stated in Needham v. S. F. & S. J. R. Co., 37 Cal. 409, as follows:

"That a plaintiff cannot recover for the negligence of the defendant, if his own want of care or negligence has in any degree contributed to the result complained of—there can be no dispute."

The court therein states the reason of the rule to be that since both parties are in fault there can be no apportionment of damages. So in Maumus v. Champion, 40 Cal. 121, it is held to be sufficient to absolve the defendant if the negligence of the plaintiff "contributed proximately to the injury complained of."

Respondent, in support of his position that the error was cured, cites Squier v. Davis Standard Bread Co., 185 Pac. 391, wherein the lower court had used the expression "the proximate cause" in defining contributory negligence, but the Supreme Court calls attention to the fact that the sentence containing the objectionable words was immediately preceded by a sentence urging the jury to determine whether plaintiff's negligence, if any, was "a proximate cause" of the injuries, and that elsewhere the jury was fully and correctly instructed on the law of contributory negligence. The Supreme Court therefore held that from the whole charge the jury could not have been misled. Upon an examination of the record in that case we find that the trial court gave this instruction:

"The defendants in their answer allege that the plaintiff himself was guilty of negligence which proximately caused his injuries, and in that regard the court instructs you that if you find that both the plaintiff and the defendants were guilty of negligence proximately causing or contributing to the injury in question, then the plaintiff cannot recover, because his own contributory negligence, if any you find, is a complete defense on the part of the defendants."

We have no such situation here.

[10, 11] The defendants requested an instruction which was modified by the court by inserting the words in italics, and was given as follows:

"If you believe from the evidence that Mrs. Spencer, upon seeing the plaintiff at the crossing starting to cross the street, check her car to allow plaintiff to pass, and that plaintiff instead of going on turned back, and that Mrs. Spencer then proceeded on her way, that plaintiff then again started across, and that to avoid hitting the plaintiff Mrs. Spencer turned to the left-hand side of the street, then I charge you that the fact that she was on the left-hand side of the street at the time her car struck the plaintiff raises no presumption that she was guilty of negligence in being there, *but puts upon her the burden of justifying her position*, and it is for you to determine from all the evidence before you whether or not Mrs. Spencer used that degree of care and prudence which would be expected of a woman so placed as she was, and called upon to act suddenly in an emergency in an attempt to avoid a collision, and if, after a consideration of all the facts and circumstances, you are satisfied that she did use such care and prudence to avoid such collision as might reasonably be expected of a woman so placed as she was, then your verdict should be for the defendants."

The first part of the instruction, concluding with the "presumption," is undoubtedly correct. In other words, if the jury believed the facts to exist as therein recited, they must conclude that Mrs. Spencer was not guilty of negligence in being on the left-hand side of the street; that is, that she was justified in being there. Nevertheless, the court proceeds to tell the jury that she has cast upon her "the burden of justifying her position." This necessarily required of her proof to overcome a presumption in her favor. In other words, although certain facts showed her to be in the right, she must introduce evidence to prove that she was not in the wrong.

[12] In virtually stating that she must offer other evidence to justify her position in the street the court by said instruction also invaded the province of the jury, since the law imposes upon the jurors the duty of determining the weight and effect of the evidence.

In further explanation of her position, it may be added that where the accident occurred the street is very narrow, only about 23 feet wide; hence it was necessary to travel only a few feet to carry the machine to the "left-hand side of the street."

The court might well have given this instruction proposed by defendants:

"I instruct you that where the evidence is as consistent with a neglect of duty on the part of the injured person as it is with a neglect of duty or care on the part of the person charged with causing the injury, the injured party cannot recover in an action for damages for the injuries sustained."

This instruction was approved by the Supreme Court in Sheldon v. James, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493. While this omission would not of itself justify a reversal, yet in view of the strikingly conflicting character of the evidence it was quite appropriate to the situation.

[13] Appellants criticize the following instruction given by request of plaintiff:

"You are instructed that it is the duty of a person operating an automobile upon the public highway to use reasonable care in its operation, and to move at a rate of speed reasonable under the circumstances and to cause it to slow up or stop, if need be, when danger is imminent and could by the exercise of reasonable care be seen or known in time to avoid injury."

Appellants declare:

"This took from the jury the right of determining whether or not, in this case, the defendant was justified in seeking to avoid the accident by turning to the left instead of stopping."

There is some force in the criticism, as the test is what would a reasonable person do under the circumstances, and not what subsequent events may have shown to be necessary to avoid the injury. Of course, a driver should ordinarily stop his machine rather than take any chances of injuring a pedestrian; but it is for the jury to determine in each particular case what the rule of reasonable care requires in that respect. We do not say that the instruction is fatally defective, but we think it lacks clearness and was liable to be misunderstood.

We find nothing else in reference to the instructions subject to criticism.

For the reason, no doubt, that they see no merit in the contention, appellants do not argue the point that the evidence is insufficient to support the finding of negligence on the part of Mrs. Spencer. As the record contains such evidence, we are reluctant to reverse the cause; but the defendants equally with the plaintiff, are entitled to a full and fair trial with the right to demand that their theory of the case, as legally sanctioned, be properly presented to the jury.

We think it just that a new trial be had, and the judgment is therefore reversed.

We concur: PREWETT, Presiding Judge pro tem.; HART, J.

Opinion of Supreme Court in Bank, denying Hearing.

PER CURIAM. The petition for rehearing in the Supreme Court is denied.

[14] With regard to the instruction relating to the rule where the evidence is as consistent with neglect of duty by the injured person as it is with neglect of duty by the person charged with causing the injury, which instruction the District Court states "might well have been given," we desire to say that while the instruction is correct in point of law, if thoroughly understood, and therefore that it is not error to give it, we are not of the opinion that a court errs if it refuses the same. All that the instruction means is that where the plaintiff must prove his case by a preponderance of the evidence and the evidence on a material point in issue is equally balanced, the plaintiff cannot prevail. This rule should be stated in clearer language than is contained in the instruction copied in the opinion of the District Court, and the court may well refuse it provided it gives the rule as it should be stated.

All concur, except LAWLOR, J., who voted for the granting of the application, and WILBUR, J., absent.

185 Cal. 475

ENGEBRETSON v. CITY OF SAN DIEGO. (L. A. 6145.)

(Supreme Court of California. April 2, 1921.)

1. Municipal corporations ⊜1002—Statutory provision necessary in order to recover interest on amount due from municipality.

In order to recover interest against a municipality, there must be some statutory provision authorizing it.

2. Municipal corporations ⊜1002 — Statute held not to give right to recover interest as against municipality.

Civ. Code, §§ 1915, 1917, do not give one having a claim against a municipality a right to recover interest; such statutes not applying to the state or any of its subdivisions.

3. Municipal corporations ⊜1002—Contractor not entitled to interest on claim against city.

Neither under Vrooman's Act, § 10, as amended by section 3, St. 1913, p. 407, nor the city charter of San Diego, was a contractor on roadwork entitled to recover interest from the city in an action on a claim based on the contract which provided that the city should pay for one-half of the work.

4. Municipal corporations ⊜1002—Approval of auditor and treasurer of San Diego essential to securing payment of money from city treasury under statute relating to interest "due on any settlement of account."

Under Charter of San Diego, article 6, c. 2, § 7, article 2, c. 2, § 15, article 6, c. 2, § 12, and article 10, § 9, the approval of the city auditor is not only essential to the securing of a payment from the city treasury, but the auditor is specially charged with the duty of passing upon the question as to the validity of any claim against the city, and is not bound by the determination of the common council as to the validity of such a claim, and such is also true of the treasurer, and it cannot be said that money due from the city to a claimant is "due on any settlement of account from the day on which the balance is ascertained" within the meaning of Civ. Code, § 1917, relating to interest, until the account is acted upon by both auditor and treasurer, even if such statute be construed as applying to municipal corporations.

[Ed. Note.—For other definitions, see Words and Phrases, Settlement of Account.]

5. Municipal corporations ⊜1015 — Approval of claim by common council does not preclude claimant from maintaining action upon claim.

Approval by the common council of the city of San Diego of a claim against the city

does not preclude the claimant from maintaining an action against the city upon the claim for the amount due, where the claimant has failed to secure payment solely by reason of the unauthorized refusal of the auditor to issue proper warrants, and it is not necessary that he proceed by mandamus to compel the auditor to issue the warrants, although he may so proceed, in view of Code Civ. Proc. §§ 581, 581a, 582.

Angellotti, C. J., and Sloane, J., dissenting.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by John Engebretson against the City of San Diego. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

The following is the opinion of Waste, J., in District Court of Appeals, First District, Division 1, rendered June 24, 1920, and concurred in by Welch, Justice pro tem., and Richards, J.:

Plaintiff appeals from a judgment entered in favor of the defendant, after demurrer to the complaint sustained, without leave to amend. The action was brought to recover of the defendant the aggregate sum of $19,937.09 alleged to be due from defendant for work done upon one of the streets of the city of San Diego.

The plaintiff and the defendant entered into two written contracts, on the 22d day of August, 1917, by the terms of which the former agreed to grade, pave and otherwise improve two different sections of Linda Vista road. The city covenanted to pay plaintiff, in warrants drawn upon the general fund of the city, the sums provided for in said contracts, for doing the work, as the same should be ascertained upon final estimates by the city engineer. Each of the contracts provided that upon the completion of the first half of the work, and its acceptance by the city engineer being reported to the auditing committee of the city, plaintiff should be paid 75 per cent. of the agreed price for that proportion of the improvement, the remaining 25 per cent. of the estimated cost not to be paid until the expiration of 35 days after the completion of the contract and the acceptance of the work by the city. The same provisions as to payment were applied to the second half of the work contracted for.

The plaintiff completed the first half of the work required to be done under both contracts, and received from the city a payment of 75 per cent. of the price for doing the same, according to the estimates made by the city engineer. On July 8, 1918, the plaintiff having fully performed both of his contracts, the city of San Diego, by a resolution of its common council, which recited that the city engineer and the manager of operation of the city, had filed their certificates showing that the work was fully completed, in all respects as provided for by the specifications, approved and accepted the work, and discharged plaintiff and his bondsmen from any future obligation in reference thereto. Thereupon the city engineer and the manager of operation made their final estimates of the cost of the work done, and the common council, by another resolution, authorized the payment to plaintiff "out of the general fund" of the sum of $29,086.74, the 75 per cent. payment due under the contracts. A certified copy of the resolution ordering this payment was duly served by the city clerk upon the auditor. When the plaintiff, immediately thereafter, applied to that official for a warrant for the amount ordered paid by the resolution, the auditor would not permit him to make and verify and declined to accept any claim for the amount due, and refused to issue a warrant for the amount upon the ground, as stated by him, "that plaintiff was required to look solely for payment of his claim to any collections that should be made by said city (of San Diego) from the delinquent taxes levied by said city for the year 1917 not otherwise appropriated, and on the further grounds that there were not sufficient funds derived from said delinquent taxes for 1917 in the city treasury to meet the said claim."

Thereafter the auditor, claiming that certain sums had been from time to time collected for delinquent taxes for the year 1917 and were available for payment upon plaintiff's claims, issued warrants to plaintiff which were paid until all but $724.14 of the final 75 per cent. payment for work on the contracts has been paid.

The city retained 25 per cent. of the entire price for doing the work under both contracts, which aggregated the sum of $19,212.95, to await the expiration of 35 days from the completion of the work and its acceptance by the common council. When that time arrived, no unpaid claims for labor or materials being presented, the council, by resolution, directed that that amount be paid to plaintiff "out of the general fund of said city, and as specified in said contracts." The auditor declined to issue a warrant to the plaintiff for this last installment, basing his refusal upon the same grounds as in the first instance. Thereafter plaintiff duly made and filed his verified claim against the city of San Diego for the amounts remaining at the time unpaid upon the two installments due for the work done and for interest thereon. The auditing committee of the city considered the claim, and rejected the demand for interest. With the exception of one payment of $2,996, the entire amount still remains unpaid, although it appears from the complaint that there has been at all times sufficient money in the treasury to pay the claim.

Appellant's position is that the city of San Diego, by the action of its common council, fully adjudicated and determined the amount due to him, and that he was, and is now, entitled to be paid the full amount without further auditing. He claims that it was not necessary to file any claim or claims against the city for the work, inasmuch as the auditor was duly notified of the action of the common council by receipt of the certified copy of the resolution accepting the work and ordering payment therefor out of the general fund, and that his filing such claims would only amount to an idle act. He contends that, while he might have sought a writ of mandate, as suggested by respondent, to compel the auditor to audit his claim and issue a warrant therefor, an acknowledged contract debt of a city, payment of which is

withheld on demand, gives a general right of action against the municipality, and that mandamus is not the exclusive remedy. In making this contention the appellant is mistaken.

It appears from the complaint that the inability of the plaintiff to collect his money arose, in the first instance, from the effort of the auditor to restrict all payments for the work done by him to the taxes collected for the fiscal year 1917, that being the year in which the contract was executed. The city extended the time for doing the work, however, under the permissive terms of the contract, and it was not fully completed until in the next fiscal year, 1918. Under the situation disclosed by the complaint, and the settled law of this state, the position of the auditor was untenable. Doland v. Clark, 143 Cal. 176, 181–183, 76 Pac. 958; McBean v. City of Fresno, 112 Cal. 166, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; Smilie v. Fresno County, 112 Cal. 311, 44 Pac. 556. In fact, we may assume that he and the city, if it at all accepted his theory, realized the error and abandoned the position. At any rate the city tendered the full amount of the last installment, less plaintiff's demand for interest, after this action was brought, and now resists plaintiff's action upon an entirely different theory. Its sole defense is concisely stated by it as follows: "In our case the council is the real auditing body, and did duly determine by proper resolution what constituted the liabilities of the city regarding plaintiff's claim, and the auditor had no right to avoid the council's action, and, since he has apparently done so, mandamus was the proper remedy to be pursued by plaintiff." In support of its contention the respondent relies upon the provisions of the charter of the city, which, in brief, provide that the auditor shall draw all warrants upon the treasury of the city for all demands allowed, and ordered paid in the proper manner. Charter of San Diego, § 5, c. 2, article 6. Its position is that, while the city contracted to pay appellant for the work performed by him, it had power to pay only in the manner provided by its charter, that is, through the medium of proper warrants drawn on the treasury, that any alleged failure to perform its contract arises through the default of an administrative officer, the auditor, and that, in the absence of any provision of the charter binding the city to respond for such default, the appellant was bound to seek his remedy by compelling the delinquent official to perform his duty. Such is the effect of the authorities in this jurisdiction. Union Trust Co. v. State, 154 Cal. 726, 729, 99 Pac. 183, 24 L. R. A. (N. S.) 1111; Hunt v. Broderick, 104 Cal. 313, 315, 37 Pac. 1040; Raisch v. Board of Education, 81 Cal. 542, 546, 22 Pac. 890; Babcock v. Goodrich, 47 Cal. 488, 514.

The act of the auditor was purely one of misfeasance, and did not constitute a breach of contract on the part of the city. The city, through its common council, had fully performed its contract. The common council acted within its jurisdiction in ordering the amount due appellant to be paid. The duty of the auditor to draw warrants for the bills ordered paid by the common council was merely a ministerial one, and no discretion as to their payment or nonpayment was vested in him. Babcock v. Goodrich, supra. Since there was no breach of the contract by the city, which has exhausted its powers to perform the terms of that instrument, no interest was due to plaintiff from it, and he could have no claim against the city for the remissness or dereliction of one of its officers in failing to perform a duty that was imposed upon him by the laws of the municipality. In this latter connection it was said in Perkins v. Blauth, 163 Cal. 782, 789, 127 Pac. 50, 53: "The principles to be deduced from the decisions in this state are that municipal corporations are not liable for dereliction or remissness of municipal officers or agents in the performance of public or governmental functions of the city, or in the performance of duties imposed upon those officers which are prescribed and limited by express law; and when an injury results from the wrongful act or omission of a municipal officer charged with duty prescribed and limited by law, the doctrine of respondeat superior is inapplicable." Sievers v. San Francisco, 115 Cal. 648, 654–655, 47 Pac. 687, 56 Am. St. Rep. 153. Appellant argues that "the contention on the part of the city" that plaintiff was limited to the delinquent resources of the year 1917 was "not abandoned by it until after this suit was brought." As a matter of fact, this contention was not made by the city, but was merely another feature of the dereliction of the auditor, in that it was the excuse which he gave for the nonperformance of his duty, after the city had fully performed its part of the contracts with appellant.

The judgment is affirmed.

Haines & Haines, of San Diego, for appellant.

T. B. Cosgrove, of Los Angeles, M. R. Thorp, of San Diego, Arthur F. H. Wright, of Bisbee, Ariz., and S. J. Higgins, of San Diego, for respondent.

WILBUR, J. The plaintiff on August 22, 1917, entered into two contracts with the city of San Diego for the improvement of a portion of the Linda Vista road. The work was to commence within 5 days and to be completed within 200 days. The contracts provided that the city should pay for one-half of the work, and this provision was in pursuance of section 26 of the Vrooman Act (Statutes of 1889, p. 170). The time for the completion of the work was extended to July 8, 1918, on which date the work was completed. On July 29, 1918, the common council of the city of San Diego authorized the payment from the general fund of the completion payment amounting to $29,086.74. $24,366.61 has been paid of this amount, and further installment of the contract price due 35 days after completion amounted to $19,212.95. The common council by resolution adopted August 30, 1918, authorized payment thereof out of the general fund of said city. On August 20, 1918, plaintiff filed his claim with the secretary of the auditing committee of said defendant for the balance due thereon with interest at 7 per cent. from July 8, 1918, on $29,086.74, less partial payments

and interest on such payments and for $19,212.95, with interest from and after August 13, 1918, at the rate of 7 per cent. per annum. On July 8, 1918, there were unappropriated revenues of the city of San Diego, provided for the fiscal year 1918 and the fiscal year 1917 and previous years, more than sufficient to pay said amounts at that date unpaid upon said contracts. On July 29, 1918, plaintiff applied at the office of the auditor of the defendant city for the proper printed blank upon which to make his verified claim for the amount specified in the resolution of the common council. The auditor refused to comply with the request upon the ground that the plaintiff was required to look solely to the revenues of the year 1917 not otherwise appropriated for payment of his claim and on the ground that there was no sufficient funds derived from delinquent taxes for 1917 in the said city treasury to meet said claim. Thereupon the contractor made a written demand upon the common council for payment, and the city attorney rendered an opinion sustaining the position of the auditor and holding that plaintiff was not entitled to interest upon his claim. On November 20, 1918, plaintiff filed a duly verified claim for all amounts unpaid, together with interest thereon at the rate of 7 per cent. per annum from the respective dates when said amounts fell due under the terms of the contract. The foregoing facts are alleged in the complaint filed by the plaintiff herein November 30, 1918, and in amendments thereto filed February 17, 1919. Plaintiff filed a supplemental complaint January 8, 1919, alleging the payment of an additional sum upon the completion payment due plaintiff under the contract, and that on December 24, 1918, the defendant tendered plaintiff the amount of the payment due 35 days after completion, to wit, $19,212.95. The demurrer of the defendant to the complaint was sustained, and judgment thereon rendered, and plaintiff appeals. The respondent concedes that the plaintiff is entitled to the payment of the amounts due under the contracts without interest, but claims that the remedy for recovery thereof, in view of the allowance of the claim by the common council of San Diego, is by mandamus directed to the auditor and treasurer, and that neither in this case nor in a mandamus proceeding is the plaintiff entitled to recover interest. While the plaintiff demanded judgment for interest from the date when the payments under the contracts were due, namely, July 8th and August 12th, in his brief he claims interest on the completion payment of $29,086.74 from the date of the resolution of the common council authorizing the payment of said amounts from the general fund and upon the sum of $19,212.95, the 35-day payment, from August 30, 1918, the date of the resolution of the common council authorizing this payment from the general fund. The respondent contends that the city is not liable for interest, that when the common council authorized the payment of the moneys due the plaintiff it was the duty of the auditor to make such payment, and that the city cannot be compelled to pay interest because of the default of the auditor in failing to perform his duty.

In Higgins v. City of San Diego Water Co., 118 Cal. 524, 50 Pac. 670, it was sought to recover money due under a contract where the validity of the contract was attacked as violating section 18 of article 11 of the Constitution, as being in excess of the revenue provided for the fiscal year in which the contract was executed. The court held that the contract was valid, but that the moneys due thereunder could only be paid from the revenues of the respective years in which the obligation accrued and originally directed a judgment in that form. On rehearing, however, which was ordered principally on the question as to the proper form of judgment, it was determined that the water company should have "an ordinary general judgment for whatever amount shall be found due it, without any direction as to the revenues out of which the judgment shall be satisfied." The reason for this determination is thus expressed by the court:

"Future provision might be made for the payment of a debt, although there might be no revenues of the fiscal year in which the debt was incurred out of which it could be satisfied, as, for instance, by the adoption by the people of a proposal to pay it, or by other methods that might possibly be suggested; and a direction in a judgment that it should be paid only out of the revenues of a certain year might be held to preclude its payment in any other way. Merely putting a demand in the form of a general judgment would not in any way take it out of the general rule that the ordinary revenues of a future year cannot be applied to the payment of a liability in a previous year, as held in Smith v. Broderick, 107 Cal. 644, 48 Am. St. Rep. 167. We think, therefore, that in a case like the one at bar there should be a general judgment in the usual form without any direction as to the method of its payment."

See, also, Arthur v. Petaluma, 175 Cal. 216, 221, 165 Pac. 698.

It is evident then that this action is not adapted to determine the question at issue between the auditor of the city of San Diego and the plaintiff, for the appropriate judgment herein would be for the amount of plaintiff's claim, and the question of whether or not there were funds to pay the claim would be still undetermined. The only effect of the judgment would be to determine that the plaintiff had a valid claim against the city for the amount of the judgment. Arthur v. Petaluma, supra; Metropolitan Life Ins. Co. v. Rolph, 194 Pac. 1005. The appellant recognizes mandamus as an appropriate remedy, but points out that in such an action no interest could be allowed plaintiff as claimed

(Barber v. Mulford, 117 Cal. 356, 360; Howe v. Southrey, 144 Cal. 767, 769, 78 Pac. 259; Hewel v. Hogin, 3 Cal. App. 248, 255, 84 Pac. 1002), and for that reason claims that mandamus is not an adequate remedy. Appellant claims that this case is differentiated from Higgins v. City of San Diego, supra, by reason of the fact that the complaint is framed for the very purpose of submitting the constitutional questions for judicial determination, and says:

"For this reason the substance of the contracts and the date of the completion and acceptance of the work was pleaded, and the allegation of paragraph IX of the complaint, relating to the sufficiency of the revenue, was made."

But the prayer of the complaint was for a general judgment for the full amount of plaintiff's claims with interest, and does not pray that said judgment should be paid from the revenue of the years 1917 and 1918.

The questions thus presented for consideration are: First. Does the approval by the common council of the city of San Diego of plaintiff's claim preclude the plaintiff from maintaining an action against the city upon the claim for the amount due, where the plaintiff has failed to secure payment solely by reason of the unauthorized refusal of the auditor to issue proper warrants? Second. Does the approval of plaintiff's claim by the common council entitle the plaintiff to recover interest from the date of such approval?

The appellate court held that the sole remedy of the plaintiff was mandamus. We will, however, consider the question of interest first.

[1] In order to recover interest against a municipality there must be some statutory provision authorizing it. The rule is thus stated in Ruling Case Law (15 R. C. L. § 14, p. 17; section 15, p. 18):

"It is well settled, both on principle and authority, that a state cannot be held to the payment of interest on its debts unless bound by an act of the Legislature or by a lawful contract of its executive officers made within the scope of its duly constituted authority. The principle applies to bonds, *claims*, judgments and *warrants*. The theory upon which the rule is based is that, whenever interest is allowed either by statute or common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to government. It is presumed to be always ready to pay what it owes. The apparently favored position of the government has been declared to be demanded by public policy." (Italics ours.)

The same reasons apply with equal force to a municipal corporation, although the authorities are not uniform on this subject. 15 R. C. L. § 15, p. 18.

[2] Appellant relies upon sections 1915 and 1917, Civil Code, to establish his right to recover interest, but in Savings, etc., Society v. San Francisco, 131 Cal. 356, 363, 63 Pac. 665, 667, it was held that these sections do not apply to the state or any of its subdivisions. The court there stated:

"The Code sections cited relate to interest as compensation or damage between parties to an action, and the language of the statute is general and does not include the state or any of its political subdivisions. The state is not bound by general words of a statute which would operate to establish a right of action against it. Mayrhofer v. Board of Education, 89 Cal. 110; Whittaker v. County of Tuolumne, 96 Cal. 100. The action here is brought under a new section of the Political Code (3819) in which no provision is made for the payment of interest. Stats. 1895, p. 335."

[3] This case was followed in Columbia Savings Bank v. Los Angeles, 137 Cal. 471, 70 Pac. 308, in Miller v. Kern Co., 150 Cal. 797, 90 Pac. 119, and in Spencer v. Los Angeles, 180 Cal. 103, 115, 179 Pac. 163. In the first two cases the actions were under section 3819, Political Code, to recover money upon void assessments, and in the latter to recover moneys paid to the city of Los Angeles upon void assessments for the opening of a street. Section 26 of the Vrooman Act, as amended by section 8, Statutes 1891, p. 206, under which the city undertook to pay plaintiff for the work done under his contracts, makes no provision whatever for the payment of interest to a contractor by a municipality. That act does provide for the payment of 10 per cent. interest for that portion of the contract price assessed upon the lots benefiting by the work done, from and after the return of the warrant after demand, if then unpaid (section 10, Vrooman Act, as amended by section 3, Stats. 1913, p. 407), nor is there any provision in the charter of San Diego for the payment of interest upon such claims.

Appellant contends that his claim bears interest from the day it was audited and ordered paid by the common council.

[4] We have only to consider the method of auditing and paying accounts of a city to observe how difficult of application the rule contended for by the appellant would be. There would always be an interval between the date of the approval of claims by the common council and the date of the drawing and issuance of the warrant by the auditor. This delay may result because of the time necessary to prepare the many warrants drawn by the auditor, or it may result from the delay of the claimant or from the determination of the auditor that the city is not liable for the indebtedness. The auditor of the city of San Diego is charged with the duty of determining, before issuing a warrant, whether or not the contracts for the performance of which the warrants are demanded create obligations in excess of the revenues properly applicable to their payment, and, if for that reason they are void,

to refuse to issue such warrants, failing in which duty the auditor and his bondsmen are "jointly, severally, and personally responsible and liable for any damage resulting to the city on account of any illegal or fraudulent claim for which a warrant may be issued." Charter of San Diego, art. 6, c. 2, § 7. The auditor as well as the common council is directly chargeable with the responsibility of determining whether or not a claim against the city is valid. Article 2, c. 2, § 15, provides as follows:

"Neither the common council, nor any officer, board, department, or authority shall allow, make valid, or in any manner recognize any demand against the city which was not at the time of its creation a valid claim against the same, nor shall they or any of them ever allow or authorize to be paid any demand which, without such action, would be invalid, or which shall then be barred by any statute of limitation, or for which said city was never liable."

The charter makes the same provisions as the Constitution of the state with reference to the contracting of debts and liabilities in excess of revenues and that "all officers of said city are charged with notice of the condition of the city treasury, and extent of the claims against the same." Article 6, c. 2, § 12. Article 10, § 9, would make both auditor and treasurer liable upon their official bond for the payment of an invalid claim. This section is as follows:

"Every officer who shall approve, allow or pay any demand on the treasury not authorized by law, ordinance, or this charter, shall be liable to the city individually, and on his official bond, for the amount of the demand so illegally approved, allowed or paid."

Under these provisions of the charter the approval of the auditor is not only essential to the securing of payment from the treasury, but the auditor is not only bound by the determination of the common council as to the validity of the claim, but he is specially charged with the duty of passing upon that question, as is also the treasurer. It follows that the appellant is in error in claiming that the amount due from the city is conclusively established by the action of the common council. Nor can it be said that the money due from the city to the claimant is "due on any settlement of account from the day on which the balance is ascertained" within the meaning of section 1917, Civil Code, for the balance is not effectively ascertained nor the account settled until acted upon by both auditor and treasurer. Although these sections, as we have said, have no application to a municipality, it may be further observed that, if interest began on all accounts when they are audited by the common council, the delay of the claimant in applying for his warrant or payment thereof would entitle him to recover 7 per cent. interest during the period of such delay, a fact which alone indicates the inapplicability of these sections to municipalities or governmental agencies where the creditor cannot tender payment to the debtor, but can only pay in the manner and form provided by law, and is presumed to be always ready and able to do so. 15 R. C. L. § 14, supra.

[5] We conclude, therefore, that the plaintiff is not entitled to recover interest, and that his remedy to avoid delay was by mandamus to compel the auditor to issue the warrants and thus secure payment.

It remains for us to determine whether or not, having failed to do so, he is entitled to any relief in this action. It is clear from the complaint that the plaintiff is entitled to the principal amount claimed. The money is due to him and has not been paid. This is admitted by the demurrer. There seems to be no good reason why he should not have judgment for the principal amount claimed, notwithstanding the fact that the claim has already been favorably passed upon by the common council, and that a judgment has no additional force except to conclusively establish the validity of the contract and of the indebtedness against the city and all its officers.

The judgment would bear interest from its date (Spencer v. Los Angeles, supra) and thus secure the plaintiff in his interest pending an appeal, in the event of a favorable decision in the lower court, and thus be more advantageous to the claimant than a mandamus suit where the validity of the indebtedness is in issue rather than the availability of funds to meet a valid claim. (Higgins v. San Diego, supra).

It seems a curious disposition of a case, where a creditor sues a debtor to recover on an acknowledged indebtedness, to deny him any relief on the ground that the debtor, or its board of directors, or its common council has admitted the claim of the creditor to be a just and valid one, even if it be found that the creditor has another remedy to secure payment of such indebtedness.

The Code of Civil Procedure declares that—

"In all cases other than those mentioned in the last two sections [581, 581a] judgment must be rendered on the merits." Section 582, Code Civ. Proc.

Sections 581 and 581a, Code of Civil Procedure, referred to, provide for a dismissal of the action, or the granting of a nonsuit, and do not include a case such as the one at bar. The trial court, upon sustaining the demurrer to the amended complaint, rendered a judgment "that the complaint, as so amended, be, and the same is hereby, dismissed," and awarded costs to the city. This is either not a judgment on the merits as required by section 582, supra, where the plaintiff alleged and the defendants admit an indebtedness of nearly $50,000, or it is a judgment on the

merits which would bar the plaintiff from recovering his claim by a subsequent mandamus. In either event it is erroneous.

Judgment reversed, and the court directed to overrule the demurrer to the complaint.

We concur: SHAW, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.

ANGELLOTTI, C. J. I dissent from the judgment of reversal. To my mind, in view of our conclusion on the question of plaintiff's right to interest, in which I entirely concur, the complaint did not state a cause of action against the city of San Diego. I think that upon the facts alleged plaintiff's sole remedy for the collection of his claim which had been duly allowed by the council of the city was by mandate against the auditor, as was decided by the District Court of Appeal of the First Appellate District, Division 1.

I concur: SLOANE, J.

51 Cal. App. 648

BENT v. SECOND EXTENSION WATER CO. et al. (Civ. 2226.)

(District Court of Appeal, Third District, California. March 3, 1921. Hearing Denied by Supreme Court May 2, 1921.)

1. Waters and water courses ⟸238—Sale of property by mutual water company is subject to nonconsenting stockholder's right to receive water.

Where a mutual water corporation had complied with Civ. Code § 324, so as to make the right of its shareholders to receive water from the corporation an appurtenance to the land which could be transferred only with the land, a sale by the corporation of all its property under the provisions of section 361a conveys the property subject to the vested right of nonconsenting stockholder to continue to receive the water represented by his shares of stock.

2. Constitutional law ⟸93(1)—Waters and water courses ⟸238—Mutual water company cannot be authorized to deprive nonconsenting stockholder of vested right to water.

If Civ. Code, § 361a, authorizing sale by a corporation of all its property with the consent of two-thirds of its stockholders, authorized a mutual water company, by the sale of its property, to deprive a nonconsenting stockholder of his vested right to receive water for his lands, that statute would be invalid.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Arthur S. Bent against the Second Extension Water Company and Alpaugh Irrigation District. Judgment for the plaintiff, and the defendant irrigation district appeals. Affirmed.

D. E. Perkins, of Visalia, for appellant.

Farnsworth, McClure & Burke, of Visalia, for respondent.

BURNETT, J. The appeal is on the judgment roll. The decree of the court required defendant Alpaugh Irrigation District, "upon payment of reasonable cost of furnishing and delivering the same to furnish and deliver to plaintiff, or his successors, upon said land mentioned, and described in the complaint in this action, for irrigation purposes from the water supply and water system formerly owned by said Second Extension Water Company" a certain quantity of water designated and described therein; it also adjudged that said quantity of water is appurtenant to all the real property described in the complaint and belonging to plaintiff, and ordered and directed that plaintiff recover from said defendant the sum of $1,625.60 for failure and neglect to furnish water on said land for irrigation purposes during the irrigation season of 1917.

The defendant, Second Extension Water Company, a mutual water corporation, was incorporated in January, 1906, in accordance with the provision of section 324 of the Civil Code. The by-laws provided that the water should be supplied only to the owners of the stock, and that such stock should be appurtenant to certain lands described in the certificates issued therefor. One hundred and twenty shares of such stock were issued to plaintiff, and in the certificate thereof 120 acres of land belonging to plaintiff were described, and a certified copy of the by-laws of the corporation was recorded with the county recorder of Tulare county wherein the land was situated. It is not disputed that the Second Extension Water Company complied with the provisions of said section 324, and that said shares of stock owned by respondent were and are appurtenant to said 120 acres of land, and it is admitted that, as a stockholder in said corporation, respondent has paid all assessments, calls, and demands thereon.

At a meeting of the stockholders of said corporation held on December 21, 1915, the holders of two-thirds of the issued capital stock authorized, by resolution, the board of directors to sell the water, water rights, and all physical property of the corporation to the Alpaugh Irrigation District, and thereafter, for a valuable consideration, the sale was consummated, and on March 3, 1917, said district entered into actual and exclusive possession and control of all of said physical properties. The respondent did not consent to such transfer and has at all times vigorously opposed the same.

It is admitted by appellant that—

Prior to March 3, 1917, "the Second Extension Water Company had regularly furnished

respondent the amount of water called for in his certificate of stock for the irrigation of the land described in said certificate, but from and after the date of said transfer neither defendants would furnish him with any water, though he demanded it from both."

Said section 324 of the Civil Code provides that—

"Any corporation organized for, or engaged in the business of selling, distributing, supplying, or delivering water for irrigation purposes or for domestic use, may in its by-laws provide that water shall only be sold, distributed, supplied, or delivered to owners of its capital stock, and that such stock shall be appurtenant to certain lands when the same are described in the certificate issued therefor; and when such certificate shall be so issued, and a certified copy of such by-law recorded in the office of the county recorder in the county where such lands are situated, the shares of stock so located on any land shall only be transferred with said lands, and shall pass as an appurtenance thereto."

Section 361a of said Code provides how a valid sale may be made of the business, franchise and property as a whole of any corporation in the state, and it is not disputed that the sale herein was made in compliance with said statutory authority.

[1] The question, then, to be determined is whether respondent, owning certain stock in a mutual water corporation, such stock being appurtenant to certain land and therefore real property, lost his right to demand water when the corporation, without his consent, sold all its water rights and physical property, or whether the vendee must continue furnishing water to respondent. The question has been decisively answered by the Supreme Court in favor of respondent's contention, and extended consideration would therefore seem to be unnecessary.

In South Pasadena v. Pasadena Land & Water Co., 152 Cal 579, 93 Pac. 490, the question arose in reference to a corporation engaged in supplying water for public use, and the Supreme Court held that such water company, by complying with the provisions of said section 361a, could transfer "its business, franchise and property as a whole." but that "the transferee would take the franchise and property pertaining to it subject to all its burdens, and so long as it held it would be obliged to continue the performance of the public service to which it had been dedicated, and that all the persons to whose use the water is appropriated or dedicated are vested with a right to have the supply continued by whosoever may be in control thereof, and may enforce such right by a proceeding in mandamus against the person in control of the supply and the works by which it is distributed, regardless of the title, to compel the continuance of the distribution, in the usual and proper manner, to those entitled."

In that case the water was a public utility, and appellant seeks to distinguish it from this upon the ground that herein only a private right of property is involved.

But in Orcutt v. Pasadena Land & Water Co., 152 Cal. 599, 93 Pac. 497, it is held that the rule is the same where the water is appurtenant to the land and is a private right of property. Therein it is said:

"The plaintiffs are residents of the portion of South Pasadena supplied with water by the defendant company, and owners of land therein, and it is alleged that a certain share of said water is appurtenant to the respective tracts of land, for irrigation and domestic use thereon. They sue on behalf of themselves and of others having similar rights. The fact that the right to receive the water is appurtenant to the land and is a private right of property, and not a mere right as one of a class entitled to share in a public use, does not in any way materially distinguish the case from South Pasadena v. Pasadena Land & Water Company."

[2] This view is not in conflict with said section 361a of the Civil Code. While the section authorizes the sale of the business, franchise, and property of the corporation as a whole, it does not, nor does it purport to, relieve the system of the burden of a vested interest in a portion of the water belonging to a nonconsenting stockholder. In fact he could not legally be thus deprived of such real property. This right of property does not belong to the corporation, and the owner of it could be divested of it "only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing." Section 1091, Civ. Code. The sale by the corporation was manifestly in its individual capacity, and not as an agent or instrumentality of the government. Hence the sale was not by operation of law. Klauber v. San Diego St. Car Co., 95 Cal. 353, 30 Pac. 555. The owner himself could have transferred his right to the water, and thus have severed the appurtenance from the land itself (Estate of Thomas, 147 Cal. 236, 81 Pac. 539, but that is, clearly, not this case.

The fault of appellant seems to be principally in assuming that the interest of the stockholder, as in the ordinary corporation, is confined to the right to participate in the profits of the business, and the distribution of the assets. Such was the situation in the cases cited by appellant. Wright v. Oroville Gold, etc., Co., 40 Cal. 20; Kohl v. Lilienthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; Hobbs v. Tom Reed, etc., Co., 164 Cal. 497, 129 Pac. 781, 43 L. R. A. (N. S.) 1112. They involved mining corporations, and the shares of stock therein did not represent a vested interest that was appurtenant to land.

In the first of these it was said:

"The mere legal title to this mining property is undoubtedly vested in the corporation itself,

and not in the stockholders as such. The board of trustees may therefore control the property, provided that, in doing so, it do not act beyond the limit which the law has assigned to the exercise of corporate authority."

So in Kohl v. Lilienthal it is said:

"Stockholders have no legal title to the property of the corporation. That remains in the corporation, and the shares simply represent the right of the shareholders to share in the distribution of the profits of the corporation, and in the final distribution of its estate when it shall cease to exist and its estate shall have been finally administered."

Likewise, in the Hobbs Case the declaration is:

"A corporation is the agent and trustee of its stockholders, in their behalf and for their use and benefit, holding, controlling, and managing the corporate property and business."

Herein there can be no objection to the sale of the business or of the assets of the corporation, but the stock represents an additional element, an interest in real property, which constitutes a private vested right that the owner may continue to assert, notwithstanding the property of the corporation has been sold. He is bound by the sale to the extent of the ordinary incidents of stock in a corporation, and he must accept service of the water from the vendee, but the law does not place in the hands of any number of his fellow stockholders the power to take away at their will this property right, which the stockholders by their own contract have made appurtenant to plaintiff's land.

Indeed, the decision of the Supreme Court is a necessary conclusion from the language of section 324 providing that—

"The shares of stock so located on any land shall only be transferred with said lands, and shall pass as an appurtenance thereto."

We may add that in section 1473 of Kinney on Irrigation and Water Rights (2d Ed.) the learned author says:

"Not only may a corporation purchase from individuals or other corporations certain portions of their property and rights, but an incorporated water company has the power to purchase from another corporation, and the latter corporation has the power, with the assent of the requisite number of stockholders required by the law, to legally sell and convey to another corporation all of its property, including its water rights, rights of way, diverting and carrying works, franchises, and business, and all other personal and real property of whatsoever kind or nature, if the same is done in good faith, and not for the purpose of delaying or defrauding creditors.

"But the rights of consumers which vested under the operations of the selling corporation are not affected by the transfer to another company, but they have the right to have the water supply 'continued by whomsoever may be in control thereof.' "

We conclude that respondent's water right is his vested private property appurtenant to his land, of which he cannot be divested except by his own conveyance, or by operation of law; that no such transfer has been made; that the purchaser took the property of the Second Extension Water Company subject to this vested right of plaintiff; and that he is entitled to a continued service of water from the system.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

51 Cal. App. 703

ABRAHAM et al. v. KING et al. (Civ. 3496.)

(District Court of Appeal, First District, Division 2, California. March 9, 1921. Hearing Denied by Supreme Court May 5, 1921.)

1. Venue ⊂=80—Transferred action properly dismissed where plaintiff did not pay fees within year.

Under Code Civ. Proc. § 581b, in an action in claim and delivery originally commenced in the superior court of the county of Sacramento where defendants appeared and moved for change of venue to the city and county of San Francisco on the ground of the residence of a defendant in such city and county, and it appeared from the affidavit filed in support of the motion that the defendant named as a company was not a legal entity, and that the name had been used by the individual defendant as a trade-name in carrying out one contract, so that it appeared that such individual defendant was the only defendant, and the transfer fees were not paid by plaintiff within one year from the time of the receipt of the papers by the clerk at San Francisco, the court properly dismissed the action.

2. Venue ⊂=80—Trial court without jurisdiction except to dismiss action begun in wrong court where fees of transfer not paid.

The trial court is without jurisdiction to do anything in an action except dismiss it under the conditions set forth in Code Civ. Proc. § 581b, providing that no action where not originally commenced in the proper county shall be further prosecuted, where the costs and fees of transmission of the pleadings and papers to the clerk of the court to which it is transferred have not been paid.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by N. Abraham and another, copartners doing business under the name and style of Abraham & Davidson, against L. C. King and another. From judgment dismissing the

action, plaintiffs appeal. Judgment modified, and as modified affirmed.

Rose & Silverstein, of Oakland, for appellants.

Nowlin, Fassett & Little, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal from a judgment in favor of the defendant. The judgment was for the dismissal of an action in claim and delivery, and for the return of certain personal property or the value thereof in the sum of $1,500, and for damages for the detention thereof in the sum of $148 and for costs.

The action was originally commenced in the superior court of the county of Sacramento. The defendants appeared and moved for a change of venue to the city and county of San Francisco on the ground of the residence of the defendant L. C. King in said city and county. It appeared from the affidavit filed in support of this motion that the defendant Pacific Wrecking Company was not a legal entity, and that that name had been used by the defendant King as a trade-name in carrying on one contract. It appeared, therefore, that said King was the only defendant in the action. The motion for the change of venue was duly granted and the papers in the case transmitted to the superior court of the city and county of San Francisco, where they were received on October 4, 1918. On October 5, 1919, the superior court rendered the judgment of dismissal under section 581b, Code of Civil Procedure, and further recited in said judgment that the action was for the recovery of the possession of personal property and that the personal property described in the complaint herein was in said action taken from the defendant L. C. King and delivered to the plaintiffs. It was then adjudged and decreed:

"That the defendant L. C. King do have and recover of and from the plaintiffs, N. Abraham and M. Davidson, that certain lot of secondhand machinery, iron, and junk more fully described in plaintiffs' complaint herein, or the value thereof, to wit, the sum of $1,500 in case a return cannot be had, together with $148 damages for the detention thereof by the plaintiff, together also with defendant's costs and disbursements incurred in said action, amounting to the sum of $5.50."

The appellant contends that under the facts of this case the trial court has no power or jurisdiction to enter a dismissal of the action, and that, assuming that the court had the power to dismiss the action, it had no power or jurisdiction to enter an alternative judgment, and the power of the court was limited to a dismissal only.

The judgment was entered under the provisions of section 581b, Code of Civil Procedure, which reads as follows:

"No action heretofore or hereafter commenced, where the same was not originally commenced in the proper county, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions heretofore and hereafter commenced must be dismissed by the court to which the same shall have been transferred, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, where the costs and fees of transmission of the pleadings and papers therein to the clerk or justice of the court to which it is transferred or of filing the papers anew, have not been paid by the plaintiff for one year after the time when such pleadings or papers shall have arrived in the custody of such clerk or justice. * * *"

[1, 2] It is admitted that the fees were not paid by the plaintiff within one year from the time of the receipt of the papers by the clerk at San Francisco. It is unnecessary to discuss the argument of the appellant upon the question of the power of the court to order a dismissal of the action. Our Supreme Court, in the recent case of Davis v. Superior Court, 195 Pac. 390, has foreclosed all argument on this question. It is there held under facts analogous to the facts in the present case that the court must dismiss the action under the provisions of section 581b, Code of Civil Procedure. This case is also authority upon the second point urged by appellant, which is that under the provisions of section 581b, Code of Civil Procedure, the trial court had no jurisdiction to do more than dismiss the action; that it could not enter an alternative judgment nor any judgment except one of dismissal of the action. In the case of Davis v. Superior Court, supra, we have a direct ruling that the trial court is without jurisdiction to do anything in an action except dismiss it, under the conditions set forth in section 581b, Code of Civil Procedure.

The judgment is modified by striking therefrom all portions thereof except the portion dismissing the action. As thus modified, the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

51 Cal. App. 585

MALONEY v. HOUSTON et al. (Civ. 3481.)

(District Court of Appeal, Second District, Division 1, California. Feb. 26, 1921. Hearing Denied by Supreme Court April 27, 1921.)

1. Sales ⊂=135 — Vendor and purchaser ⊂=144(2)—Lack of title in seller prior to time of performance no ground for rescission.

Want of title furnishes no ground for rescission of a contract of sale of land or personalty unless on tender seller is unable to comply with the agreement.

2. Sales ⊂=137—Provision in contract as to personal obligations held intended to apply only to such as would be a lien on property.

A provision in a contract of sale of an interest in concessions, a partnership contract to be executed on payment of purchase price, that no party to the agreement had any personal obligations nor would contract any obligations that would be a lien on the business, *held* intended to apply only to obligations which would be a lien on the property.

3. Sales ⊂=137—Existence of liens on property held not ground for rescission of contract of sale.

That seller of beach concessions had personal obligations that were a lien upon property contracted to be sold, contrary to the provision in the contract that there should be no personal obligations which would be a lien on the property, was no ground for rescission of the contract by the prosecuting purchaser who had not tendered the balance due on the purchase price, which would give him the right under the contract to possession of the property.

4. Sales ⊂=384(1)—Seller held not entitled to damages by reason of purchaser's failure to complete purchase.

In an action wherein sellers of interest in property sought recovery of damages for breach of contract by purchaser and attempted rescission, sellers were not entitled to recover by reason of the fact that on account of purchaser's default one of them was unable to pay balance of purchase price upon his automobile, the want of the use of which prevented him from reaching the place of his employment on time as the result of which he lost his position, and that other parties had replied to an advertisement of sale of the property in question and manifested some interest therein, but with whom, on account of purchaser's agreement to purchase, they did not enter into negotiations, and that they were compelled to borrow money to carry on the business, and were not treated with the same consideration as they had been heretofore treated by land company that had given them a concession, as seller's right to recover damage for purchaser's refusal to complete his purchase, whether personal or real property, is fixed by Civ. Code, §§ 3307, 3311.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by E. M. Maloney against Carl T. Houston and another. Judgment for defendants, and plaintiff appeals. Judgment that plaintiff take nothing affirmed, and judgment for defendants on cross-complaint reversed.

John Clarkson and S. M. Davis, both of Santa Ana, for appellant.

H. C. Head, of Santa Ana, for respondents.

SHAW, J. Plaintiff appeals from a judgment entered in favor of defendants. On September 6, 1918, defendants, who were in possession of two certain concessions at Seal Beach, Cal., known as "Auto Parking Station" and "Tent City and Delicatessen Store," of which they claimed to be owners, entered into a written contract with plaintiff whereby, for the sum of $2,000, to be by him paid, they agreed to sell an undivided one-half interest in the property. Of the consideration so specified, $700 was paid by plaintiff at the time of the execution of the contract, and it was provided therein that the balance of $1,300 was to be paid on or before September 26, 1918, at which time a written contract of copartnership was to be executed for the conduct of the business. The contract contained a clause as follows:

"It is further agreed by the parties hereto that no party to this agreement has any personal obligations or otherwise, nor will they contract any obligations that would be a lien on said concessions without the written consent of all parties hereto without forfeiting their rights in this agreement and in said concessions, current running expenses and necessities of life excepted."

Plaintiff made default in the payment of the $1,300 called for by the contract, and on November 22, 1918, filed an amended complaint containing three counts, one of which was to recover for 26 days' services alleged to have been performed by plaintiff at the special instance and request of defendants, another to recover in assumpsit for $700, money had and received by defendants for and on account of plaintiff, and the other for a rescission of the contract.

In addition to their answer, defendants filed a cross-complaint, alleging the execution of the agreement and plaintiff's default in the making of the payment, as agreed therein, by reason whereof they were damaged in the sum of $750.

At the trial the court made findings adverse to plaintiff, and as to the matters alleged in the cross-complaint found in favor of defendants, as a result of which it was adjudged that plaintiff take nothing by reason of the action, and that the defendants have judgment against him for the sum of $500.

As to the cause of action based upon the alleged services rendered by plaintiff to defendants, the adverse finding of the court thereon is clearly sustained by the testimony of defendants to the effect that plaintiff was

never employed by them, nor did he, at their instance and request, perform any services, but pending the consummation of the deal in accordance with the contract made his home at the Tent City, and of his own accord and without any authority so to do occasionally participated in the performance of some slight service required around the place.

[1] The right to a rescission is based upon the fact that at the time of executing the agreement defendants were subject to personal obligations for the payment of money, and further that defendants did not have title to the property which they agreed to sell. It appears that the Bayside Land Company was the grantor of the concessions, and that E. B. De Garmo and defendant S. J. Houston were the grantees thereof, and that under the terms of the grant or lease the grantees were prohibited from assigning the same without the consent of the grantor; that some time prior to the entering into of the contract in question De Garmo sold his interest therein to defendants, depositing with the Bayside Land Company an assignment, which was approved by the said company and held by it under instructions of the assignor to deliver it to the assignees upon payment of a balance of $230, unpaid to De Garmo upon this assignment. He also owed something upon an automobile purchased by him, but which was no part of the property sold and upon which the vendor held a lien, and was likewise indebted to his father.

In our opinion, none of these conceded facts constitute ground for rescission of the agreement to sell the property, a transfer of which plaintiff was not entitled to until he paid the balance of the purchase price; and, since he never paid or offered to pay the same, the fact that defendants did not have title to the property was not a subject of concern to him. That one may lawfully agree to to sell either personal or real property to which at the time he has no title cannot be questioned, and the want of title furnishes no ground for rescission unless, upon tender, defendant is unable to comply with the agreement; and hence, until he complied with his part of the contract by tendering the balance of the purchase price, plaintiff could not demand a conveyance, and was in no position to complain of defendants' default. When the purchaser is in default of the payment of the purchase price he cannot, against the will of the seller, repudiate such contract. Bradford v. Parkhurst, 96 Cal. 102, 30 Pac. 1106, 31 Am. St. Rep. 189; Glock v. Howard, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

[2, 3] The provision in the contract that none of the parties thereto had any personal obligations appears by the context to have been intended to apply to obligations which would be a lien on the property. The agreement is that they have no personal obligations, nor will they contract any such that would be a lien on said concessions. We construe this provision as intended to apply to obligations only which were a lien upon the property agreed to be transferred. As appears from the evidence, there were none, and even if, as claimed by appellant, such liens did exist at the time of making the agreement, nevertheless, as stated, appellant was not affected thereby, since he never paid nor tendered payment.

Under this view of the case it is apparent that plaintiff was not entitled to recover for money had and received on account of the $700 paid upon the purchase price, in accordance with the terms of the contract.

While appellant predicates error upon a number of rulings made by the court in admitting and excluding evidence, he suggests no reason for such claim, and, as presented in his brief, we cannot say that any of the rulings were erroneous.

[4] As stated, the defendants filed a cross-complaint alleging that, by reason of plaintiff's failure to comply with the terms of the contract, they were damaged in the sum of $750, and as to which the court found that plaintiff's refusal to perform the agreement on his part injured the business, plans and arrangements of defendants, and who, but for his acts, might have negotiated a sale to other parties, all to their damage in the sum of $500, for which a judgment was rendered against plaintiff. This finding is without sufficient support in the evidence, which in effect shows that by reason of plaintiff's default the defendant C. T. Houston was unable to pay the balance of the purchase price upon his automobile, the want of the use of which prevented him from reaching his place of employment on time, as a result of which he lost his position at the shipyards; that other parties had replied to an advertisement of sale of the concessions and manifested some interest therein, but with whom, on account of plaintiff's agreement to purchase, they did not enter into negotiations; and, further, that they were compelled to borrow money to carry on their business and were not treated with the same consideration by the Bayside Land Company as they had theretofore been treated. It thus appears that the damage, if any, was due to causes entirely too remote from plaintiff's default and cannot be attributable thereto. Moreover, whether the subject of the agreement be deemed personal or real property, defendants' right to recover damages for plaintiff's refusal to complete the purchase, is fixed by the provisions of the Code. See sections 3311 and 3307, Civ. Code.

The judgment that plaintiff take nothing by the action is affirmed; and the judgment rendered in favor of defendants upon the cross-complaint for $500 is reversed.

We concur: CONREY, P. J.; JAMES, J.

51 Cal. App. 746

CRANE et al. v. BLATT. (Civ. 3141.)

(District Court of Appeal, Second District, Division 2, California. March 16, 1921.)

Sales ⊂=66—Contract construed to obligate buyer to pay particular amount.

Where contract of sale of goods provided that buyer "does hereby agree to buy the above goods as stated above and does agree to pay for same as follows: $300 to be paid upon the taking of the invoice and $1,000 to be paid by E. (third person not a party to the contract) the balance to be paid by notes to be payable $200 or over each month from date of sale," the buyer was liable for the $1,000; E. not being a promisor under the contract.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by W. H. Crane and another against S. Blatt. Judgment for defendant, and plaintiffs appeal. Reversed.

J. F. Keogh and C. C. Mishler, both of Los Angeles (Frank H. Snyder, of Glendale, of counsel), for appellants.

Harry Lyons, of Los Angeles, for respondent.

WORKS, J. The parties to this action entered into a contract whereby appellants agreed to sell to respondent, the party of the second part therein, certain fixtures and other articles and a certain stock of merchandise. The sum of $1,200 was to be paid for the fixtures and the other articles mentioned. The following part of the agreement related to the merchandise:

"Said party of the second part does hereby agree to buy the above goods as stated above and does agree to pay for same as follows: $300.00 to be paid upon the taking of the invoice and $1,000.00 to be paid by E. L. Weaver, the balance to be paid by notes to be payable $200.00 or over each month from date of sale."

Respondent paid all the amounts mentioned in the agreement except the thousand dollars, and this action was commenced to enforce a collection of that sum. Judgment went for the defendant, and the plaintiffs appeal.

The trial court made several findings of fact based upon the view that the agreement contained no promise on the part of respondent to pay the thousand dollars, and it is insisted by appellant that those findings are not supported by the evidence.

The paragraph which we have above quoted commences with the statement that respondent agrees to buy the goods and agrees to pay for them "as follows." The items thus agreed to be paid were $300, $1,000, and certain notes. The fact that it was also stated that the thousand dollars was to be paid by Weaver is of no consequence. Weaver was not a party to the contract and therefore not a promisor under it; but respondent was. The mention of the thousand dollars in the paper is entirely out of place, except upon the theory that respondent was to pay it. Moreover, to conclude where we began, it is listed under respondent's express promise to pay. The clause in question is, in effect, only this:

"I agree to pay you one thousand dollars, to be handed to you for me by E. L. Weaver."

The findings in question are not supported by the evidence.

The judgment is reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(51 Cal. App. 575)

GALLOWAY v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 3703.)

(District Court of Appeal, First District, Division 2, California. Feb. 26, 1921. Hearing Denied by Supreme Court April 27, 1921.)

1. Carriers ⊂=383—Evidence held to justify inference that motorman's purpose was to assist in ejecting passenger, so that whether he was acting within scope of employment was for jury.

In an action against a street railroad company for death of plaintiff's minor son, a passenger on a car, when assaulted and struck on the head by the motorman, evidence *held* to justify an inference that it was the purpose of the motorman to assist the conductor in ejecting from the car a passenger who had become boisterous and beyond control, in carrying out which purpose both would have been acting within the scope of their employment, so that whether the motorman was so acting was a question of fact for the jury.

2. Carriers ⊂=365(1)—If conductor and motorman act within scope of employment in ejecting a passenger, company is not liable if unreasonable force is not used.

In carrying out the purpose of ejecting from the car a passenger who had become boisterous and beyond control, both the conductor and the motorman would have been acting within the scope of their employment, and, if they did not use unreasonable or unnecessary force, the street car company would have been free from liability for damage for the resulting injury to the passenger.

3. Carriers ⊂=365(2)—Plaintiff suing for death of son did not need to establish passenger relation.

It was not a prerequisite to right of plaintiff to recover of defendant street railroad for death of her minor son when struck on the head by the motorman of a car when being ejected that plaintiff should establish that the passenger relation existed between her son and the street railroad.

4. Carriers ⊂=381(1)—Prima facie case held to cast burden on defendant street railroad to show motorman's act was not committed in course of agency.

Plaintiff, suing defendant street railroad company for death of her minor son when struck on the head by the motorman of a car when being ejected, having made out a prima facie case of injury resulting either from the negligence of the motorman within the scope of his employment or from wrongful acts committed by him as agent for the company in and as a part of the transaction of the company's business, there was established a prima facie liability on the company, and the burden was then placed on it to show that act was not committed in the business of the agency within the meaning of Civ. Code, § 2338.

5. Carriers ⊂=384(2)—Instruction clearly stating law as to one phase of case not erroneous.

In an action against a street railroad company for death of plaintiff's minor son when struck on the head by the motorman of the car on which he was or had been riding, an instruction that, if the injury occurred while deceased was passenger through the negligence or reckless act of the motorman acting in the course of his employment, the company was liable, was not in itself erroneous, clearly stating the law as to one phase of the case.

6. Carriers ⊂=365(2)—All persons, including motorman, must refrain from assaulting others.

It is the duty of every one, whether a motorman on a street car or not, to refrain from committing any assault on any person, whether such person be a passenger or not.

7. Carriers ⊂=384(1)—Instruction stated law of case in so far as liability of defendant street railroad attached, irrespective of passenger relation.

In an action against a street railroad company for death of plaintiff's minor son when assaulted by the motorman on the car on which he was or had been riding, instruction, so far as it went, *held* to have presented the law of the case to the jury in so far as the liability of defendant company attached, irrespective of the passenger relation.

8. Carriers ⊂=384(1) — Instructions confining liability of street railroad to showing of passenger relation erroneous and prejudicial.

In an action against a street railroad company for death of plaintiff's minor son when struck on the head by the motorman of the car on which he was or had been riding, instruction tying the liability of defendant to a showing of a passenger relation of plaintiff's deceased son, from which the jury must have drawn the conclusion that the trial court entertained the view that without such a showing plaintiff could not recover, *held* erroneous and prejudicial to plaintiff.

9. Trial ⊂=237(3)—Instruction held erroneous as requiring jury to be satisfied beyond a reasonable doubt.

In an action against a street railroad company for death of plaintiff's minor son when assaulted by the motorman of the car on which he was or had been riding, instruction that the evidence must satisfy the jury's mind to a moral certainty and by a preponderance of the whole evidence was erroneous, as it clearly required satisfaction beyond a reasonable doubt, which is not necessary in such a case.

10. Trial ⊂=296(8)—Erroneous instruction as to measure of proof required not cured.

In an action against a street railroad company for death of plaintiff's minor son when struck on the head by the motorman of a car on which he was or had been riding, instruction that, if any of the facts mentioned had not been proved by a preponderance of the evidence, verdict must be in favor of defendant, *held* not to have cured the first portion of the charge which advised the jury that satisfaction to a moral certainty and by a preponderance was necessary.

11. Appeal and error ⊂=882(12)—Error in instruction on degree of proof required not invited.

In an action against a street railroad company for death of plaintiff's minor son when assaulted by a motorman, error in the instruction advising the jury that both satisfaction to a moral certainty and by a preponderance of the evidence was required for verdict for plaintiff *held* not invited by the instruction requested by plaintiff that moral certainty only was required of plaintiff, defining it; the language being followed immediately by admonition that the rule in criminal cases had no application.

12. Appeal and error ⊂=1064(1)—Instruction plaintiff must prove case to a moral certainty prejudicial.

In an action against a street railroad company for death of plaintiff's minor son when assaulted by a motorman, erroneous instruction that plaintiff must prove her case to a moral certainty and by a preponderance of the evidence *held* prejudicial to plaintiff.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Mary K. Galloway against the United Railroads of San Francisco. From judgment for defendant, plaintiff appeals. Reversed.

F. H. Dam, of San Francisco, for appellant.

Wm. M. Cannon, Wm. M. Abbott, and Kingsley Cannon, all of San Francisco, for respondent.

NOURSE, J. Plaintiff appeals from a judgment after verdict in favor of defendant in an action for damages for the death of her minor son. Death was alleged to have been caused by a blow on the head inflicted by defendant's motorman with the controller bar or gate handle of a street car upon which deceased had been a passenger, and from which he had alighted just prior to receiving the injury.

The facts in evidence, without substantial

conflict, are that the deceased—a young boy of about 18 years of age—with three other companions, was traveling upon a Valencia street car in the city and county of San Francisco when an altercation arose between the conductor of the car and the deceased over the request of the latter for transfers, to which it is conceded he was lawfully entitled. As a result of the altercation blows were exchanged between the conductor and the deceased, and the conductor gave the motorman an emergency signal to stop the car immediately after it had passed Twenty-Third street. The parties were then separated, and the conductor gave the signal to go ahead. Thereafter the altercation was resumed, and a passenger gave the emergency signal, whereupon the motorman brought the car to a stop about 100 feet north of the intersection of Twenty-Fourth street. The motorman immediately opened his gate, and, taking the gate handle, stepped down upon the street from the front platform and ran to the rear of the car to give aid to the conductor. At the same time the deceased left the car and was standing in the street when the motorman approached the rear step. The deceased took two or three steps toward the motorman, who thereupon struck him violently on the head with the gate handle, causing a concussion of the brain which resulted in almost instant death.

The appeal is based upon alleged errors of law occurring at the trial and excepted to by plaintiff in the giving, modifying, and refusing of certain instructions. Appellant's principal contention is that the instructions given made the test of liability depend upon the question whether or not decedent was a passenger at the time of receiving his fatal injury, and that this was erroneous because he would be entitled to recover, even though the passenger relation had terminated, if his death was caused by a tortious act of defendant's motorman acting in the course and within the scope of his employment. Respondent concedes this principle, and that the relationship of passenger and carrier is not per se determinative of the issue as to whether or not the tort complained of was committed within the scope of the employment. It argues, however, that appellant limited her cause of action to the passenger theory by alleging in her complaint that decedent was a passenger, and that therefore she was not entitled to have the jury instructed on the question of defendant's liability for injuries to one not a passenger. The authorities cited by respondent to support this position hold that one may not plead one relation and prove another, but in each instance the complaint was based exclusively on the theory of the passenger relation, and it was neither alleged nor proved that the act was done in the course of or within the scope of employment, so that on failure of proof of the passenger relation no cause of action was stated. It is said in Raming v. Metropolitan Street Railway Co., 157 Mo. 477, 509, 57 S. W. 268, 273, cited by respondent:

"If plaintiff was not a passenger, then the defendant company could only become liable by reason of the fact that the alleged acts of the gripman were within the scope of his duties. * * * But there was no such allegation in the petition, and no evidence on the point. This being the case, no recovery could be had on such ground, absent such allegation and absent such evidence."

In the instant case, if the allegation of the passenger relation is eliminated, the complaint still states a good cause of action for damages for a wanton assault. It is alleged with great care that the "motorman, then and there acting in the course and within the scope of his said employment as such motorman, * * * negligently, wantonly, recklessly, and tortiously struck the said Lucian A. Galloway upon the head with said controller bar." This allegation is supported by the uncontradicted evidence that during the altercation between the conductor and the deceased on the rear platform of the car the conductor gave the motorman the emergency signal of three bells, and that the latter immediately brought the car to a stop. Having ascertained that the trouble was over, he started his car toward Twenty-Fourth street, when he again received the emergency signal and was told by passengers that something was wrong on the rear of the car, and that the conductor needed his assistance. Acting upon the signal given and urged by these passengers, he opened the front gate, and, taking the gate handle in his right hand, stepped out upon the street and ran to the rear of the car to give what assistance was needed to the conductor. When he arrived there both the deceased and his companion had left the car, while the conductor was still standing in his position on the rear platform.

[1, 2] From the facts in evidence the inference might well have been drawn that it was the purpose of the motorman to assist the conductor in ejecting from the car a passenger who had become boisterous and beyond control. In carrying out this purpose both the conductor and the motorman would have been acting within the scope of their employment, and so long as they did not use unreasonable or unnecessary force the company would have been free from liability for damage for the resulting injury. Wasserman v. L. A. Ry. Corporation (Sup.) 193 Pac. 130. Whether the motorman was acting within the scope of his employment was a question of fact for the jury to determine.

[3, 4] It was not a prerequisite to the right to recover that the passenger relation should be established. Appellant made out a prima

facie case of injury resulting either from the negligence of the motorman within the scope of his employment or from the wrongful acts committed by him as agent for respondent in and as a part of the transaction of respondent's business. There was thus established a prima facie liability upon respondent within the rule of Otis Elevator Co. v. First National Bank, 163 Cal. 31, 39, 124 Pac. 704, 41 L. R. A. (N. S.) 529, and Johnson v. Monson (Sup.) 190 Pac. 635. The burden was then placed upon the respondent to show that the act was not committed "in the transaction of the business of the agency" within the meaning of section 2338, Civil Code. Chamberlain v. Cal. Edison Co., 167 Cal. 500, 505, 506, 140 Pac. 25; Barmore v. Vicksburg, etc., Ry. Co., 85 Miss. 426, 38 South. 210, 70 L. R. A. 627, 3 Ann. Cas. 594; Cleveland v. Newsom, 45 Mich. 62, 7 N. W. 222.

The trial court at some stages of the proceedings took the view that there could be no recovery unless the injury resulted while plaintiff was a passenger on the car. This is shown by the modifications which were made in the instructions proposed by plaintiff and in the action of the trial court in denying a new trial "upon the sole ground that, while the death of the decedent was caused by the act of the defendant's motorman, the relation of passenger and carrier did not exist between the defendant and the decedent at the time said motorman inflicted upon the decedent the fatal blow."

[5, 6] Specific objection is made to the action of the trial court in modifying plaintiff's proposed instruction No. 6 by adding the words "while he was a passenger on the car." The instruction as modified, however, correctly stated the law as to one phase of the case. As the jury was thereby instructed that, if the injury occurred while the deceased was a passenger on the car through the negligence or reckless act of the motorman while acting in the course of his employment, then the employer was liable, it cannot be said that the instruction in itself was erroneous. Objection is also made to instruction No. 28, which reads:

"While it is the duty of a motorman and conductor of a street car to refrain from committing any wrongful assault upon persons riding upon said car as passengers, such duty ends when such persons cease to be passengers."

This instruction was clearly erroneous, as it is the duty of every one, whether he is a motorman on the street car or not, to refrain from committing any assault upon any person, whether such person be a passenger or not.

[7] Respondent, though not conceding any error in these instructions argues that, taking them all together, the instructions fully and fairly presented the issues to the jury. Reference is made particularly to the following instruction:

"If you find that before the car in question reached his destination the decedent, Galloway, and the conductor of said car became and were engaged in an affray on or near the rear of the car, and if you find that before or in the course of said affray the motorman of said car received the emergency bell, and if you find that the motorman was then informed of said affray, and thereupon, with the purpose and with the design of engaging in the affray and assisting the conductor, he stopped the car, and if you find that after stepping from the car he took in his hand the controller bar or gate bar of the car, and thereupon left his place in the front of the car and went to or near the rear of said car, in pursuance of his said purpose and design, and struck Galloway with the controller bar or gate bar a blow which caused his death, and if you further find that the affray in question at that time continued or threatened to continue, then the defendant is liable."

This instruction, so far as it went, presented the law of the case to the jury in so far as the liability of the defendant attached irrespective of the passenger relation.

[8] But the injury was done by those instructions which tied the liability of defendant to a showing of a passenger relation of the deceased from which the jury must necessarily have drawn the conclusion that the trial court entertained the view that without such a showing plaintiff could not recover.

Other and equally prejudicial instructions were those numbered 30 and 31. No. 30 reads in part as follows:

"Before you can render a verdict against the defendant, the evidence must satisfy your minds to a moral certainty and by a preponderance of the whole evidence: * * * Second, that in committing such act the motorman was acting within the scope of his employment by the defendant. * * *"

No. 31 used similar language relating to the proof necessary to show that the blow was the proximate cause of the death of the deceased, the court saying:

"If, therefore, the evidence upon this point is equally balanced or if it does not satisfy your minds to a moral certainty and by a preponderance, * * * your verdict must be in favor of the defendant."

[9] It was not incumbent upon the plaintiff to satisfy the jury to a moral certainty and by a preponderance of evidence that the motorman was acting within the scope of his employment when he struck the fatal blow or that the blow was the proximate cause of the death of deceased. Sufficient evidence had been produced by plaintiff to warrant the inference that the motorman was so acting within the scope of his employment when the fatal blow was struck, and the burden of proving that he was not so acting was cast upon the defendant. To instruct the jury, therefore, that the evidence must satisfy their minds to a moral certainty and by a

preponderance was error, as it clearly required satisfaction beyond a reasonable doubt, which is not necessary in a case of this nature. People v. Miller, 171 Cal. 649, 651, 154 Pac. 468; People v. Preciado, 31 Cal. App. 519, 525, 160 Pac. 1090; Boa v. S. F. Oakland Terminal Railways (Sup.) 187 Pac. 2.

The rule as to the measure of proof required in civil cases as distinguished from the measure required in criminal cases is ably discussed in Cooper v. Spring Valley Water Co., 16 Cal. App. 17, 116 Pac. 298. That was an action for conversion of corporate stock where the plaintiff alleged and endeavored to prove that the certificates of stock had been stolen from his testator by one who transferred it to a bank, and that the water company over plaintiff's protest had transferred the stock on its books. The trial court instructed the jury:

That "plaintiff must produce satisfactory evidence" to establish the theft of the stock; that "suspicion will not warrant a verdict of theft; it must be established by such positive proof of actual theft or circumstances as to preclude any other inference so as to convince the mind of a reasonable man. Innocence is always presumed, and the presumption cannot be overcome except by satisfactory proof to the contrary." 16 Cal. App. 21, 116 Pac. 300.

In reversing the case, Mr. Justice Lennon, after quoting from subdivision 5 of section 2061, Code of Civil Procedure, providing that "in civil cases the affirmative * * * must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence," said:

"In other words, 'the result should follow the preponderance of the evidence' (2 Wharton on Criminal Evidence, 1246), and this rule applies to all civil cases alike, even though the theory of the case involves, as it does here, an accusation of felony."

And again (16 Cal. App. 22, 116 Pac. 301):

"The reason for the rule limiting the burden of a plaintiff's proof in such cases to a preponderance of evidence is founded largely 'in the importance of preserving the distinction between civil and criminal cases with the growth of the criminal law. Almost every tortious act is by statute made indictable if done willfully or maliciously; and the courts should be reluctant to adopt, in civil cases, the rules peculiar to criminal law, lest wrongdoers be enabled to avoid civil liability, as well as escape criminal responsibility, under cover of the rules of criminal prosecution, the object of which is punishment only.' Kane v. Hibernia Ins. Co., 39 N. J. L. 697, 23 Am. Rep. 239."

The rule of the Cooper case is supported by a long line of authorities such as New York & Brooklyn Ferry Co. v. Moore, 102 N. Y. 667, 6 N. E. 293; United States Exp. Co. v. Jenkins, 73 Wis. 471, 41 N. W. 957; State ex rel. Detroit, etc., Ins. Co. v. Ellison, 268 Mo. 239, 187 S. W. 23; Brothers v. Horne, 140 Ga. 617, 79 S. E. 468; Brinser v. Fid. Tr. Co., 1 Boyce (Del.) 220, 75 Atl. 792; and many others which might be cited. Its application to the present case is that the complaint alleged that the motorman, while acting in the course and within the scope of his employment, wantonly, recklessly, and tortiously struck the fatal blow. The effect of these allegations is to charge the liability of defendant to the criminal acts of its motorman amounting to manslaughter as well as assault with a deadly weapon. In such a case the above rule as to the measure of proof required should control. As such a crime could be proved for the purposes of this case by a mere preponderance of the evidence, the jury might well have drawn the inference that the act was committed within the scope of the motorman's employment. To require the plaintiff to prove that fact by satisfying the minds of the jury to a moral certainty imposed upon the plaintiff a burden greater than the law required.

[10] Respondent's only defense of these instructions is that they were cured by the further instruction that preponderance was all that was required, that the error was invited by plaintiff's requested instructions, and that they were nonprejudicial. It is true that in instruction No. 30 the court concluded with the words:

"If any one of these facts has not been proved by a preponderance of the evidence, your verdict must be in favor of the United Railroads."

But this language clearly does not remove the harm done by the first portion of the instruction, which advised the jury that both satisfaction to a moral certainty and by a preponderance was necessary. Then in instruction No. 31 no attempt was made to cure the error.

[11] The statement that the error was invited by plaintiff is not supported by the record. In instruction No 4, requested by plaintiff, the expression "moral certainty" was used in this way:

"Moral certainty only is required of plaintiff. Moral certainty is defined as that degree of proof which produces conviction in an unprejudiced mind."

However, this language was followed immediately by the admonition that—

"The rule which applies in criminal cases that the guilt of the defendant must be established beyond a reasonable doubt has no application to this case. In other words, the plaintiff is not required to establish her case by more than a preponderance of the evidence. If, after weighing all the evidence in the case, the minds of the jurors shall be satisfied that the scales tip by ever so little in favor of the plaintiff, then the plaintiff has sustained her burden of proof and has established her case by a preponderance of the evidence."

The court adopted that portion of the proposed instruction referring to moral certainty, but the language last quoted was stricken out and was not given to the jury in any other form. Instructions numbered 30 and 31 were given on the request of defendant.

[12] That prejudice resulted from this error cannot be doubted. The court did not define what was meant by a preponderance of the evidence and did not at any time advise the jury that a preponderance of the evidence alone would be sufficient to justify a finding in favor of the party having the burden of proof. As that phase of the case most strongly relied upon by appellant depended upon the question whether the fatal blow had been struck by the motorman while acting within the scope of his employment, and as the burden of proving that he was not so acting had been cast upon the respondent, the instructions complained of were clearly prejudicial to appellant's case. "In such case it is impossible to determine which of the conflicting rules presented to them was followed by the jury, and the error in any of the instructions must be deemed prejudicial." Rathbun v. White, 157 Cal. 248, 253, 107 Pac. 309, 311.

The judgment is reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

51 Cal. App. 538

In re SIELCKEN.

SIELCKEN v. GARVAN, Alien Property Custodian.

(Civ. No. 3804.)

(District Court of Appeal, First District, Division 1, California. Feb. 24, 1921. Rehearing Denied March 25, 1921.)

1. Records ⇐17(8)—Judgment restoring records under statute held appealable.

An appeal will lie from a judgment granting an application for restoration of court records under St. 1906, p. 73, although no provision for an appeal is embraced in the statute.

2. Appeal and error ⇐870(3)—Right to appeal not questionable in absence of appeal from order making appellant a party.

Court in proceeding under St. 1906, p. 73, to have naturalization records restored, having by an order made the Alien Property Custodian of the United States a party, and no appeal having been taken from such order, it cannot be claimed on appeal that such Alien Property Custodian had no interest in the result of the proceeding and was not entitled to take and prosecute an appeal.

3. Trial ⇐105(2)—Hearsay evidence admitted without objection may be considered.

When hearsay evidence has been admitted in the trial court without objection, the trial court and also the appellate court may properly consider the same in order to determine whether the evidence as a whole is sufficient to sustain findings and a judgment or order of the trial court.

4. Aliens ⇐69—Records ⇐17(7)—Evidence sustaining finding of naturalization in proceeding to restore record thereof.

In a proceeding under St. 1906, p. 73, to restore an alleged record of naturalization of the petitioner's deceased husband, evidence *held* sufficient to support a finding of the trial court that decedent had been naturalized, and that there was a record thereof which had been destroyed.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

In the matter of the naturalization of August Hermann Sielcken, also commonly known as Hermann Sielcken. Petition by Clara Sielcken, as widow of August Hermann Sielcken, praying for an order restoring the records of the district court of the Fourth judicial district in the matter. Francis P. Garvan, as Alien Property Custodian of the United States, intervened. From a decree restoring the record of naturalization, the intervener appeals. Affirmed.

Knight, Boland, Hutchinson & Christin, of San Francisco, for appellant.

John Francis Neylan, of San Francisco, for respondent.

RICHARDS, J. This proceeding was instituted by the petition of one Clara Sielcken, as the widow of one August Hermann Sielcken, directed to the superior court of the city and county of San Francisco, praying for an order restoring the records of the district court of the Fourth judicial district of the state of California in the matter of the naturalization of said August Hermann Sielcken, alleged in her amended petition to have occurred in said court. The jurisdiction of said superior court to entertain said petition arises out of the fact that it became the successor of the jurisdiction and custodian of the records of said former district court under the provisions of the Constitution creating said superior court and of the statutes expressly providing for such succession. St. 1880, p. 23. The proceeding itself was instituted under and in accordance with the provisions of section 2 of an act of the Legislature approved June 16, 1906, entitled "An act relating to the restoration of court records which have been lost, injured or destroyed by conflagration or other public calamity." Stats. 1906, p. 73. The petitioner's application was filed in said superior court on October 20, 1920, and came on for hearing on October 23d of that year. At the inception of said hearing no person appeared to

oppose said petition, and thereupon considerable evidence was presented to the court in support thereof without objection; but at a later session of said court held on November 3, 1920, one Francis P. Garvan, Alien Property Custodian of the United States, appeared, alleging that as such official he had an interest in the determination of said matter, and he therefore at said time presented a complaint in intervention and asked leave to file the same. The further hearing of the matter was then continued until December 1, 1920, at which time the respective parties appeared, the petitioner to object to the filing of said complaint in intervention upon the ground that the said complainant as such official was not a party in interest in said proceeding, and the said complainant in intervention to move to strike out all of the evidence theretofore presented by the petitioner upon the ground that the petition did not state facts sufficient to entitle the applicant to the relief prayed for. In making said motion the complainant in intervention expressly disclaimed making any objection to the competency of the evidence thus far presented, or to the fact that it was in a large measure hearsay. The petitioner at this point amended her original petition in certain respects, and thereupon the court took under advisement both matters. The hearing then proceeded with the further submission of evidence both in support of the original and amended petition and in opposition thereto, to none of which evidence was any objection urged upon the ground of competency; and, the cause having been submitted to the court for decision, it made an order permitting the complaint in intervention to be filed, and also made a further order denying the motion of the complainant to strike out the testimony on behalf of said petitioner, and thereupon made and entered its judgment granting the prayer of the petitioner for the desired relief. From such last-named judgment the complainant in intervention prosecutes this appeal.

[1] The first question presented upon this appeal is as to whether a right of appeal exists in a proceeding of this character. It is conceded that this is a special proceeding, and that it is one in which no provision for an appeal is embraced in the statute which provides for such proceeding. Notwithstanding this fact, we are of the opinion that the existence of a right of appeal in proceedings of this character has been conclusively determined, so far as this court is concerned, by the decision of the Supreme Court in the recent case of Application of Herman, 191 Pac. 934.

[2] The next question presented for discussion is as to whether, conceding that a right of appeals exists, the appellant, as the Alien Property Custodian of the United States, has such an interest in the result of this proceeding as to entitle him to take and prosecute such an appeal. We are of the opinion that this question has been determined, in so far as this court is concerned, by the action and order of the trial court in permitting the appellant to file and present proofs in support of his complaint in intervention. Having been thus made a party to the record in this proceeding by an order of the trial court from which no appeal has been taken, we think the appellant has acquired sufficient standing thereby to permit the prosecution by him of this appeal, particularly in view of the fact that throughout the entire record herein it is made apparent that the purpose of the petitioner in seeking to have the lost record of her deceased husband's admission to citizenship restored is in furtherance of her prior and continuing effort to wrest from the custody of the Alien Property Custodian of the United States that portion of the estate of her deceased husband which was taken over during the recent war by said official upon the theory that her said husband was an alien enemy.

This brings us to the only remaining question before this court for its determination upon this appeal. That question is whether there was sufficient evidence presented to the trial court to sustain its order granting the relief prayed for by the petitioner under the provisions of section 2 of the act of the Legislature approved June 16, 1906, relating to the restoration of court records lost, injured, or destroyed by conflagration or other public calamity.

It is conceded that the records of the district court of the state of California in and for the Fourth judicial district were destroyed in the conflagration of 1906, but it is contended by the appellant that there is no evidence in the record before us sufficient to sustain the findings of the trial court that there ever existed in the records and files of said court a record of a judicial proceeding wherein August Hermann Sielcken was made a naturalized citizen of the United States. Before entering upon the inquiry as to just what the record herein does contain touching more or less closely the question before us, it may be well to refer briefly to the statute which authorizes such proceeding. There are two sections in this statute relating to the restoration of lost or destroyed judicial records. By the first of these the record may be restored by the simple process of presenting to the court a duly certified copy of the original record. In the second section of the act, however, it was apparently realized by the lawmakers sitting in extra session within a brief space of time after the great conflagration of 1906 that cases might arise wherein it would be impossible to procure either certified copies of the original proceedings or any exact evidence as to what the original record did actually contain; and

in the presence of such a possibility section 2 of said statute was enacted, permitting parties seeking the restoration of lost judicial records to present such competent evidence as they might be able to produce as to the substance or effect of the lost or destroyed judgment or order. This is such a case. It has relation to the judicial record of the naturalization of an individual occurring nearly 50 years ago, the individual himself being deceased, and, in all human probability, each and all of those who participated in the original proceeding as judge, clerk, witnesses, and spectators having likewise gone the way of all the earth. It is in the light of the situation which is thus presented that we approach a consideration of the evidence in the instant case.

[3] In so doing it is to be noted that the appellant has expressly waived any objection which he might have urged at the hearing in the trial court to the competency of any and all of the evidence produced on behalf of the petitioner, and to the fact that much of said evidence was hearsay. When evidence of this character has been admitted in the trial court without objection, it and also this court upon appeal may properly consider the same in order to determine whether the evidence as a whole is sufficient to sustain findings and a judgment or order of the trial court in the petitioner's favor. Smith v. Golden State Syndicate et al., 185 Pac. 209.

Having thus determined, we take up the entire record before us for the purpose of discovering and properly weighing what it may contain touching the matter of the date and place of the naturalization of August Hermann Sielcken. There are certain unquestioned facts which stand forth upon the threshold of this record having an important bearing upon the weight and effect of certain other proffered evidence. This initial evidence has reference to the character of the deceased August Hermann Sielcken and to his lifelong conduct touching the matter of American citizenship. The record teems with proof that August Hermann Sielcken, commonly known as Hermann Sielcken, was a man of the highest personal character and of a capacity approaching genius in the conduct of large, diversified, and widely extended business affairs. He came to the state of California a poor foreigner, almost an exile, from Hamburg, Germany, the place of his birth. He died in Baden Baden in 1917. Between these two dates he rose from a position of obscurity and poverty to be a merchant of international reputation, a several times millionaire, and a man of affairs, whose reputation for personal and business integrity extended to three continents. From a time dating back to the period of his early residence in California Hermann Sielcken began to deport himself as and to declare himself to be a naturalized citizen of the United States, and from that early date up to the hour of his death he consistently claimed and acted as a naturalized American citizen. He voted in national and local elections as such citizen while residing in the city of New York. He served upon juries for which citizenship was a prerequisite. He acted as a director of numerous corporations to which citizenship was an essential qualification. He traveled widely upon permits issued to him upon his declaration of his American citizenship. He was at his marriage and in the official records of each alliance certified to the fact that he was a citizen of the United States. He repeatedly asserted among his former friends and acquaintances, at home and abroad, that he was a naturalized American citizen. He was, in fact, very proud of his citizenship, even when a resident in Germany during the closing years of his life and when it would have been to his interest to have declared himself a citizen and subject of Germany. He acquired an extensive estate in Baden Baden, and, after having done so, being offered a title of nobility by the duchy of Baden, conditioned upon his becoming a German citizen, he refused such title upon the ground that he possessed a higher title of nobility in the fact of his American citizenship. Over the portals of his home in Baden Baden he constantly kept displayed the American flag, while he adorned its halls with portraits of American presidents and other distinguished citizens of the United States. Being in Germany at the time of the outbreak of the great war, and being detained there against his desires to return to America, he steadfastly and courageously maintained that he was an American citizen, and frequently caused his assertion in that regard to be entered in the official records of the German Empire. Upon the declaration of war between the United States and Germany he was listed by the latter as an alien enemy of Germany and as an American citizen, and his property in Germany was ordered seized by the German Alien Property Custodian. In the year 1910 he was called as a witness before a congressional committee at Washington, D. C., and there testified under oath to the fact that he was a citizen of the United States and had been so for 30 years. In addition to such sworn declaration, he frequently declared to numerous persons that he had been naturalized while living in California, but that he had lost his naturalization papers in the wreck of the steamer Parana off the coast of Brazil in the year 1877. In a word, there is not a scrap of evidence coming from his lips or pen in contradiction of this consistent course of conduct, oral statement, and recorded evidence tending to show that during the entire period of his life, from a time shortly after his arrival in California, Hermann Sielcken constantly and con-

sistently acted as and asserted and believed himself to be a naturalized American citizen, and conducted himself uniformly as such in all the manifold relations of his active, extensive, and distinguished business career. From these evidences the inference is irresistible that Hermann Sielcken was in fact a naturalized American citizen, and that he had been such from early in the period of his residence in the United States and while he was living within the state of California.

This brings us to the question as to when and where and by the action and order of what tribunal Hermann Sielcken was made an American citizen by the process of naturalization. The fact is undisputed that he first entered the United States in the year 1869, being at that time 19 years of age, and arriving in California from Costa Rica, and that for the first two or three years thereafter he engaged in the business of traveling wool buyer through various portions of California. During this period he entered the employ of R. Feuerstein & Co., being a firm of wool buyers having their headquarters in San Francisco, and, according to his own statement, was required by said firm to become an American citizen as a condition of his remaining in their employ. He further states in writing, though not under oath, that he accordingly made an application for naturalization to the courts of either Mendocino or Sonoma county. This statement has reference evidently to his intention papers, which he would have been entitled to take out after a two-year residence in California and which, in accordance with the expressed wish of his employers, he would have executed during those early years and while traveling upon their business in those portions of the state. However, he took up his settled residence in California in about the year 1873, according to the San Francisco directory of that year, and kept such residence until some time in the year 1875, when he went East for the first time, to accept employment in the firm of importers of which he afterwards became and continued up to his death in 1917 to be a leading member. It was during this period of fixed abode in San Francisco that he would have arrived at his majority and would also have completed his five-year term of residence in the United States which would for the first time have entitled him to take out his final naturalization papers and receive from the court his order and certificate of naturalization. The record shows that he frequently thereafter asserted, both orally and in writing, that he was possessed of these naturalization papers, and that he lost the same in the wreck of the steamer Parana off the coast of Brazil in the year 1877. Notwithstanding the loss of these papers, he constantly and consistently thereafter, as we have seen, declared himself to be and conducted himself as an American citizen in all the affairs and relations of his business, social and personal life.

[4] From these undisputed facts, with which the record may fairly be said to be filled, but one reasonable and natural inference can be drawn, which is that August Hermann Sielcken was naturalized during the year 1874 or 1875 while residing in the city of San Francisco, and by the action of a court of record in said city having jurisdition to confer naturalization upon him. The statutes of the United States during that period required that persons seeking naturalization should make their final application therefor in the district in which they resided. The inference as thus fortified is aided by evidence of a fruitless examination of the records of Mendocino and Sonoma counties for the purpose of discovering a record of the first or final naturalization papers of Sielcken if such ever existed there, and is also aided by the report of one Becker, showing a like fruitless investigation of the records of the federal District Court of this district relating to naturalization. The district court of the state of California in and for the judicial district which embraced the city and county of San Francisco was the state court of record, which was invested by act of Congress with jurisdiction over the subject of naturalization. The trial court, by a rational process of elimination, and after a careful consideration of all of the evidence which this record contains, drew the inference and reached the conclusion that Hermann Sielcken had taken out his final naturalization papers in that court, and hence that a record thereof existed therein prior to the 18th day of April, 1906, which record, being destroyed by the conflagration of that day and year, might be restored as to its substance and effect under section 2 of the act of June 16, 1906, relating to the restoration of lost or destroyed judicial records. We are unable to say that the inference thus deduced and the order thus made are not sufficiently supported by the evidence in the case.

It follows that the judgment of the trial court should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

51 Cal. App. 791

GARVAN, Alien Property Custodian, v. FLOOD, Superior Court Judge.
(Civ. 3802.)

(District Court of Appeal, First District, Division 1, California. Feb. 24, 1921.)

Application by Francis P. Garvan, as Alien Property Custodian of the United States, for certiorari to review a decree of the Superior Court of the City and County of San Francisco, Bernard J. Flood, Judge, restoring a record of naturalization. Dismissed.

Knight, Boland, Hutchinson & Christin, of San Francisco, for petitioner.

John Francis Neylan, of San Francisco, for respondent.

PER CURIAM. Upon the authority of the case entitled "In the Matter of the Naturalization of August Hermann Sielcken, etc. (No. 3804)," 197 Pac. 668, this day decided, the petition for a writ of review herein is dismissed.

51 Cal. App. 696

JAYNES v. WEICKMAN et al.
(Civ. No. 3454.)

(District Court of Appeal, Second District, Division 2, California. March 8, 1921.)

1. Appeal and error ⊜488(2)—Appeal does not stay preventive or prohibitory injunction.

An appeal does not stay the operation of a preventive or prohibitory injunction.

2. Appeal and error ⊜488(2)—Appeal stays mandatory injunction.

An appeal stays the operation of a mandatory injunction.

3. Appeal and error ⊜488(2) — Order restraining continuance of condition not necessarily mandatory injunction stayed by appeal.

An order or decree restraining the further continuance of an existing condition does not take on the character of a mandatory injunction stayed by an appeal merely because it enjoins defendants from continuing to do the forbidden acts, as an injunction that restrains the continuance of an act or series of acts may be just as much a protective or prohibitory injunction as one that restrains the commission of an act.

4. Appeal and error ⊜488(2)—Order inhibiting defendants from continuing business under trade-name not mandatory to be stayed by appeal.

An injunction inhibiting defendants from carrying on their business of truckmen under a proscribed trade-name, necessarily requiring that they remove the forbidden trade name or names from their trucks, from the entrance to their place of business, etc., is not a mandatory injunction stayed by appeal, but a preventive or prohibitory injunction not stayed; injunction prohibiting the infringement of a right adjudged to belong to plaintiff not being mandatory merely because defendant may incidentally be compelled to perform some act.

Action by Maud E. Jaynes against Charles C. Weickman and others. Judgment for plaintiff, and defendants appeal and apply for supersedeas pending appeal to prevent punishment for contempt for violation of injunction. Order to show cause discharged.

A. G. Reily, of Los Angeles, for appellants.

Collier & Labarere and Walter H. Sprague, all of Los Angeles, for respondent.

FINLAYSON, P. J. The appellants in this case have asked this court to grant a supersedeas pending their appeal from the judgment. Pending the appeal, the superior court undertook to punish appellants for contempt of court. The alleged contempt consisted of appellants' continued use of a certain trade-name in violation of the terms of an injunction embodied in the judgment from which the appeal was taken. Appellants filed a petition for a writ of prohibition, but this court, being of the opinion that supersedeas, rather than prohibition, is the writ applicable to the case, made an order to show cause why the writ of supersedeas should not issue.

The facts pertinent to the inquiry, as disclosed by the judgment roll, briefly are these: For some time prior to the commencement of the action plaintiff, the respondent on the appeal, had conducted, under the trade-name "the Active Transfer Company," the business of transferring, for hire, baggage and luggage from place to place in the city of Los Angeles. The appealing defendants—that is, the defendants other than the telephone company—since some time prior to the action, have been engaged in a similar business in the same city, using in that business the trade-name "the Action Transfer Company." That name and other similar descriptive trade-names were displayed upon the trucks, stationery, and place of business of the appealing defendants, and likewise in certain display advertisements in the telephone directory of the defendant Southern California Telephone Company; that company having issued its latest telephone directory shortly prior to the entry of the judgment in the action. The superior court found that the trade-name adopted and used by the appealing defendants was calculated and intended to and did deceive the patrons of plaintiff and the public in general, and that its use by those defendants had damaged plaintiff's business.

The judgment adjudges and decrees, in substance and effect, that the appealing defendants be perpetually enjoined from advertising and carrying on their business as "the Action Transfer Company," and from using the words "Action Transfer Company" in any manner whatsoever. The judgment likewise decrees that the defendant Southern California Telephone Company change the telephone number that is listed in its telephone directory in connection with the name "the Action Transfer Company." The telephone company has not appealed from the judgment. Since the appealing defendants, the defendants who are asking for the writ of supersedeas, are not directed to change the number in the telephone directory, that injunctive part of the decree being directed solely to the telephone company, and since,

therefore, the appealing defendants cannot properly be proceeded against for contempt by reason of any failure of the telephone company to comply with this part of the judgment, it will not be necessary to consider whether a writ of supersedeas should issue to stay proceedings thereon. It will be time enough to consider that question when, if ever, the superior court, by contempt proceedings initiated against the telephone company, shall attempt to enforce obedience to this particular part of the decree.

In the contempt proceedings initiated subsequently to the date when the appealing defendants took their appeal from the judgment and filed the $300 undertaking in due form, it was made to appear to the superior court, by affidavit, that each of the defendants by whom the appeal has been taken, subsequent to the receipt of notice of entry of the judgment, continued to allow the name "Action Transfer Company" to remain on the trucks and vehicles owned and driven by them, that their place of business is still conducted under the trade-name that they always have used, that of "the Action Transfer Company," and that they are carrying on their business without having made any change in their advertisement signs.

The motion for the writ of supersedeas is based upon the claim that those parts of the decree that, in effect, enjoin the appealing defendants from continuing to carry on their business under the name "the Action Transfer Company" were stayed by the appeal from the judgment. This claim is based upon that provision of section 949 of the Code of Civil Procedure whereby it is declared that in cases not provided for in sections 942 to 945, inclusive—and this is not one of them—the perfecting of an appeal by giving the $300 undertaking "stays proceedings in the court below upon the judgment or order appealed from."

[1, 2] It is well settled, indeed conceded, that an appeal does not stay the operation of a preventive or prohibitory injunction. Merced Min. Co. v. Fremont, 7 Cal. 130; Heinlen v. Cross, 63 Cal. 44. Equally well settled is it that an appeal does stay the operation of a mandatory injunction; i. e., one that compels affirmative action. Schwartz v. Superior Court, 111 Cal. 106, 43 Pac. 580; Clute v. Superior Court, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54. The reason for this distinction is found in the inherent nature of an order or decree which merely prohibits or restrains affirmative action. A stay of proceedings from its nature operates only on orders and decrees commanding some acts to be done; for the appeal operates only as a stay of any proceedings that may be had or taken upon the order or decree appealed from—i. e., proceedings to enforce the order or decree. A prohibitive injunction requires no execution for its enforcement. It acts "directly without process upon the defendant." Heinlen v. Cross, supra; Wolf v. Gall, 174 Cal. 140, 162 Pac. 115. The effect of a supersedeas is to restrain the respondent from taking affirmative action to enforce his decree; it does not authorize the appellant to do what the decree prohibits him from doing. The only effect of an appeal, when perfected, is to stay execution of, i. e., "proceedings upon," the judgment; and if the judgment acts directly upon the defendant without the necessity for any writ of execution or other proceeding for its enforcement, the appeal does not stay its operation.

[3] The injunctive features of the decree under consideration here enjoin the appealing defendants from continuing to do certain things. An order or decree restraining the further continuance of an existing condition does not take on the character of a mandatory injunction merely because it enjoins the defendants from continuing to do the forbidden act. An injunction that restrains the continuance of an act or series of acts may be just as much a preventive or prohibitory injunction as one that restrains the commission of an act. State v. Superior Court, 39 Wash. 115, 80 Pac. 1108, 1 L. R. A. (N. S.) 554, 109 Am. St. Rep. 867, 4 Ann. Cas. 229; United Railroads v. Superior Court, 172 Cal. 85–87, 155 Pac. 463, and cases there cited.

[4] Appellants, contrary to the injunctive inhibitions, are continuing to carry on their business under the proscribed trade-name. They are not enjoined from engaging in the transfer business in the city of Los Angeles or elsewhere. What they are enjoined from doing is to use in their business the interdicted trade-name. It is true that, in order to carry on their business in a manner conformable to the injunctive features of the judgment, they must remove the forbidden trade-name or names from their trucks, from the entrance to their place of business, and from their display advertising signs; and it also is true that these are affirmative acts. But the affirmative acts necessary to be done by defendants in order to continue the transaction of their business without disobeying the injunctive features of the judgment are but acts that are necessary to effectuate the principal purpose of the injunction, which is to forbid further infringement upon plaintiff's right to the exclusive use of the business name that she had adopted before the defendants entered the field of competition. The injunctive parts of the decree, therefore, only incidentally involve the doing of any affirmative act. And not only are the affirmative acts but incidental to the accomplishment of the principal purpose of the injunction; they are acts each one of which is within the power of the defendants lawfully

to perform. This feature alone is sufficient to differentiate this from the Schwartz Case, 111 Cal. 106, 43 Pac. 580, so much relied on by these appellants in their application for the writ of supersedeas.

According to all the definitions, the injunction embodied in the decree is preventive or prohibitive. An injunction which prohibits the infringement of a right adjudged to belong to the plaintiff is not mandatory merely because the defendant may incidentally be compelled to perform some act; and the courts, as said by Mr. Justice Henshaw in the United Railroads Case, 172 Cal. 88, 155 Pac. 463, "have been swift in holding that the character of a prohibitive injunction was not transformed and made mandatory because it incidentally involved the doing of an affirmative act." The same learned jurist also says in that case that "the court will not destroy the relief granted by any excessive astuteness in selecting some minor mandatory feature of the injunction and holding that that should control the consideration of the nature of the relief awarded."

In Georgia the granting of a mandatory injunction is prohibited by statute. In Merchants' & Miners' Transp. Co. v. Granger, etc., 132 Ga. 167, 63 S. E. 700, the injunction restrained the defendant "from refusing to receive and carry the lumber of the plaintiff in the order in which it is duly tendered for shipment." It was contended that this was not a preventive injunction, but was strictly mandatory in character, since its effect was to compel the defendants to do the affirmative act of taking and receiving and shipping the lumber. The Supreme Court of Georgia declared:

"While under the Code * * * an injunction will not issue to compel a person to perform an act, yet the court may grant an order the essential feature of which is to restrain, although in yielding obedience to the restraint the defendant may incidentally be compelled to perform some act."

The same principle is announced in Falcon v. Boyer, 157 Iowa, 745, 142 N. W. 427, in the following language:

"While an injunction is issued primarily to restrain, and not to compel, an act, defendant may be required to do some affirmative act necessary to effectuate the principal purpose of the order."

In Fairfield Floral Co. v. Bradbury (C. C.) 87 Fed. 415, the postmaster had changed the usual course of business of his office. An injunction was sought to prevent the continuance of such interruption. It was argued that the injunction would be mandatory because it would compel the postmaster to do things other than those he was performing. The Circuit Court disposed of the contention in the single sentence:

"If, incidentally, this would compel the postmaster to perform some minor things which, in the ordinary course of business, he would perform, this would not render it a mandatory injunction."

What essentially are the features of the injunction embodied in the judgment in this case? The defendants are not compelled to surrender their business. They retain their business, and every lawful right to carry it on in the usual and customary manner. They are, however, forbidden to do that which the court below determined to be illegal and improper, namely, to use certain business names in the conduct of their business. If we take the injunctive words of this judgment in their ordinary sense, it is difficult to see that any affirmative action is required of these appealing defendants except that, in yielding obedience to the restraint they may incidentally be compelled to perform some acts. The judgment, in substance, merely prohibits the appealing defendants from carrying on their business as the Action Transfer Company. The fact that they had for some time been enjoying their asserted right to use that business name does not change the character of the injunction. If this were not so, almost any injunction against the doing of repeated acts would be mandatory if the performance of the acts had been begun and carried on for any considerable time prior to the commencement of the action. For example, an injunction against the continued operation of a cement plant to the injury of plaintiff's adjacent orange grove (Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 Pac. 928, 38 L. R. A. [N. S.] 436), or against the operation of a ferry claimed to have been conducted in infringement of the plaintiff's franchise rights (Vallejo Ferry Co. v. Solano Aquatic Club, 165 Cal. 255, 131 Pac. 864, Ann. Cas. 1914C, 1197), or one restraining a smelting company from permitting fumes from its works to blow over and upon neighboring lands (People v. Selby Smelting & L. Co., 163 Cal. 84, 124 Pac. 692, 124 Pac. 1135, Ann. Cas. 1913E, 1267), could be regarded as mandatory. But, although in each of the cases just referred to the plaintiff's right to an injunction was bitterly contested, it does not appear to have occurred to the learned counsel representing the various defendants that the injunctions were mandatory, and that their effect could, for this reason, be stayed pending appeal.

The applicants for the writ of supersedeas tell us that the writ is necessary to preserve their status quo and to avoid the consequences of a mere "barren victory" should they be successful on their appeal from the judgment. But, to quote again from the opinion of Mr. Justice Henshaw in the United Railroads Case:

"There is no magic in the phrase 'maintaining the status quo' which transforms an injunction essentially prohibitive into an injunction essentially mandatory."

Probably most injunctions, especially those granted pendente lite, are necessary to the protection, declaration, or establishment of some disputed property right; but the operative effect of a strictly prohibitive injunction is not for that reason stayed by an appeal. Wolf v. Gall, supra.

Sufficient, we think, has been said to show that in its essence the injunction embodied in the judgment in this case is prohibitive and restrains continued acts of infringement upon a right which the decree adjudges to be plaintiff's exclusive property, namely, the right of plaintiff to the exclusive use of the business name "the Active Transfer Company." The case seems to fall squarely within the ruling in Morton v. Morton, 148 Cal. 142, 82 Pac. 664, 1 L. R. A. (N. S.) 660, where it was held that an injunction restraining the defendant, his agents and employees, from holding himself out as the representative of the plaintiffs, and from wearing on his hat, while engaged in the business of soliciting the transfer of baggage and luggage, a badge with the word "Morton's" written thereon, or any word similar thereto, is not mandatory but prohibitive.

The order to show cause is discharged.

We concur: WORKS, J.; CRAIG, J.

51 Cal. App. 692

GREENEBAUM v. SMITH. (Civ. 3556.)

(District Court of Appeal, First District, Division 1, California. March 8, 1921. Hearing Denied by Supreme Court May 5, 1921.)

1. Shipping ⊂⊃58(3)—Measure of damages for total breach of contract by charterer of ship.

In actions against the charterer of a ship for a total breach of his contract, the measure of damages is the net amount which would have been earned by the vessel under the charter, less the net amount earned, or which might, with reasonable diligence have been earned, by the vessel during the time required for the performance of the voyage named in such contract of charter.

2. Attachment ⊂⊃5—Action for breach of charter contract held "action on contract for direct payment of money."

Where defendant charterer agreed to ship cargo, of which freight would be $30,000, and totally failed to do so, and ship sailed empty, an action by the owner for breach of the contract for damages in the amount of $28,000, $2,000 being the cost of loading and unloading such a cargo, is one for the breach of a contract for the direct payment of money, and an attachment may issue under Code Civ. Proc. § 537, the damages being easily ascertainable according to fixed standards supplied by the contract or the law acting upon it.

3. Attachment ⊂⊃2—Constitutional law ⊂⊃249—Statute, permitting attachment by certain persons, not unconstitutional as conferring special rights on a class.

Code Civ. Proc. § 537, giving the right to an attachment to plaintiff in an action for the direct payment of money by reason of a breach of contract, is not unconstitutional, in that it denies one of the parties to a contract the equal protection of the law, since it operates uniformly in favor of persons damaged by the breach of a contract to pay them money, not being deprived of such uniformity because the remedy is not given against breaches of a different character.

Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by Alfred Greenebaum against C. Henry Smith. From an order denying his motion to discharge attachment, defendant appeals. Affirmed.

Andros & Hengstler and F. Eldred Boland, all of San Francisco, for appellant.

Wm. Denman, of San Francisco (J. F. Resleure, of San Francisco, of counsel), for respondent.

KERRIGAN, J. This is an appeal from an order denying defendant's motion to discharge an attachment. The action is for breach of a charter party. At the commencement of the action the plaintiff had a writ of attachment, and caused its levy upon property of the defendant. The defendant moved to quash the writ and vacate the attachment, upon two grounds: First, that the action is not one within section 537 of the Code of Civil Procedure, i. e., it is not for the direct payment of money; second, that if the case is within said section, then defendant is deprived of the equal protection of the laws, because, in like case, if plaintiff had breached the contract, the defendant could not have secured an attachment. The defendant supported his motion with an affidavit that he was at all times pertinent to the action a resident of the state of California. His motion was denied, and he takes this appeal from the court's order in that behalf.

The plaintiff was the owner of the schooner Bangor, and chartered the vessel to the defendant under a written contract, made and payable within the state of California, for a voyage from Sidney, New South Wales, to San Francisco. Under this contract defendant agreed to load a full and complete under-deck cargo of copra in bulk, and a full and complete deck cargo of vegetable oil in barrels or drums, or general

merchandise, and agreed to pay $40 per ton on the under-deck cargo, and $25 per ton on the deck cargo. The Bangor could have carried 500 tons of the agreed cargo under deck and 400 tons on deck, so that, had the defendant provided the cargo agreed upon by him, he would have been required to pay in all the sum of $30,000. Defendant failed to provide such cargo, and the "Bangor" was compelled to sail empty from Sidney to San Francisco. This action was brought to recover $30,000 freight money, less the sum of $2,000 which plaintiff would have been obliged to pay for loading and discharging at the ports of Sidney and San Francisco respectively. The plaintiff accordingly fixed his damage at the sum of $28,000.

[1, 2] The measure of damages in this class of cases seems to be well settled. In actions against the charterer of a ship for a total breach of his contract, such measure is the net amount which would have been earned by the vessel under the charter, less the net amount earned, or which might with reasonable diligence have been earned, by the vessel during the time required for the performance of the voyage named in such contract of charter. Cornwall v. Moore (D. C.) 132 Fed. 868; Utter v. Chapman, 43 Cal. 279; 7 Cyc. 294. This being an action for damages for the breach of an executory contract, defendant contends that it cannot be held to be an action on a contract for the direct payment of money. True, this is not an action for a debt in a technical sense, nor for a certain sum of money specified in the contract, but it is nevertheless an action for the breach of a contract for the direct payment of money, and merely because the amount is uncertain, consisting of damages to be proven at the trial, is no reason why an attachment may not issue where, as here, such damages are easily ascertainable according to fixed standards supplied by the contract or the law acting upon it. Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64; Flagg v. Dare, 107 Cal. 482, 40 Pac. 804; 6 Corp. Jur. 81. In the first mentioned of these cases defendant sold certain real property to the plaintiff, agreeing to sell the property for plaintiff within 12 months, and guaranteed to pay over a specified amount therefor. The complaint alleged defendant's failure and refusal to sell the property, and alleged the damages to be the difference between the sum agreed and the highest market value of the property since the expiration of the year. It was held that while the action was for damages for the breach of a contract, nevertheless, since they could be ascertained with sufficient certainty so that plaintiff could aver the amount due in his affidavit, the attachment should issue. The court said:

"Our Code does not require that the amount due on the contract shall appear from the contract itself (Code Civ. Proc. § 537), but that the amount of the indebtedness shall be shown by affidavit (Code Civ. Proc. § 538). Attachment may issue in an action for damages for breach of a contract. Donnelly v. Strueven, 63 Cal. 182. And this, where proof is necessary at the trial to show the amount of damages. Drake on Attachment, §§ 13, 23."

In the case of De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718, the court approves of the reasoning in Dunn v. Mackey in the following language:

"Nor is it necessary, in order to give a right of attachment, that the amount in which the defendant may be liable should appear upon the face of the contract or instrument by or from which the liability is to be determined. It often happens that the amount due under a contract does not appear from the contract itself. 'Our Code does not require that the amount due on the contract shall appear from the contract itself' * * *"

—quoting from the opinion the language above set out, and resumes:

"But there must exist a basis upon which the damages can be determined by proof."

[3] It is argued by the appellant that for a breach by either of the parties to a contract of the character under consideration the correlative remedy is an action for damages, but in the event that the breach is by the defendant the valuable right of attachment is given to the plaintiff for the reason that the undertaking of the defendant is to pay money, whereas were the situation reversed the defendant could not avail himself of the right of attachment, since the breach of which he complains is the plaintiff's failure to transport freight (Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976); that therefore section 537 of the Code of Civil Procedure is unconstitutional in that it denies to one of the parties to a contract the equal protection of the law. We may concede that a statute would be unconstitutional in this respect which conferred special rights and remedies on one class which others in the same class could not avail themselves of. We think, however, that the statute under consideration is not of this character, since it operates uniformly in favor of persons damaged by the breach of a contract to pay them money. That the remedy is not given against breaches of a different character, though it might be logical in such cases to give it, does not, in our opinion, deprive it of the uniformity of application which the constitutional provision here invoked has in view.

The order is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

51 Cal. App. 731

PEOPLE v. THOMAS. (Cr. 929.)

(District Court of Appeal, First District, Division 1, California. March 14, 1921. Rehearing Denied April 12, 1921. Hearing Denied by Supreme Court May 12, 1921.)

1. Criminal law ⊜366(4), 1169(1)—Evidence held admissible to show deceased's condition and purpose of visit to physician accused of abortion, and harmless to defendant.

In a prosecution for homicide resulting from a criminal abortion performed by accused, evidence of a conversation with deceased, out of the presence of accused, in which deceased stated she had made an appointment with accused, a doctor, that he wanted to operate on her forthwith, but she had preferred to wait until a later day, that he was going to charge her $50, that deceased said she was going to telegraph for money, and that on the day preceding the operation deceased stated she had received the money, and testimony of two employees of a telegraph company showing deceased's telegraphing and receipt of the money as requested, was competent for the limited purpose of showing the condition of deceased and the purpose of her visit to accused, although some of such testimony was merely narrative of occurrences, and therefore not within the res gestæ rule, but its admission for such limited purpose, if error, was merely technical and without injury to accused.

2. Witnesses ⊜379(3)—Contradicting testimony held proper.

In trial for murder resulting from abortion, where a doctor who was called in by accused to examine deceased shortly before her death was called as a witness by accused, and testified, in effect, among other things, that it had not occurred to him upon such examination that an illegal operation had been performed, it was proper to rebut this testimony to allow a police detective to testify that in a statement to him this witness, referring to the case, said: "This was a dirty mess."

3. Criminal law ⊜419, 420(11), 1169(1)—Admission of evidence as to conversation covering no disputed fact held error, but without prejudice to accused.

In prosecution for murder from abortion, the admission of testimony of a witness, detailing conversation between her and the nurse or attendant in accused's office, was error, but was not prejudicial, as it covered no disputed fact in the case.

4. Criminal law ⊜706, 1170½(6)—Admission of contradictory statement later stricken out held not error.

In a prosecution for murder from abortion, where it appeared that a friend of deceased had made two written statements which were inconsistent with each other, the first shortly after the death of deceased, and at a time when the friend was disposed to protect accused from prosecution and the family of deceased from notoriety, and the first statement was introduced by accused for the purpose of discrediting the witness, the action of the court in admitting the witness' second statement on redirect examination and later on motion striking it out was not error prejudicial to accused, nor did the conduct of the prosecuting attorney in this behalf constitute misconduct.

5. Criminal law ⊜1169(11)—Admission of evidence giving rise to inference of prior offense not reversible error, in view of convincing evidence of guilt.

In prosecution for murder from abortion, the admission of testimony of a detective concerning a conversation with accused, who said, in reply to a question why he displayed no physician's sign, "I haven't had any signs on my office since I got into trouble at the time I was on T. street," even if the testimony was inadmissible as affording the jury ground for inferring that accused had been charged with a prior and separate offense, and inadmissible to prove intent in this class of cases, was not reversible error, in view of the convincing character of the remaining evidence of accused's guilt.

6. Criminal law ⊜1186(4)—Misconduct of prosecution in asking objectionable questions held not reversible error.

In prosecution for murder from abortion, misconduct of the prosecuting officers in cross-examining accused as to whether or not he was accustomed to have patients like the deceased, whether he had any similar patients at his home before when miscarriage had taken place, which questions were answered in the negative, and asking him if he knew Myrtle D. or Myrtle H., which question after argument was withdrawn, and upon the cross-examination of a witness for accused asking him, for the purpose of showing his friendship for accused, if he was not on accused's bond, which question was not objected to and was answered affirmatively, upon which the witness was asked if he had not been upon accused's bond on several occasions, which question was in effect withdrawn and not answered, was not, under Const. art. 6, § 4½, reversible error, in view of the convincing character of the evidence of accused's guilt.

7. Homicide ⊜254—Evidence held to support conviction of murder resulting from abortion.

In prosecution for murder from abortion, evidence *held* to support conviction of murder in second degree.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Frank Thomas was convicted of murder in the second degree, and from the judgment and from an order denying his motion for new trial he appeals. Affirmed.

Leo Kaufmann and J. Mueller, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of murder in the second degree. This appeal is from the judgment and from an

order denying the defendant's motion for a new trial.

The theory of the prosecution was that the homicide was the result of a criminal abortion performed by the defendant, who was a licensed physician. He had a fully equipped office, which was in his home on Franklin street, in San Francisco. Rose M. White, the deceased, was a young woman about 19 years of age, in good physical health. On Wednesday, November 20, 1919, she communicated to her intimate friend, Mrs. Blanch E. Clarke, that she was pregnant, mentioned the name of a man who, she said was responsible for her trouble. She also stated that she had been given the name of a doctor who would relieve her of her condition, and that she intended to make an appointment with him. Later that day she gave the doctor's name as Thomas, and informed her friend that the operation would cost her $50; also that the doctor desired to operate at once, but that she had put it off until the following Friday. Mrs. Clarke suggested to her friend that she should telegraph to the man whose name she had given, informing him of her condition and asking for assistance. To this Miss White demurred, but later informed Mrs. Clarke that she had followed her suggestion, and the records of the Western Union Telegraph Company which were introduced in evidence show that she did in fact telegraph to the person in question asking for $40, and that he sent her the money. On Thursday night Miss White remained with Mrs. Clarke, and the next morning, on leaving to keep her appointment with the defendant, requested Mrs. Clarke to communicate with her by telephone in case she did not hear from her by noontime, at the same time giving to Mrs. Clarke a paper on which was written a telephone number and also a street address, which was the telephone number and street address of the defendant. At the time indicated Mrs. Clarke called up the number; the call being answered by a woman, Mrs. Goffoller, the nurse or assistant of the defendant, who, in reply to Mrs. Clarke's inquiry after Miss White, said she knew no one by that name. Mrs. Clarke then recalled that her friend had told her to ask for Mrs. Stevens, and she accordingly did so, whereupon Mrs. Goffoller stated that Mrs. Stevens was resting easily, but wanted Mrs. Clarke to call for her after dinner that evening. She accordingly called at the office and residence of the defendant, and there saw the defendant, who stated to her that it had been necessary for him to give Miss White two treatments—one in the morning, which was unsuccessful, and a second in the afternoon. Mrs. Clarke found her friend in great pain. Shortly after Mrs. Clarke's arrival at the office Mrs. Goffoller left the house, saying she was going to a dinner party. Later the defendant answered the telephone, and Mrs. Clarke heard the voice of a woman at the other end of the line. The defendant asked the person on the line if Dr. Kremer had been told about the event and if he was coming down with her. The replies were in the affirmative, and shortly afterwards Mrs. Goffoller returned, followed by Dr. Kremer. The defendant told Dr. Kremer that he had treated the deceased about a year before, and that he had found it necessary on that occasion, as on this, to give her a second treatment. The defendant, in response to a query from Dr. Kremer, stated that the deceased was about three months pregnant. Thereupon Dr. Kremer wrote a prescription, and Mrs. Clarke went to have it filled. When she returned about half an hour later her friend was dead. Later Mrs. Goffoller said to Mrs. Clarke, "Will you stand by us?" The latter promising to do so. She also asked Mrs. Clarke if she would take the body to her apartment, but this was refused. Subsequently one Morris Weintraub, a friend of the defendant, arrived on the scene, and he, the defendant, and Mrs. Goffoller retired to another room, where they remained for a short time, when Mrs. Clarke was requested to join them. While there with them Weintraub remarked: "We will have to fix this up or the doctor will have to go to jail." He also suggested that Mrs. Clarke should say that she was walking along the street with the deceased, when the latter fell and was picked up by Mrs. Clarke and brought into the defendant's office. This she refused to do, and she also refused at about this time, in the presence of the defendant, to accept $40 offered to her by Mrs. Goffoller, who in doing so remarked: "This is the money the doctor got from the girl."

Miss White died about 10:30 p. m., and about two hours later the defendant, at the instance of Weintraub, reluctantly notified the coroner's office by telephone that a woman had died in his office; that she had come to his office unexpectedly and died suddenly; that he did not know the cause of her death; that he had failed to notify the coroner's office sooner for the reason that the telephone was out of order. Shortly thereafter a deputy coroner, accompanied by Detective Leo Bunner, arrived at the defendant's office. They found blood spots upon a bed, which the defendant in some confusion explained came from himself, he being a sufferer from piles, and, when it was pointed out to him that they were on the upper sheet, he stated that he sometimes slept on his stomach. Fresh blood clots were also found on the defendant's operating table, although he declared that he had not used it for three months. The telephone was found to be in good order. An examination of the body of the deceased showed that one stocking had been put on inside out, that the hooks and eyes of her dress were improperly fastened, and that her clothes appeared to have been

hastily put on. A satchel containing obstetrical instruments was found in the doctor's office.

Dr. John R. Clark, the autopsy surgeon, testified that the death of the deceased was due to a hemorrhage resulting from the procurement of an abortion.

[1] Over the objection of the defendant, Mrs. Clarke was permitted to testify to a conversation with the deceased, out of the presence of the defendant, in which the deceased stated that she had made an appointment with Dr. Thomas, the defendant; that he wanted to operate on her forthwith, but she had preferred to wait till Friday; that he was going to charge her $50 to perform the operation. She also testified that her friend had told her that she was going to telegraph to the man responsible for her condition in New York, asking that he send her the sum of $40, and that on the day preceding the fatal operation her friend informed her that she had received the money. Covered by this objection is also the testimony of two witnesses, employees of the Western Union Telegraph Company, showing that the deceased, shortly after her conversation with Mrs. Clarke, had telegraphed to New York for $40, and that she had received said sum as requested. This testimony was not admitted for the purpose of showing the commission of the offense charged, but to show the condition of the deceased and the purpose of her visit to the defendant. For this limited purpose it was competent. People v. Wright, 167 Cal. 1, 138 Pac. 349; People v. Northcott, 189 Pac. 704. While this character of evidence is admissible when part of the res gestæ of a particular phase of the whole transaction (State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902), some of the above testimony thus admitted over objection was merely narrative of occurrences, and therefore not within the rule making it competent; still, as the court instructed the jury that such testimony was not admitted generally, but only to show the condition of the deceased and the character of her visit to the defendant's office, it is clear that the error, if error it be, was merely technical and without injury to the defendant. As to that part of such testimony showing that the deceased had received by telegraph the sum of $40 from New York, this constituted part of the preparation for the visit, and was clearly admissible under the rule announced in People v. Wright, supra.

[2] Dr. Roy Kremer, the physician who was called in by the defendant to examine the deceased shortly before her death, was called as a witness in behalf of the defendant, and he testified, in effect, among other things, that it had not occurred to him upon the occasion of such examination that an illegal operation had been performed. To rebut this testimony Capt. Duncan Matheson, head of the detective force of the police department, was called, and testified that in a statement to him this witness, referring to the case, said: "This was a dirty mess." For the purpose offered this evidence was competent.

[3] The contention of the defendant that the testimony of Mrs. Clarke, detailing the conversation between her and the nurse or attendant in the defendant's office, was inadmissible, must be sustained, but it covered no disputed fact in the case, and was wholly without prejudice to the defendant.

[4] Objection was made to the reading of a statement made by Mrs. Clarke. It appears that she had made two written statements which were inconsistent one with the other. The first was made shortly after the death of her friend, and at a time when she was disposed to protect the defendant from prosecution and the family of her friend from humiliation and notoriety. It was contradictory of a written statement later made by her and of her testimony given at the trial. The first statement was introduced by the defendant for the purpose of discrediting the witness. On redirect examination her second statement was admitted, but later on motion it was stricken out. The court committed no error prejudicial to the defendant in so ruling, nor did the conduct of the prosecuting attorney in his behalf constitute misconduct.

[5] Complaint is made of the admission of the testimony of Miles Jackson, a detective, concerning a conversation had with the defendant, wherein the latter, in reply to a question as to why he displayed no physician's sign in connection with his office, replied: "I haven't had any signs on my office since I got into trouble at the time I was on Turk street." It is urged in support of the admission of this testimony that it was an explanation by the defendant of a suspicious circumstance in ths particular case and therefore competent; but assuming, as contended by the defendant, that the object and effect of this testimony was to afford the jury ground for the inference that the defendant had been charged with a prior offense separate from the charge on trial, and that it was inadmissible to prove intent in this class of cases, still, in view of the convincing character of the remaining evidence against the defendant, we would not be warranted in reversing the judgment on account of the admission of this somewhat ambiguous testimony.

[6] During the examination of the defendant as a witness upon the trial, and also of one of the witnesses called in his behalf, the defendant objected to certain questions asked by the deputy district attorney. He is not, however, in a position to complain of the rulings of the court upon them, for they were either withdrawn or they elicited nothing injurious to defendant's case. The defendant now in this court for the first time

assigns the asking of such questions as misconduct. Upon this point the record shows that the prosecuting officers cross-examined the defendant as to whether or not he was accustomed to have patients like the deceased; whether he had any similar patients at his home before when miscarriage had taken place. These questions were answered in the negative. The witness was then asked if he knew Myrtle Dean or Myrtle Hanley, but this question, after argument, was withdrawn. Upon the cross-examination of a witness for the defendant the deputy district attorney, for the purpose of showing the witness' friendship for the defendant, asked him if he was not on the defendant's bond. This question was not objected to and was answered affirmatively; whereupon the prosecuting attorney asked him if he had not been upon the defendant's bond on several occasions. This question was, in effect, withdrawn and was not answered.

[7] The question put to the defendant last above quoted was not proper cross-examination, and, assuming that the question put to the other witness just detailed was not asked in good faith, still, as the asking of this question was not assigned as misconduct, nor the court requested to direct the jury to disregard it, and in view of the very strong case made by the people, we cannot regard these matters as justifying a reversal, although in a close case our conclusion might well be otherwise. The law contemplates that the defendant in a criminal case shall be tried according to the rules of law, and while in a given case an appellate court, in view of the convincing character of the evidence, may recognize that it is its duty to affirm the judgment of conviction, notwithstanding a disregard by the prosecuting officer of some of those rules, it would be a matter of serious regret if such officers should take advantage of the situation created by the adoption of section 4½ of article 6 of the Constitution to indulge in such infractions, more especially in view of the comparative helplessness of the defendant under such circumstances. In the present case the evidence, as we have said, is quite convincing of the defendant's guilt. It is admitted that he was a licensed physician; that the deceased was pregnant; that she had made two recent visits to his office, and had been given two treatments by him on the occasion of the second of those visits; that she died in his office as the result of an abortion. The evidence also shows that the defendant informed Dr. Kremer that deceased was three months pregnant; that he asked Dr. Kremer to sign the death certificate; that the defendant's assistant in his presence offered to return to Mrs. Clarke the money received by the defendant from the deceased, and requested Mrs. Clarke to stand by them and to take the body of her friend to her own apartment; that defendant's friend Weintraub in his presence remarked, "We must fix this up for the doctor or he will have to go to jail," and at the same conversation, with the same persons present, suggested that Mrs. Clarke should say to the authorities that the deceased was suddenly taken ill on the street in front of the doctor's office, and was conveyed into his office and died. In addition there are the suspicious circumstances of the blood clots on the bed and operating table, and the defendant's explanation concerning them; the delay in notifying the coroner's office of the death. In view of the evidence in the case we think it is plainly one that falls within the terms of the amendment to the Constitution above cited, requiring an affirmance of the judgment.

The instructions of the court were fair and fully covered every phase of the case.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

51 Cal. App. 744

McCONNELL v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

(Civ. 3848.)

(District Court of Appeal, First District, Division 1, California. March 15, 1921. Hearing Denied by Supreme Court May 12, 1921.)

Certiorari ⟸29—Determination of motion for new trial without proper affidavits, etc., mere irregularity.

Though the lower court proceeded to determine motion for new trial without having before it proper affidavits and in the absence of proper specifications of errors of law occurring on trial and with no specifications of the evidence claimed to be insufficient to justify the decision, there was a mere irregularity in the proceedings of the lower court which did not affect its jurisdiction, conferred by Code Civ. Proc. § 657 et seq., to hear and determine motion for new trial, and the writ of certiorari is not available to attack such irregularity, lying only where an inferior court or tribunal has acted without, or in excess of, jurisdiction.

Application for certiorari by Emmett W. McConnell against the Superior Court of the State of California in and for the County of Alameda and Hon. J. J. Trabucco, Judge thereof, to require respondent judge to show cause why an order granting new trial should not be set aside, and judgment entered in favor of petitioner. Application denied.

Goldman & Altman, of San Francisco, for petitioner.

PER CURIAM. There has been filed in this matter what purports to be a verified petition for a writ of review. It appears therefrom that an action was heretofore commenced in the superior court of the state of

California in and for the county of Sonoma, wherein Christian Schlake, Jr., was plaintiff and Emmett W. McConnell, petitioner herein, was defendant, which cause was thereafter transferred to the superior court of the state of California in and for Alameda county. After trial by the court, findings of fact and conclusions of law were duly made, and judgment was entered thereon for the defendant. The plaintiff in the action thereupon made a motion for a new trial upon all the statutory grounds, and served and filed his affidavits in support thereof. The defendant, petitioner herein, opposed said motion, and in support of his position likewise filed an affidavit. Motion for a new trial was granted.

Thereupon the defendant, this petitioner, made a motion to vacate the order granting a new trial and for an order re-entering judgment in his favor. This motion was denied.

Petitioner now files in this court what purports to be a petition for writ of review, but which, in reality, appears to be an application for an order directing the lower court to show cause why the order granting a motion for a new trial in the cause should not be set aside and the court directed to re-enter judgment in favor of the defendant in the action and against the plaintiff. The basis of the application appears to be that the lower court proceeded to determine the motion for a new trial without having before it proper affidavits and in the absence of proper specifications of errors of law occurring at the trial, and with no specifications of the evidence claimed to be insufficient to justify the court's decision.

Assuming this to be the fact, we think the only result was an irregularity in the proceedings of the court which did not affect the jurisdiction conferred by section 657, et seq., Code of Civil Procedure, to hear and determine the motion for a new trial.

"The writ of certiorari is not available to attack mere error; it lies only where an inferior court or tribunal has acted without, or in excess of, its jurisdiction. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 694, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822."

See, also, sections 1068 and 1074, Code Civ. Proc.

The application for writ of review is denied.

51 Cal. App. 712

KENDRICK v. GOULD. (Civ. 3324.)

(District Court of Appeal, Second District, Division 2, California. March 11, 1921. Hearing Denied by Supreme Court May 5, 1921.)

1. Appeal and error ⟸1011(1)—Judgment for attorney's fees on conflicting evidence not disturbed.

In an attorney's action to recover fees where the issue arose as to whether defendant was liable personally or whether the estate of which he was executor was liable, a judgment for plaintiff will not be disturbed on conflicting evidence.

2. Appeal and error ⟸931(3)—Presumed that finding was made against defense not sustained by evidence.

Although a special defense may be set up in the answer, if there is not evidence to support it the appellate court must conclude that any finding which could have been made would have been adverse to defendant on that issue, so that, under such circumstances, the failure to find thereon does not require a reversal.

3. Trial ⟸395(3)—Special findings unnecessary where all denials in answer found untrue.

A finding that each and all of the denials set forth in the answer are untrue is full, definite, and certain, so as to obviate necessity of special findings.

4. Evidence ⟸571(7) — Court may pass on reasonableness of fees without regard to expert evidence.

In an attorney's action to recover fees, it is within the power of the court to pass on the reasonableness of the fee without regard to expert evidence.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Wm. T. Kendrick against Will D. Gould to recover attorney's fees. Judgment for plaintiff, and defendant appeals. Affirmed.

James Donovan, Clara Shortridge Foltz, and Will D. Gould, all of Los Angeles, for appellant.

Newlin & Ashburn, of Los Angeles, for respondent.

CRAIG, J. It is hard to conceive of a case wherein the rule that, if a substantial conflict exists in the evidence, the findings of the trial court will not be disturbed, applies more directly than in the one at bar. The principal question to be determined is, Was plaintiff employed as defendant's attorney, or for the defendant in his capacity as executor? The parties do not agree in their versions of what was said at the time the contract of employment was made, but, for the purpose of this appeal, the evidence given by plaintiff must be deemed to be true. He testified:

"Gould, the defendant, and James H. Blanchard, came into my office about the date I have mentioned, and after the usual greeting Gould says, 'We want you to help us,' or, 'We want your services in the contest that has been filed in the estate of Samuel F. Baker, deceased,' and I replied, 'All right,' or words to that effect I said 'All right.' * * * After the conversation had proceeded, and just before they left the office, Gould said, 'How about attorney's fees?' or 'What do you expect?' or words to

that effect; and I said, 'Well, I only want a reasonable fee, and you and Blanchard are both lawyers; I would be willing to leave the amount of the fee to you gentlemen.' And my best recollection is that no reply was made to that. They went out."

From this it appears that the parties did not, in definite terms, specify the exact capacity of the employment. However, this conversation, standing alone, is surely more consistent with the theory of private employment, or at least personal responsibility, than that the plaintiff was to act for the defendant as executor, and to receive his fee from the estate. All of those concerned were lawyers, and it must be assumed from the fact that Gould asked Kendrick what about the fee, and Kendrick said he would leave it to Gould and Blanchard to fix the fee, that they did not have in mind the court's fixing the fee, as, of course, they knew the court only would have authority to do in case the employment was to be that of an attorney acting on behalf of the estate, and the fee to be a charge against it. If Gould had in mind that Kendrick was to look to the estate for his fee, when Kendrick said that he would leave the matter to Gould and Blanchard, the natural reply would have been, "No, we will have to let the court determine the matter."

The trial court would have been justified in concluding from the oral contract of employment that the parties intended to create a personal obligation upon the part of Gould. However, it considered further what was said and done by the parties subsequently. Appellant calls attention to the fact that plaintiff joined in a petition for the recovery of attorney's fees in the estate of Samuel F. Baker, and insists that this is evidence that he regarded the employment as merely one to represent the estate. On the other side, it is pointed out that the order for substitution of attorneys, made on motion of Blanchard, representing the defendant, was that "James H. Blanchard, William T. Kendrick and Will D. Gould, Esqs., be, and they are, hereby substituted as attorneys for said executor and Will D. Gould personally," etc., and that a motion to dismiss the contest was signed by these attorneys as "for executor and Will D. Gould personally."

[1] And we find other conflicting evidence, and evidence some of which is susceptible of being interpreted upon either theory. Under such circumstances, it is elementary that the decision of the trial court will not be disturbed.

One of the grounds relied upon by appellant is that the findings are incomplete. In support of this contention Bank of Woodland v. Treadwell, 55 Cal. 379, and Warren v. Robinson, 71 Cal. 380, 12 Pac. 265, are cited. It is apparent that these—

"were cases where the finding left something undetermined, so that the court could not ascertain precisely what facts had been found." Chatfield v. Continental Bldg., etc., Assn., 6 Cal. App. 668, 92 Pac. 1040.

The Bank of Woodland v. Treadwell is a fair example of others of this class in which findings have been held insufficient because uncertain and incomplete. The complaint included a cause of action for attorney's fees claimed for the foreclosure of a mortgage; the answer alleged that the plaintiff was employed by the defendant to perform legal services at a fixed salary, and not otherwise, and that the services rendered had been paid for by the payment of the plaintiff's salary, and the court merely found:

"That all the allegations of the complaint are true, and all the allegations and denials of the answer contradicting the complaint in any respect are untrue."

Clearly, the issue of the existence of the contract of employment and the plaintiff's payment thereunder, alleged in the answer, was one not tendered by the complaint, and yet one which, if true, would defeat plaintiff's cause of action. Consequently, the finding was insufficient. But in the case at bar it appears that, except in the counterclaim contained in the answer, but one statement is found the effect of which is to do more than contradict some allegation of the complaint. That allegation is as follows:

"And the plaintiff then and there stated to this defendant that it was not customary for one lawyer to charge another for professional services rendered, or to be rendered, and that he would make no charge in the matter unless the defense was successful, and in case the defense was successful he would leave the matter of his fees and compensation to said James H. Blanchard and Will D. Gould, and that in no case should the same exceed the amount which the court might allow him in the matter of the estate of Samuel F. Baker, deceased, as attorney's fees, in assisting in said defense, and that there should be no charge for attorney's fees against Will D. Gould personally. * * *"

An analysis of this affirmative allegation discloses that it contains five propositions: First, one to the effect that a contract of employment was entered into by which defendant employed plaintiff to represent him in the defense of the will of Samuel F. Baker against a certain contest. This fact is also alleged in the complaint. Second, interpreting the language most favorably to appellant it may be construed to say, inferentially, that plaintiff was not to represent defendant personally. This allegation is no more than a denial of an allegation of the complaint "that plaintiff was employed by defendant," etc., and other similar statements therein contained; consequently, a finding "That each and all the allegations set forth in

plaintiff's amended complaint and the amendment thereto are true," disposes of this mere denial, whether affirmative or negative in form, of such allegation. Third, that under no circumstances was any charge to be made against defendant personally. This is only a denial of the allegation in the complaint that plaintiff was to receive a reasonable fee to be suggested by Blanchard and Gould. It, therefore, required no special finding. Fourth, it is indirectly alleged that plaintiff was employed by defendant to represent defendant as executor. This allegation requires no finding, because, even if true, it would not contradict any part of finding one above quoted or refute the allegation of the complaint that a contract to represent Gould personally was made, as it is obvious that plaintiff may have been employed to represent defendant, both personally and as executor, since defendant was interested in the outcome of the contest as a beneficiary under the will, as well as being the executor. Fifth, the allegation under examination contains the assertion that the contract of employment provided that the plaintiff's claim to any fees should be contingent upon the successful outcome of the litigation.

This statement in the answer presents an issue which, if found to be true, would defeat plaintiff's cause of action, and its truth might not be regarded as definitely determined by a general finding "that each and all the allegations set forth in plaintiff's amended complaint and the amendment thereto are true," since such an allegation as to the contract of employment might be true, and yet an additional agreement as to the fee being contingent would avoid liability if the defense in which the parties were engaged was unsuccessful. But the record of testimony given at the trial discloses that no witness testified in support of the allegation in the answer to the effect that the fee was to be contingent. On the contrary, Gould in his testimony states that Kendrick, replying to the question, "How about fees?" said:

"It was not the custom of one lawyer to charge another personally, and that he never did, and there would be no charge against the estate except as fees would be allowed, and that, as Blanchard and I were both attorneys in the case in the matter of the division of those fees, he would leave that to us."

[2] This is the only testimony which contradicts Kendrick's version of the conversation which constituted the contract of employment, and Gould makes no mention of anything being said abut the fee being contingent. Hence, no finding is required upon this last part of the affirmative allegation quoted from the answer; for, although a special defense may be set up in the answer, if there is no evidence to support it, we must conclude that any finding which could have been made would have been adverse to the defendant upon that issue. Under such circumstances, the failure to find thereon does not require a reversal. Haight v. Costanich, 31 Cal. App. Dec. 237; [1] Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309.

As to the allegations of the counterclaim, finding III is full and complete. It reads in part "that all the allegations set forth in paragraph 2 of defendant's counterclaim are untrue except," and then follows a specific finding entirely consistent with the allegations of the complaint.

[3] In Williams v. Hill, 54 Cal. 390, it is held that a general finding, "that all the facts set forth in the complaint were true" is full, definite, and certain as to the issues tendered by the complaint. See, also, Johnson v. Klein, 70 Cal. 186, 11 Pac. 606; Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766. It follows that a finding that "each and all of the denials set forth in defendant's answer to plaintiff's amended complaint and amendment thereto are untrue" is full, definite, and certain. This finding was probably unnecessary, in view of the second finding that "each and all the allegations set forth in plaintiff's complaint and the amendment thereto are true."

Numerous other points argued are determined by the conclusions already reached. For example, if the original contract of employment was one to represent the defendant individually, it follows that the provisions of sections 1616 and 1619, Code of Civil Procedure, have no application. Again, there is no finding that plaintiff was employed to represent the defendant in a dual capacity, but only in a personal one; consequently no question arises as to the segregation of fees.

[4] The court found that $2,500 was a reasonable fee for the services rendered. This finding was supported by the testimony of several lawyers. The court might have passed upon the matter without regard to the expert evidence. Zimmer v. Kilborn, 165 Cal. 523, 132 Pac. 1026, Ann. Cas. 1914D, 368.

The judgment appealed from is affirmed.

We concur: FINLAYSON, P. J.; MYERS, Justice pro tem.

[1] For opinion in Supreme Court, see 194 Pac. 26.

51 Cal. App. 654

FLOYD v. TIERRA GRANDE DEVELOPMENT CO. (Civ. 3613.)

(District Court of Appeal, First District, Division 1, California. March 4, 1921.)

1. Evidence ⊜434(9)—Escrow instructions and documents prior to final written contract held admissible on issue of fraud.

Escrow instructions and other papers prepared by parties to a transaction defining the obligations and duties of the parties executed prior to the final written agreement, whereby plaintiff was to be paid for services in procuring an exchange of property, were admissible on the issue of fraud.

2. Corporations ⊜426(6)—Resolution held to ratify contract, though parties present were ignorant of contents.

The force of a resolution ratifying a contract cannot be avoided on the ground that all the parties present were ignorant of the contents of the contract which they assembled to ratify.

3. Corporations ⊜399(1)—Bound same as individual by apparent authority given officers or agents.

A corporation is bound by the same rules of law concerning apparent authority of officers and agents that govern individuals, and no concealed resolution, however artfully worded, may give a corporation an advantage that does not belong to an individual.

4. Corporations ⊜425(2)—Bound by apparent authority given agent.

Where corporation officers had knowledge of the fact that the name of the general manager appeared in the body of a contract as owner of properties which she offered in exchange, and made no objection to her claim of ownership, they are estopped by failure to deny and also by affirmative action in ratifying the contract.

5. Corporations ⊜426(10)—Acceptance of fruits of transaction a ratification thereof.

Where a corporation accepts the fruits of a transaction carried out by its general manager and has never explicitly repudiated it, it cannot relieve itself of the obligations imposed by the contract.

6. Trial ⊜391—Finding should be expressly made on fraud issue.

In an action by a broker against a corporation on a note and an agreement to pay a commission for an exchange of property, where defense included allegations of fraud in obtaining the note and also the agreement, plaintiff was entitled to a specific finding on the issue of fraud as framed by the second cause of action relating to the alleged fraudulent obtaining of the agreement, for the reason that the court may have found that the note was fraudulently obtained, and also have found against a fraudulent procurement of the agreement, since, allegations of fraud being serious in their effect, a finding should ordinarily be expressly made by the court, fraud never being presumed.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by J. C. Floyd against the Tierra Grande Development Company. Judgment for defendant, and plaintiff appeals. Reversed.

W. J. Ford and Ford & Bodkin, all of Los Angeles, for appellant.

Haas & Dunnigan, of Los Angeles, for respondent.

SEAWELL, Presiding Justice pro tem. This is an appeal by plaintiff from a judgment rendered in favor of defendant. The complaint contains two causes of action. The first is laid on a one-year promissory note bearing date October 19, 1915, for the sum of $2,000 with interest at the rate of 7 per cent. per annum and for attorney's fees should suit be necessary to enforce collection. The second cause is based on an agreement in writing executed September 30, 1915, by defendant's agent and general manager, Mrs. C. A. Lovell, by the terms of which said defendant bound itself to pay the plaintiff the sum of $2,000 as a commission for services rendered in promoting an exchange of real properties owned by defendant corporation and one Dr. E. D. Stoddard, respectively. Said causes of action sprang from the same real estate transaction.

Defendant corporation was organized September 23, 1912. Mrs. C. A. Lovell, who appears in her business transactions as C. A. Lovell, is the mother of Edward J. Fleischer and Mrs. Gertrude K. Hurley. The son and daughter were the owners of several parcels of land situate in the counties of Los Angeles and Orange. To suit a family, or other purpose, not apparent, a corporation was formed, and said properties were taken over by it. While Mrs. C. A. Lovell was quite active in its management, she insists that she did not have at any time a financial interest in said corporation's affairs. The officers of said corporation as originally organized consisted of Mrs. C. A. Lovell, president, her daughter, Gertrude K. Hurley, secretary, and her son, Edward J. Fleischer, presumably vice president. Miss A. M. Brown, a resident of New York City, had for a brief time an official connection with said corporation, but was eventually dropped from membership. Her relations with it are not material to a consideration of the issues of the cause. The stock was owned by the son and daughter, who also constituted the entire board of directors. After serving as president for several months Mrs. Lovell resigned, and on November 7, 1914, she was, by resolution of the board of directors, made general manager, which position she held throughout the transaction of negotiation and exchange.

The properties owned by said corporation

were heavily mortgaged, and it was in arrears in the payment of interest. The Stoddard holdings consisted of 800 acres of land situate in Tulare county, together with live stock and farming equipment of considerable value. It was likewise heavily incumbered.

The mortgage and other indebtedness of each owner respectively amounted to upwards of $35,000. There is no controversy as to disparity of values.

Plaintiff Floyd, referred to by Mrs. C. A. Lovell as an elderly gentleman, was and had been for 20 years past a real estate dealer or broker located in the city of Los Angeles. He and Mrs. Lovell had been acquaintances for a period of several years prior to this transaction. The respective owners of said properties having listed them with plaintiff for sale, he undertook to effect an exchange of said properties between said respective parties. Accordingly an agreement was prepared and executed. The parts thereof material to the issues presented are as follows:

"This agreement witnesseth: That Dr. E. D. Stoddard, owner of the following described piece of property situate, lying, and being in the county of Tulare, state of California, particularly described as follows, to wit:—[Description follows]—which I agree to exchange for the following described piece of properties owned by Mr. C. A. Lovell of Los Angeles, California, and particularly described as follows, to wit: [Description follows.] * * *

"It is further agreed and understood that if for any reason whatsoever either or all principals to this agreement shall fail to comply with same, and in consequence this exchange shall fail consummation, then the party or parties at fault agree to pay J. C. Floyd the full commission for both sides, together with attorney and escrow charges.

"It is further agreed with J. C. Floyd that, when he has received an acceptance to exchange the above properties on above terms, I will pay to him the sum of two thousand five hundred dollars ($2,500) as commission for such service irrespective of any commission paid by any other party. I will allow the second party fifteen (15) days' time to furnish certificate of title or abstract and deed conveying the second described property.

"Dated this thirtieth day of September, 1915.

"Dr. E. D. Stoddard.
"Ellen Stoddard."

Reverse side reads as follows:

"This agreement witnesseth: That I, C. A. Lovell, of Los Angeles, California, owner of the second piece of property herein described, hereby accept the proposition of the exchange made herein and upon terms herein stated, and agree to furnish a certificate of title or abstract from a competent searcher of title within fifteen (15) days, showing property vested as deeded, and to furnish a good and sufficient deed of conveyance as directed. I agree to pay to J. C. Floyd the sum of $2,000 commission for services rendered.

"Dated this 18th day of September, 1915.

"C. A. Lovell, Mgr."

It is admitted that said agreement was executed by C. A. Lovell on the 30th day of September, 1915, and not on the 18th day of said month, as appears at the bottom of said agreement. The presence of the name C. A. Lovell in the body of the agreement as owner of the property offered by her in exchange is accounted for by plaintiff on the theory that she represented herself to be the true owner of all of the stock and property of the corporation.

Dr. Stoddard, being an elderly gentleman, was represented in the transaction by his nephew, Frank W. Ford.

[1] On October 5, 1915, certain escrow instructions or papers were prepared by the parties to the transaction, defining the obligations and duties of said parties including an obligation on the part of said corporation to pay to plaintiff a commission in the sum of $2,000 for services rendered in effecting said exchange. The escrow papers were excluded from evidence, and the contents thereof are left in an uncertain state. We are permitted only to conjecture as to what they contained by scant references occasionally made to them. Said documents, nevertheless, constituted a part of the transaction in which false and fraudulent representations are relied upon to avoid an agreement. Such evidence was material to the main issues, to wit, fraud or no fraud. Said offer was not made with a purpose to vary the terms of a written contract, nor could such evidence have been properly excluded on the theory that all of the agreements of the parties were merged in the final written agreement. This evidence was offered for no such purpose. It was pertinent, however, to the question of whether or not deceit or fraudulent practices had been employed. In other words, it was admissible as evidence bearing upon the vital subject of inquiry, to wit, fraud. In the investigation of fraudulent conduct a very generous rule obtains.

Returning to the chronological order of events, it is shown by the record kept by the secretary of said corporation that on October 9, 1915, a meeting of all of the officers and stockholders, to wit, President Edward J. Fleischer and Secretary Gertrude K. Hurley, was held, after notice regularly given, for the purpose of ratifying the contract and agreement entered into on the 30th day of September, 1915, between Dr. Stoddard, his wife, and C. A. Lovell.

Mrs. C. A. Lovell, general manager, and attorney H. H. Hahn, a member of the law firm of Hahn & Hahn, attorney for said corporation, were also in attendance at said meeting. In fact, H. H. Hahn, Esq., outlined and directed the legal procedure for the occasion and dictated the draft of the minutes of the meeting. With the contract dated September 30, 1915, before them, which contract or agreement had been in the possession of

the agents and officers of said corporation for nine consecutive days, a resolution was adopted, of which the following is a part:

"This corporation does hereby approve of and ratify a certain agreement entered into in writing between C. A. Lovell and Dr. E. D. Stoddard, and dated September 30, 1915, for the exchange of the above-described properties, and in the effecting of such exchange the president and secretary of this corporation are hereby authorized to modify or change the terms above set forth in such manner and to such extent as they in their judgment may deem beneficial to this corporation."

The authority given to the president and secretary by the above resolution to modify or change the terms "above set forth in such manner and to such extent as they in their judgment may deem beneficial to this corporation" has no reference to the commission of $2,000 to be paid to plaintiff, as this matter is not one of the things set forth or mentioned in said resolution of ratification.

In fact, it is the claim of Mrs. C. A. Lovell that she did not tell her son or daughter until October 12 or 15, 1915, anything about the contract containing a provision to pay said commission to plaintiff. The son and daughter contend that neither had any knowledge at the time the ratifying resolution was passed that the agreement contained a provision for the payment of a commission. Indeed, H. H. Hahn, the attorney who prepared the minutes of ratification, upon making answer at the trial to a question as to whether he had examined the agreement of September 30, 1915, which had been submitted to him for examination and inspection, said:

"I examined only the front page, at the bottom of which appears the signatures Dr. E. D. Stoddard and Ellen Stoddard.

"Q. Did you see the reverse side? A. I did not; it was not called to my attention or discussed in my presence."

That all of said parties except Mrs. C. A. Lovell, who remained silent, under the circumstances of the situation, were informed as to all other portions of said agreement except that portion or particular part which obligated said corporation to pay a commission, seems highly improbable. Such a statement amounts almost to a challenge to credulity. Without the portion which provided for said commission there would have been no acceptance, no contract, and therefore nothing to ratify.

Mrs. C. A. Lovell represented herself as being unable to immediately pay the $2,000 commission, and it was agreed that she should give a note payable one year after date. Shortly prior to the close of the transaction, and at a time when the agreements of exchange were about to be released from escrow, in response to the demand of plaintiff upon Mrs. C. A. Lovell that she execute and deliver to him the promissory note agreed upon, she caused to be executed and delivered the note here sued upon, which is in words and figures as follows:

"2,000. Los Angeles, Cal. Oct. 19, 1915.

"One year after date without grace I promise to pay to the order of J. C. Floyd two thousand dollars payable at Los Angeles for value received, with interest from date at the rate of seven per cent. per annum until paid. Principal and interest payable in U. S. gold coin at Los Angeles, and in case suit is instituted to collect this note or any portion thereof I promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.

"[Signed] Tierra Grande Dev. Co.,
"By C. A. Lovell, Mgr.

"No. ———. Due October 19, 1916."

As a defense to the first cause of action defendant variously sets out in his answer that said note was signed and delivered by Mrs. C. A. Lovell without authority from the defendant to so do; that it was given without any consideration whatever; that Dr. Stoddard had criticized plaintiff, and charged him with favoring defendant in several controversies that had arisen affecting said exchange of properties; that plaintiff obtained said note by falsely stating that he wished to show it to Dr. Stoddard so as to convince him that both he and the corporation were receiving the same treatment; that plaintiff also represented that he wished to place said note with the escrow papers so that the trust officer of the title insurance and trust company would think plaintiff was doing a good business; that defendant did not owe plaintiff anything on account of commissions, and that it was agreed that said note after it had served the purpose of its procurement would be destroyed; that said representations were false and fraudulent; that said C. A. Lovell did not sign said note as defendant's corporate act, and that she had no authority to do so; that said defendant corporation did not discover the execution of said note until November 1, 1915; that the use said note was intended to serve was contrary to public policy.

The answer to the second cause of action repeats much of the matter heretofore set out, and in addition denies that defendant entered into an agreement requesting or empowering plaintiff to negotiate any exchange of said properties. It affirmatively alleges, however, that plaintiff was engaged in attempting to bring about an exchange of real properties between Dr. Stoddard and defendant, and that Mrs. C. A. Lovell assisted therein, but that it was expressly agreed that defendant, in the event that said exchange should be effected, would not be obligated to pay plaintiff any commission for his services. The execution of the agreement of September 30, 1915, is admitted, but it is denied that a commission was in fact to be paid. It is averred that the purposes of

signing said agreement was to enable plaintiff to satisfy Dr. Stoddard that defendant had also agreed to pay plaintiff a commission. It is denied that defendant was a party to said commission agreement or that it authorized Mrs. Lovell to execute the same. Denial is made that her act or acts were ratified by the corporation. It is further denied that plaintiff performed services and labor in bringing about said exchange. A fraudulent design and purpose is charged against plaintiff in obtaining the signature of Mrs. Lovell to both note and agreement.

The findings of the trial court substantially follow the allegations of the defendant's answer except that there is no specific finding of fraud on the issue that the agreement was obtained by fraudulent representations.

Because of a failure, in our opinion, of the sufficiency of the evidence to support the finding based on fraud, no special notice will be taken of the question whether or not the facts relied upon to establish the separate causes of action are so related as to make a finding on one decisive of the other, except to observe that such a finding made in reference to the second cause of action would render it unnecessary to find on the issue presented in the first; while the converse of the proposition would not be true.

The findings of the court that plaintiff requested the execution and delivery of said note "so that said trust officer would think that he, plaintiff, was transacting a good piece of business" stands without a scintilla of evidence to support it. The same may be said of the finding that defendant corporation did not discover the execution of said note until on or about November 1, 1915. It was admitted at the trial that its existence was known as early as October 19, 1915. Mrs. C. A. Lovell testified that she told her attorney of the existence of the note at about that time.

The reasons given in justification or by way of excusing the execution of the note and commission agreement are too trivial and futile to require extended consideration. It is nowhere explained in what manner Dr. Stoddard or his nephew, Frank W. Ford, who solely represented him in the transaction, could have been interested or could in any way have profited by the payment of a commission to plaintiff.

All the parties to the action appear to possess more than ordinary intelligence. Mrs. C. A. Lovell had for several years past been the manager of defendant corporation. In fact, she organized it. She was well experienced in business affairs. She had also been engaged in the brokerage and mining business. Her son, Edward J. Fleischer, had also been engaged as a real estate broker, and was a man of business experience. Mrs. Hurley was the secretary of the corporation and doubtless understood ordinary business transactions. It appears, therefore, that none were without business training and experience. The negotiations extended over a period of four or five months, and every member of the family took an active interest in consummating the exchange.

It was the claim of Mrs. Lovell that Mr. Ford, representing his uncle, insisted that defendant should pay a commission, and objected to the delivery of the escrow instructions because they contained no provision requiring defendant to pay a commission to plaintiff, and that in order to placate him she executed and delivered the note in controversy. Mr. Ford absolutely denies her statement. He testified that neither Dr. Stoddard nor himself had any interest whatever or concern in the question of a commission to be paid by defendant to plaintiff or any one else. His testimony is that it was a matter of absolute indifference to him whether the escrow papers contained a provision for the payment of a commission by defendant or were silent on the subject. Mrs. Lovell is also contradicted in this particular by the escrow holder, Ralph R. Johnson. The only person who insisted on the execution of the note before the transaction should be closed was plaintiff. He instructed escrow holder Johnson to include the note among the escrow papers.

That Mrs. C. A. Lovell regarded herself or the corporation liable for the payment of a commission in connection with the exchange appears from the testimony of another apparently disinterested witness, E. R. Corson, a stockholder of a corporation that held a mortgage on the defendant's real property. His testimony is that pending negotiations for said exchange Mrs. Lovell made the statement that she would have to pay a commission "if this deal does not go through." There was a provision in the agreement to the effect that, should either party fail to comply with the terms of said contract, such party so failing should pay the full commission for both sides to said J. C. Floyd.

The documentary evidence received at the trial is decidedly, if not indeed conclusively, in favor of plaintiff's claim. His testimony was in essential parts at least corroborated by all of the disinterested witnesses who testified in the case. The facts contended for by defendant take such a wide departure from ordinary rules of human conduct and experience under the circumstances of the situation as to raise the question of improbability as to their existence. The reasons urged in explanation of damaging conduct are far from satisfactory.

[2] That the resolution adopted October 9, 1915, was a ratification of the whole contract, including the agreement for commissions, cannot admit of doubt. The force of the resolution cannot be avoided on the ground that all the parties present were ignorant of the contents of the agreement which they had assembled to ratify. If such a practice is

to prevail, the most solemn forms prescribed by the law by which man may pledge faith with man will become but a mock ceremony.

[3, 4] As to the binding consequence of Mrs. Lovell's acts there can be no serious doubt. By the resolution dated November, 1914, she was appointed general manager of said corporation, with full power to sign checks, pay bills, negotiate purchases and sales of property for the corporation, subject to the approval of the board of directors. Said resolution provided, however, that she was "not authorized to create any indebtedness or sign anything in writing unless first authorized to do so by resolution of the board of directors." A corporation, however, is bound by the same rules of law that govern individuals, and no concealed resolution, however artfully worded, may give a corporation an advantage that does not belong to an individual. We are of the opinion that under the authorities her active participation in the transaction, assuming that she did have full authority to deal with said property, doubtless with the consent and knowledge of her children, is sufficient without recourse to the positive ratification made by said corporation on October 9, 1915, to hold her acts to be the acts of the corporation. There is no denial of the fact that the corporation officers had knowledge of the fact that C. A. Lovell appeared in the body of the agreement which was ratified October 9, 1915, as owner of the properties which she offered in exchange. No objection was made to her claim of ownership. The corporation officers are unquestionably estopped by a failure to deny and also by their affirmative action in ratifying the agreement.

Sufficient to illustrate the principle of law as here announced, see Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 Pac. 405, and Wisp v. Hazard, 66 Cal. 459, 6 Pac. 91. The case first cited also makes citation to sections of the Code applicable to the questions presented.

[5] Defendant accepted the fruits of the transaction and has never since explicitly repudiated it. This it must do if it would relieve itself of the obligations which the law will otherwise cast upon it. Pope v. Armsby Co., 111 Cal. 159, 43 Pac. 589; Ballard v. Nye, 138 Cal. 588, 72 Pac. 156.

It is not necessary to multiply authorities in support of well-recognized principles of substantive law.

[6] We are satisfied that, if the general finding may be construed as a sufficient finding applicable to plaintiff's second cause of action, said finding would still stand unsupported by the evidence. Plaintiff was entitled to a specific finding on the issue as framed by the second cause of action, for the reason that the court may have found said note to have been fraudulently obtained, if the evidence so warranted, and also to have found against a fraudulent procurement of said agreement. Allegations of fraud being serious in their effect, a finding should ordinarily be expressly made by the court on each issue presented. Fraud is never presumed. It must be satisfactorily proved.

The issue of fraud not being sustained by the evidence, the judgment appealed from is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

185 Cal. 520

READ, Ex'x, v. PACIFIC ELECTRIC RY. CO. (L. A. 6397.)

(Supreme Court of California. April 18, 1921.)

1. Appeal and error ⊜867(2), 933(4)—Scope of review on appeal from order granting new trial in general terms stated.

Under Code Civ. Proc. § 657, as amended by St. 1919, p. 142, providing that, if grant of new trial is for insufficiency of the evidence, that fact must be specified in order on appeal from order granting in general terms a new trial, the Supreme Court cannot consider whether or not the evidence is sufficient to sustain the verdict unless it is insufficient in law and without conflict on any material point, but, if the court finds any other ground on which the motion might have been granted, the order granting new trial should be affirmed.

2. Street railroads ⊜103(1) — "Last clear chance" doctrine stated.

The substance of the doctrine of the last clear chance, as applied to an accident on a street railway's tracks, is that, although it appears that the contributory negligence of decedent was one of the proximate causes of his death, yet, if defendant railway's agents, having charge of the instrumentality which caused the death, perceived that decedent had placed himself in a position of peril from which he probably could not escape, and, after perceiving his perilous position, failed to exercise ordinary care and prudence to avoid injuring decedent, and such negligence was also a proximate cause of his death, his representative can recover.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last clear chance.]

3. Street railroads ⊜118(15)—Evidence insufficient to justify instruction on last clear chance.

In an action against a street railway for a death when its car collided with the automobile driven by decedent, evidence showing that the motorman on observing the peril had less than a second of time to set the brakes *held* insufficient to justify the giving of an instruction on the doctrine of the last clear chance, so that new trial was properly granted for the giving of such an instruction.

4. Street railroads ⊜99(10)—Automobile driver crossing ahead of car negligent.

An automobile driver was guilty of contributory negligence in trying to cross ahead of a

rapidly moving street car at a street intersection where he could have seen the car approaching had he taken the trouble to look when he was 60 feet from the track.

Department 1.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Mary Ella Read, executrix of the estate of George Gilbert Read, deceased, against the Pacific Electric Railway Company. Verdict for plaintiff. From grant of new trial, plaintiff appeals. Affirmed.

George Clark, of San Francisco, and Rupert B. Turnbull, of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, for respondent.

SHAW, J. This is an action by the executrix of the estate of George Gilbert Read, deceased, to recover damages on account of his death, which, so it is alleged, was caused by the negligence of the defendant. The cause was tried by a jury, and a verdict was given in favor of the plaintiff, upon which judgment was duly entered. Thereupon, on motion of the defendant, the court ordered a new trial. The plaintiff appeals from the order granting said motion. The notice of intention to move for a new trial stated, among other things, that it would be made upon the ground that the evidence was insufficient to justify the verdict, that the verdict was against law, and that errors were made by the court in its rulings at the trial. The order granting a new trial was general in terms. It was made in December, 1919, and it did not specify any particular ground as the basis upon which it was made.

[1] The last clause of section 657 of the Code of Civil Procdure as amended in 1919, which took effect on July 22, 1919, provides that—

"When a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground." Stats. 1919, p. 142.

Because of this provision, the rule stated in Kauffman v. Maier, 94 Cal. 277, 29 Pac. 481, and other cases following it, applies, and we are precluded from considering whether or not the evidence is sufficient to sustain the verdict, unless it is insufficient in law and without conflict on any material point. Under the doctrine of that case, however, if we find any other ground upon which the motion might have been granted, the order should be affirmed.

[2-4] It appears that the court gave the jury an instruction upon what is known as the doctrine of "the last clear chance." The substance of the doctrine as applied to such cases is that, although it appears that the contributory negligence of the decedent was one of the proximate causes of his death, yet, if the defendant's agents having charge of the instrumentality which caused the death perceived that the decedent, by his own negligence, had placed himself in a position of peril from which he probably could not escape, and after perceiving his perilous position failed to exercise ordinary care and prudence to avoid injuring the decedent, and such neglect was also a proximate cause of his death, the plaintiff could recover. From an examination of the evidence on the subject we are satisfied that there was no evidence in the case which would justify the giving of an instruction upon this point. The death of the decedent was caused by a collision between a street car operated by the defendant upon its railroad tracks on Santa Monica avenue where the same crosses Vermont avenue in the city of Los Angeles. The decedent was approaching said crossing on Vermont avenue in an automobile. The plaintiff contends that the car was approaching the crossing at a speed of from 30 to 50 miles an hour. There is some evidence to support this contention. A city ordinance in force at the time prohibited a street car from crossing an intersecting street at a speed greater than 20 miles an hour. The excessive speed was therefore negligence upon the part of the defendant. The uncontradicted testimony, and the only testimony on the subject, is that the motorman operating the defendant's car observed the decedent driving the automobile toward the crossing; that when the decedent reached a point 60 feet from the track he could have seen the car approaching the crossing if he had taken the trouble to look; that the motorman supposed that decedent intended to stop before reaching the track or to turn down Santa Monica avenue, and did not perceive that the decedent intended to cross the track ahead of the car until the car reached the curb of Vermont avenue, which point was 40 feet distant from the place of the collision, which occurred at the intersection of the two streets. Under the doctrine of the last clear chance, when the motorman thus perceived that the decedent would probably endeavor to cross in front of him instead of turning to the right down Santa Monica avenue, it became his duty immediately to do all that he could, under the circumstances, to avoid a collision. The evidence of the defendant's witnesses, including the motorman and several of the passengers, was to the effect that the moment he perceived this intention on the part of the decedent the motorman put on the emergency air brakes to stop the car, that a light rain had just begun to fall, so that the rails were wet, and that the immediate result was that the wheels locked, and

the car skidded for some 250 feet before stopping, and that it struck the decedent at the intersection some 40 feet away from the point where the motorman started to apply the brakes. On behalf of the plaintiff there was some testimony of persons observing the collision that the speed of the car did not slacken until after it had struck the automobile. One witness testified that, although the car was going from 30 to 35 miles an hour, it did not slow up until "about 25 feet from where it stopped." This, of course, must have been a mistake. The car weighed 34 tons. From this evidence it is argued that the motorman did not set the brake as the witness had testified, and therefore that he did not use reasonable diligence to avoid a collision after perceiving the danger of the decedent. It will be perceived that the motorman had less than a second of time up to the moment of the collision in which to apply the brakes and get them into full operation on the car. If the car was going at 30 miles an hour, it would traverse a distance of 44 feet in one second of time. If it were going faster, of course it would go farther in one second. It is obvious that there was no time for the operation of the doctrine of the last clear chance. The 40 feet would have been passed before the brakes could have been fully set, so as to check the speed of the car, and the best efforts of the motorman would have been unavailing. We think the court was justified in its decision granting the new trial, upon the ground that the evidence did not justify the application of this doctrine to the case. The decedent was clearly guilty of contributory negligence in trying to cross ahead of the street car, and therefore, unless the doctine of the last clear chance applied, the plaintiff could not recover. Hence the court in its discretion might readily have concluded that the verdict of the jury was based upon that doctrine, and that it was rendered because the court instructed them upon that subject.

The order is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

185 Cal. 552

SHANLEY v. AMERICAN OLIVE CO. (L. A. 6347.)

(Supreme Court of California. April 20, 1921.)

1. Negligence ⟸32(1)—Owner not bound to keep premises absolutely safe for invitee.

One invited to do work upon the premises of another may recover from the owner for injuries received owing to the dangerous condition of the premises known to the owner, but not known to the person so invited, but such owner is not bound to keep his premises absolutely safe, and is only required to use ordinary care.

2. Negligence ⟸52—Warning invitee of obvious danger unnecessary.

If there is danger attending the work which an invitee is to do on the premises of another, and the danger is not readily apparent to the eye, it is the owner's duty to give reasonable notice or warning thereof, but owner may assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses, and need not warn of obvious danger.

3. Negligence ⟸111(1)—Complaint held insufficient for failure to show conditions requiring owner of premises to warn switchman.

In an action against the owner of premises by a railway switchman, crushed between a building and a gravel car, which he was climbing, a complaint, showing that the danger from the proximity of the building to the track was apparent to ordinary observation, except under unusual conditions, with no averment as to existence of such conditions, *held* insufficient to charge negligence in failing to give warning.

Department 1.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by John M. Shanley against the American Olive Company for personal injuries. Judgment on the pleadings for defendant, and plaintiff appeals. Affirmed.

E. B. Drake, of Los Angeles, for appellant.

Scarborough & Bowen, of Los Angeles, for respondent.

SHAW, J. The plaintiff sues to recover damages arising from bodily injuries to himself, alleged to have been caused by the negligence of the defendant. After the filing of its answer, the defendant moved for judgment in its favor on the pleadings. This motion was sustained by the court, and judgment was entered accordingly. The plaintiff appeals.

The effect of such motion by defendant was to admit the truth of all the allegations of the complaint. The answer must be disregarded. The sole question is whether or not the facts stated in the complaint constitute a cause of action against the defendant. We proceed to state the facts alleged.

The defendant was the owner of land near the railroad of the Pacific Electric Railway Company, on which land it maintained a plant for the buying and selling of olive oils and other products. At the request of the defendant, the Pacific Electric Railway Company had constructed a spur track for the use of the defendant in its business, from the main track of the railroad to and upon the said land. Thereafter the defendant built as a part of its plant a building 40 feet

high, 15 feet wide, and 38 feet long. The plaintiff was employed by the Pacific Electric Railway Company as a switchman assisting in the operation of its cars. The Pacific Electric Railway Company agreed to switch a carload of gravel and sand for the defendant onto said spur track. The plaintiff was one of the crew of the railway company engaged in the said switching operation. On the side of said car was a ladder for the use of the crew in climbing upon it. The said building was so near to said spur track that when such a car passed it on the track the clearance between the ladder on the car and the side of the building was "only about 4 to 6 inches." While engaged in switching said gravel car as aforesaid, and while attempting to climb upon the side of the car as it was moving along the spur track, the plaintiff was caught between the car and the side of said building, and was crushed and injured. The defendant knew of the situation of the spur track when it erected said building, and by the exercise of ordinary care could have known of the danger in making such a switching movement of cars thereon. The plaintiff had not been upon the spur track, nor had he been engaged in any work in relation thereto after the erection of said building, and he did not know that the building was there until after said accident and injury.

It is alleged that the accident to plaintiff "was caused alone by the negligence of the defendant in erecting and maintaining the said building in too close proximity to the said railroad spur track and necessary switching thereon as aforesaid," and "by the negligence of the defendant * * * in failing to give notice or warning to the plaintiff of the danger of making the switching movement as aforesaid with the said building so near thereto."

[1, 2] From the facts alleged it appears that the plaintiff, as a member of the crew switching the car, was invited by the defendant to enter its premises for the purpose of switching said car to the spur. A person so invited upon the premises of another may recover from such owner "for any injuries received owing to the dangerous condition of the premises known" to the owner and not known to the person so invited; but such owner "is not bound to keep his premises absolutely safe." 29 Cyc. 453. The responsibility of such owner for the safety of such person in such a case is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger. 29 Cyc. 471, 474; 26 Cyc. 1213.

[3] It cannot be disputed that a building 40 feet high, 38 feet long, and 15 feet wide, situated alongside of a spur track and within 37 inches of the nearest rail thereof, would be obvious to the sight of any person approaching it under any ordinary circumstances or conditions. Even in the nighttime, unless the night was unusually dark, it would be easily perceived. In the daytime one would have to shut his eyes, or fail to look in that direction, to avoid seeing it. The complaint does not aver that it was nighttime when the accident occurred, or that the building was in any manner obscured or concealed from view, or that the work in which plaintiff was engaged prevented him from looking ahead or from observing his surroundings. Certainly the climbing of the ladder on the side of the car would not prevent him from doing so. The owner, so far as appears, had no reason to apprehend that the plaintiff would not see the building and perceive its proximity to the track. Unless there was some reason for apprehending this, he was under no duty to notify the plaintiff thereof. Where a plaintiff's cause of action rests upon the negligence of the defendant, the complaint must show such negligence. When the facts alleged show that the plaintiff and defendant stand in such relation to each other that the defendant is not chargeable with negligence toward the plaintiff, unless unusual conditions coexist with the conditions alleged, such unusual conditions will not be presumed to exist in favor of the plaintiff, but must be alleged by the plaintiff. Since under the circumstances appearing in the complaint the defendant was not chargeable with negligence toward plaintiff, as one invited upon the premises and standing in no other relation to the defendant, unless the building and the danger therefrom to one engaged in switching cars upon the spur track were not apparent to ordinary observation, and since they would be so apparent, except under extraordinary and unusual conditions, it was necessary for the plaintiff to allege the facts, if any existed, which required of defendant the exercise of the unusual precaution of giving plaintiff warning of the existence of the building and its proximity to the spur track.

The complaint fails to aver such conditions, and hence it shows no negligence on the part of the defendant. The court below did not err in granting the motion for judgment on the pleadings.

The judgment is affirmed

We concur: OLNEY, J.; LAWLOR, J.

185 Cal. 524

RAPFOGEL v. KLASSEN. (L. A. 6451.)

(Supreme Court of California. April 18, 1921.)

Costs ⊜22—Courts ⊜90(4)—Attorney's fee not recoverable in slander action where damages are less than $300; construction of statute long followed not disturbed.

Under Code Civ. Proc. § 1022, authorizing recovery of costs where plaintiff recovers $300 or over, the attorney's fee allowed to successful plaintiff in an action for libel or slander cannot be allowed where plaintiff recovered only $250 damages, since that construction of the statute was adopted more than 40 years ago, and since that time it has been followed by the courts, and not questioned by the Legislature.

Department 1.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action for slander by Charles N. Rapfogel against Jacob H. Klassen. From an order striking out plaintiff's cost bill after judgment for the plaintiff, plaintiff appeals. Affirmed.

Janeway & Beach and Lester W. Roth, all of Los Angeles, for appellant.

Charles M. Ackerman, of Los Angeles, for respondent.

SHAW, J. The plaintiff recovered a judgment for $250 in an action for slander, begun in the superior court. In due time thereafter he filed a cost bill, claiming only the sum of $100 as counsel fees allowed as costs, under the act of March 23, 1872 (Stats. 1871–72, p. 533). On motion of the defendant, the court below made an order striking out said cost bill. The plaintiff appeals from this order.

Section 1022 of the Code of Civil Procedure provides that when, in an action in the superior court for the recovery of money or damages, the plaintiff recovers $300 or over, he is also allowed to recover his costs. Since costs are not allowed in any case except where it is so provided by statute, it follows that the plaintiff in such an action is not entitled to recover costs where he recovers less than $300 of his demand.

Section 7 of the act of 1872, above mentioned, provides that in an action for libel or slander, "in case plaintiff recovers judgment, he shall be allowed as costs one hundred (100) dollars, to cover counsel fees, in addition to the other costs." The claim of the plaintiff is that, notwithstanding the general provisions of section 1022 of the Code, under which costs are not to be allowed unless the plaintiff recovers $300 or over, the effect of the act of 1872 is that the plaintiff may recover the $100 as counsel fees, in an action for slander or libel, as costs, regardless of the amount of his recovery for damages. This precise question was presented and decided in Jacobi v. Baur, 55 Cal. 554. It was held in that case that the act of 1872 did not have the effect of allowing costs to the plaintiff in any case where it was not allowed by the general law, as provided in the Code of Civil Procedure, referring to section 1022 aforesaid, and, hence, that the plaintiff was entitled to recover no costs whatever, in an action for slander, where his recovery of damages was less than $300. The plaintiff attacks this decision, and asks that we should overrule it. Inasmuch as it was decided in 1880 and has been followed ever since as the law of the state without question by the courts or amendment by the Legislature, we are not disposed to disturb the law as thus settled and followed. Reasons may be given on either side, of course, but we must presume that they were all considered and determined by the court in the decision of that case. No sufficient reason for overruling the case has been presented, and we therefore adhere to the doctrine.

The judgment is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

185 Cal. 526

WOOD et al. v. NIEMEYER et al. (L. A. 6427.)

(Supreme Court of California. April 18, 1921.)

1. Fraud ⊜58(1)—Finding of fraud in exchange of property justified.

In action for fraud, inducing plaintiffs to exchange a ranch for a moving picture theater building, where it was claimed that defendant owner and other defendant, purporting to have possession under assignment of lease, made fraudulent representations as to existence of lease and as to the condition of the moving picture business, evidence *held* to sustain findings that the lease and the assignment were fictitious and arranged for the purpose of enabling defendant owner to secure a purchaser, and that plaintiffs relied on such representations.

2. Fraud ⊜13(1)—Representations as to lease not bona fide held actionable, regardless of its terms.

Where plaintiffs were induced to exchange their ranch for a building containing a moving picture theater by representations that the building was leased, when, in fact, the lease was not bona fide, but was executed as part of a conspiracy to enable the owner to dispose of the building, such representations were actionable, regardless of the fact that the representations as to the terms of the lease were true.

3. Fraud ⊜59(2) — Measure of damages stated.

In action for fraudulent representations, inducing plaintiffs to exchange their ranch for

defendant's property, the measure of damages was the difference between the actual value of the property received by the plaintiffs and the value which it would have had if the defendant's representations as to the value thereof had been true.

4. Appeal and error ⟸1033(9)—That finding of value was not supported by the evidence is harmless, where appellee was entitled to more than he received.

In action for fraud, inducing plaintiffs to exchange their ranch for defendant's city property, insufficiency of evidence to support finding as to actual value of plaintiff's property *held* immaterial on defendant's appeal from judgment awarding damages on the mistaken theory that the measure of damages was the difference between the actual value of the exchanged properties, where the difference between the actual value received by plaintiffs and the value which it would have had if the representations had been true, the proper measure of damages in such case, was greater than the amount of such judgment.

5. Evidence ⟸113(20)—Land exchange contract, giving valuation of property, admissible as some evidence of its value.

In action for fraud, inducing execution of land exchange contract, the memorandum of the agreement concerning the property to be conveyed, giving the valuation placed upon the property, *held* admissible as some evidence of its value.

6. Fraud ⟸60—Cost of alterations of building recoverable as damages.

In an action for fraud inducing plaintiffs to exchange their ranch for a moving picture theater building, where it appeared that defendants misrepresented the existence of a lease and the condition of the lessee's moving picture business, when, in fact, the building could not be successfully rented as a moving picture theater, the cost of making alterations to make the building suitable for other purposes was recoverable as an element of damages.

Department 2.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Jeanette Kirkham Wood and another against Linus J. Niemeyer and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

James S. Bennett and Harold E. Thomas, both of Los Angeles, for appellants.

Loewenthal, Loeb, & Walker and Loeb, Walker & Loeb, all of Los Angeles, for respondents.

LENNON, J. In the month of December, 1917, plaintiff I. A. Wood was the owner of a ranch consisting of 63 acres of land, part in vineyard, part in alfalfa, and the rest unimproved, and defendant Niemeyer owned a building in the city of Los Angeles which contained two small stores and an auditorium and lobby, designed and constructed for use as a moving picture theater. Being desirous of disposing of their respective holdings, each had listed his property with a real estate broker in Los Angeles. By this broker the two parties were brought together, and, after each had inspected the property of the other, an exchange was finally effected, whereby the said plaintiff transferred to defendant Niemeyer his ranch, together with certain horses, cattle, tools, and implements thereon, and received from said defendant the lot and building above mentioned and certain additional property which need not be described. The exchange was made by means of an escrow proceeding, which was completed in January, 1918.

In the latter part of the year 1918, plaintiff I. A. Wood and his wife brought the present action against defendants Niemeyer and Dones for damages for fraud in the transaction above outlined. It appears from the allegations of the complaint that, during the negotiations for the exchange and for the purpose of inducing plaintiffs to consent to and consummate said exchange, defendant Niemeyer represented that the moving picture theater in the building owned by him was rented to a reliable tenant named Dones, who was in possession of the theater under a written assignment of a lease executed by defendant Niemeyer, as lessor, and one Fred Ford, as lessee, on May 31, 1917. The said defendant further stated that the theater was being conducted at a profit by said Dones, and that the latter was paying a monthly rental of $175 under the lease, which would not expire until June 1, 1920. The complaint states that, upon plaintiffs communicating with defendant Dones, informing him of their contemplated purchase and inquiring as to the truth of these statements, defendant Dones stated to plaintiffs that the lease was in full force and effect, and that he was conducting the theater at a profit and doing very well. Plaintiffs believed the statements and representations of defendants, made the exchange in reliance thereon, and were deceived thereby. On January 19, 1918, at the time of the completion of the escrow, defendant Niemeyer paid to plaintiffs the sum of $105, purporting to be a part of the rent of the theater for the month of January, paid to defendant Niemeyer by defendant Dones. Thereafter defendant Dones never paid any rent for the theater, and, on account of the nonpayment of rent, plaintiffs were compelled to cancel the lease on February 6, 1918. The complaint then sets forth that the lease and assignment were executed to Ford and Dones as agents of defendant Niemeyer and as part of a conspiracy for the purpose of enabling defendants to represent that the theater was being profitably conducted by a reliable tenant, and that the statements and representations in respect

thereto were made as a part of an agreement between the defendants for the purpose of inducing the purchase by plaintiffs. Plaintiffs allege that no revenue is obtainable from the auditorium as a moving picture theater, and that it must be remodelled so as to render it suitable for other purposes, that the property is not worth what it would have been had defendants' representations as to the lease and rental thereof been true. Plaintiffs seek damages for the alleged fraud.

Both defendants filed answers denying the allegations of the complaint, and defendant Niemeyer filed a cross-complaint, claiming misrepresentations on the part of plaintiffs as to the value of the ranch, and asking damages therefor. The trial court found that the facts in regard to the conspiracy in the ostensible execution and assignment of the lease and the representations made by defendants concerning the same were substantially as pleaded in the complaint. The allegations of the cross-complaint as to the misrepresentations on the part of plaintiffs and resulting damages to defendant Niemeyer were found to be untrue. Judgment was rendered in favor of plaintiffs for damages in the sum of $9,007. Defendants appeal from the judgment upon the ground that the evidence is insufficient to sustain the findings of the trial court in the following particulars: (1) The making of false representations by defendants; (2) plaintiffs' reliance upon defendants' representations; (3) the value of the respective properties exchanged.

Plaintiff I. A. Wood testified that defendant Niemeyer told him that the theater was being conducted by defendant Dones at a profit, that Dones was occupying the same as assignee of a lease and was paying $175 a month therefor, that Dones was a reliable tenant, and that the rent would be mailed to plaintiff the first of each month so that he would not even have to go to the building to collect the same. The purported lease was delivered to plaintiff, and, when he inquired as to the whereabouts of Ford, the original lessee, he was informed by the defendants that Ford could not be located. Plaintiff further testified that he would not have consummated the deal had he not believed the statements of defendant concerning the existence of the lease, and that the building was rented and bringing in good returns, and was a "good revenue-paying affair." Up to this point plaintiff's testimony was corroborated by Mr. Kious, but the latter was not present at the interviews between plaintiff and Mr. Dones. Plaintiff testified that, before purchasing the property, he inspected it several times and had several conversations with defendant Dones. At the first conversation defendant Dones refused to talk about the property until he had received word from Mr. Niemeyer. He later told plaintiff he had communicated with Mr. Niemeyer, and that the latter had stated that he was thinking of making an exchange with plaintiff, and that plaintiff was free to question Dones concerning the property. Plaintiff then asked about the business, and Dones said that he was running the theater under the lease, which was "absolutely all right," that business was increasing very much, that he expected in a short time to pay off the mortgage on the furniture in the theater, and that he "only regretted that there wasn't more seats in the building than it contained." The exchange was made in January, 1918, and plaintiff testified that Dones never paid any rent thereafter and, when plaintiff went to the theater for the rent, shortly after the 1st of February, 1918, Dones told him that he could not pay the rent; that the theater was not paying, and he could not run it. The theater was then closed, and plaintiff was unable to rent it, and had received only $175 as rent therefor from the time he acquired the building until the date of the trial, which was over a year and a half.

Defendant Dones, who was called as a witness by plaintiffs, subject to the provisions of section 2055 of the Code of Civil Procedure as added by St. 1915, p. 58, testified that he had never seen Ford, the original lessee, that some time prior to the assignment of the lease to him he was called on the telephone by Ford, who said he heard Dones wanted to open the theater, and that Dones then asked Ford to come and talk over the matter. Ford never appeared, but, a few days after this conversation, defendant Niemeyer came to see Dones, and stated that he would obtain an assignment of the lease from Ford to Dones. Dones also testified that, after the assignment, and during the months of December, 1917, and January, 1918, he occupied the theater as tenant, but he admitted his signature to a letter, produced by plaintiffs' counsel, dated April 15, 1918, and addressed to a deputy collector of internal revenue of the United States government. In this letter it was stated that, during the months of December, 1917, and January, 1918, Dones was the manager of the theater in question, that during the time that he was manager Mr. L. J. Niemeyer was the owner of the theater as well as of the furniture and property, both real and personal, that he had nothing to do with the taxes, and, in fact, did not know there was a government tax to be paid. The letter closed with the following statement:

"I hope this letter will make it plain that I have never owned any theater whatsoever, and when I was running said theater, it was simply as manager for Mr. L. J. Niemeyer."

Another witness, called by plaintiffs, a real estate man, testified that, shortly prior to the transaction between plaintiffs and defendants now before the court, defendant Niemeyer had listed the theater property with him. This real estate dealer arranged

an exchange of the property for property in Colorado. At the time of the exchange it was represented that the theater was leased to parties by the names of Warner and Sayler. Shortly after the consummation of the exchange the client from Colorado became dissatisfied and wished to rescind. At first defendant Niemeyer declined, but finally consented to a rescission upon being informed by the witness that the latter had discovered that the lease under which the theater was operated at the time of the exchange was not bona fide, the ostensible lessees having been paid by defendant Niemeyer to sign the lease. This testimony was corroborated by that of a witness who had been employed at the theater as a janitor during the times in question.

[1] It is unnecessary to go into further detail, for to do so would be but weighing the evidence, and it is clear from the evidence thus far excerpted that there is ample substantial evidence in support of the findings to the effect that the lease and assignment were fictitious, and arranged for the purpose of enabling defendant Niemeyer to secure a purchaser of the property, and that they in fact accomplished the purpose which they were designed to bring about.

[2] The court found that the representations that the lease would not expire until June 1, 1920, and that the lease called for a monthly rental of $175, were untrue. Defendants complain of this finding, claiming that the terms of the lease show that these representations were true. The court found, in substance, that the lease was not bona fide, but was executed as part of a conspiracy to permit the defendant Niemeyer to dispose of his property, and that the representations that there was a binding lease to a reliable tenant containing the terms mentioned was untrue. The evidence justifies this; if there was not a bona fide lease as represented, the terms of the purported lease were immaterial.

[3-5] The remaining questions concern the findings of the value of the properties exchanged. The findings place the value of the ranch traded by plaintiffs at $26,900, less a mortgage of $6,000, and the value of the personal property transferred with the ranch at $2,500, making a total valuation, after deducting the amount of the mortgage, of $23,400. The value of the theater property which passed to plaintiffs under the exchange was found to be $19,193, less an incumbrance of $8,000, and the additional property transferred was valued at $3,200, making a total of $14,393. The damage awarded was the difference between the value of the property conveyed by plaintiffs and that received by them from defendants, of $9,007. Defendants assert that the evidence did not warrant the placing of a gross valuation of $26,900 upon the ranch. This contention merits but little, if any, consideration, for respondents have demonstrated in their brief that, from the evidence adduced, the trial court should have applied a different measure of damages, and consequently have placed a higher valuation on the ranch than that found. That is to say, the trial court found, upon sufficient and satisfactory evidence, that the defendant Niemeyer represented the value of the theater property to be $35,000, and the aggregate value of certain other real and personal property, which was also involved in the trade, to be $3,200, making the represented aggregate value of the defendant's property to be $38,200. The trial court further found the actual value of the defendant's property involved in the exchange to be but $19,193. Upon these findings and the settled rule of law in this state applicable to actions "for deceit in the sale or exchange of real estate * * * " the plaintiff, as the party found to have been defrauded, was entitled to recover the difference between the actual value of the property which he received and the value which it would have had if the defendant Niemeyer's representations as to the value thereof had been true. Hines v. Brode, 168 Cal. 507, 143 Pac. 729; Blake v. Arp, 180 Cal. 144, 179 Pac. 683; George Cople Co. v. Hindes, 34 Cal. App. 576, 170 Pac. 155. So we say, in unison with counsel for respondent, that appellant has but little cause for complaint as to the amount of damages awarded him when, as a matter of law upon the facts as found, the trial court should have awarded the plaintiff as damages the sum of $19,007, the difference between the misrepresented and the actual value of the defendant's property, rather than the sum of $9,007, which the court did award for damages, upon the mistaken theory that the measure of damages was the difference between the actual market value of the exchanged properties. Defendants contend that there was no evidence to support the finding that the value of the personal property transferred to defendant Niemeyer by plaintiffs was $2,500. It does not appear that the values of either the personal property sold with the ranch or the property which passed to plaintiffs with the theater property were in dispute. However that may be, plaintiffs introduced in evidence a written memorandum which plaintiff I. A. Wood had delivered to defendant Niemeyer at the time of the completion of their negotiations. This writing, which, it was testified, was a memorandum of the agreement of the parties to the exchange, contained a list of the property conveyed by plaintiffs to defendant Niemeyer and plaintiff's estimate of the value thereof, including an itemized statement of the personal property in question at a total valuation of $2,500. Defendants claim that this valuation cannot be considered in determin-

ing the value of the personal property, for the reason that in this memorandum the ranch was valued at $31,500, whereas the court found the ranch to be worth only $26,900. Considerable evidence was introduced on both sides as to the value of the real estate, and while the court evidently accepted other evidence as to the value of the ranch, it does not follow that the court disregarded the valuation placed upon the personal property by the plaintiff. Since the memorandum in question was a memorandum of the agreement of the parties concerning the property to be conveyed, the statements therein contained were some evidence of the value of the personal property transferred. Booth v. Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101; Bringham v. Knox, 127 Cal. 40, 59 Pac. 198; Lehigh v. Standard Tie Co., 149 Mich. 102, 112 N. W. 481. No evidence was introduced by defendants to contradict or offset these statements.

[6] The final contention of defendants relates to the fact that in valuing the building traded by defendant Niemeyer to plaintiffs the court deducted from the cost of reproduction thereof the cost of altering the building to make it suitable for a use other than as a moving picture theater. There was testimony that no rent could be obtained from the building in the condition in which it stood, because no one would rent the auditorium as a moving picture theater, and that was the only purpose for which it could be used in its then condition. Plaintiffs were induced to accept the building in that condition by the representations of defendants that the building was rented and was producing income as a moving picture theater. Therefore the fact that the building would not yield an income as it then stood and the necessity for altering the same to make it rentable was, under the theory adopted by the trial court, an element to be taken into consideration in fixing the damage resulting from the fraud.

The judgment is affirmed.

We concur: WILBUR, J.; SLOANE, J.

185 Cal. 534

SHERMAN v. S. K. D. OIL CO. et al. (L. A. 5696.)

(Supreme Court of California. April 19, 1921.)

1. Corporations ⟸617(2)—Dissolution for failure to pay license tax does not mature obligations.

The dissolution of a corporation by operation of law for failure to pay the license tax does not mature obligations of the corporation not yet due.

2. Corporations ⟸252—Ordinarily creditor's action against stockholders accrues after unsatisfied execution against corporation.

The general rule is that the right of action by a creditor against a stockholder for the unpaid value of the stock does not accrue until judgment has been obtained against the corporation and execution thereon returned nulla bona.

3. Corporations ⟸252—Creditor's action accrues against stockholders without judgment and execution against insolvent corporation.

A creditor's right of action against the stockholders of a corporation accrues without the necessity of obtaining judgment and execution against the corporation, in case the corporation is insolvent and that fact has become manifest by its ceasing to do business.

4. Limitation of actions ⟸58(4)—Creditors of dissolved corporation not required to sue stockholders before maturity of obligations; hence limitations began to run only from maturity of note.

Creditors of corporation which was engaged in the highly speculative enterprise of drilling for oil on leased premises are not required to bring suit against stockholders of the corporation for the unpaid value of their stock before the notes given to creditors have matured, even though before that time the corporation had been dissolved for failure to pay its license tax and was insolvent and had ceased to do business, so that the statute of limitations against a creditor's bill began to run only from the maturity of the notes.

5. Limitation of actions ⟸34(5)—Creditors' suit against stockholders is not to enforce statutory "liability created by law."

A bill by creditors of a corporation against the stockholders to compel them to pay the difference between the value of the property for which the stock was issued and the par value of the stock is not a suit on a "liability created by law," within the meaning of that term as used in Code Civ. Proc. § 359, requiring such actions to be brought within three years.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liability Created by Law.]

6. Limitation of actions ⟸39(14)—Creditors' suit against stockholders is not for "relief on ground of fraud or mistake."

A suit by creditors of corporation to enforce a liability of the stockholders to pay the full value of the stock issued to them is not one for relief on the ground of fraud or mistake, within Code Civ. Proc. § 338, subd. 4, requiring such an action to be begun within three years after the discovery of the fraud or mistake, but is regulated by Code Civ. Proc. § 343, requiring actions for relief not thereinbefore provided for to be commenced within four years after the cause of action accrued.

7. Corporations ⟸273—Stockholders with notice liable to creditors for entire overissue of stock notwithstanding return of part to corporation.

Where a corporation issued its stock, having a par value of $500,000, in payment for an

assignment of an oil lease valued at $125,000, under an arrangement whereby the recipient of the stock immediately returned $375,000 to the treasury for sale by the company, a creditor is entitled to recover the difference between the actual value of the oil lease and the total par value of the stock issued without deduction for that returned to the company.

8. Corporations ⟸240(1) — Creditor with knowledge cannot recover from stockholders for overvaluation.

Creditors who extended credit with full knowledge that corporation's stock was issued for overvalued property cannot recover for such issuance by a creditor's bill in equity.

9. Corporations ⟸240(1) —Notice to creditors that part of the stock had been issued for overvalued property is not notice that all was issued and part returned.

Notice to creditors of a corporation that a stated amount of the stock of the company had been issued for an overvalued oil lease is not notice to them that the entire authorized stock had been so issued and the amount exceeding that stated returned to the company.

10. Corporations ⟸240(1)—Creditor bound by valuation of property for which he knew stock was issued.

The creditor of a corporation, who knew that stock had been issued for an oil lease at an overvaluation, cannot recover from the stockholders the difference between the valuation and the true value of the lease, though he can recover for other stock issued for the lease and returned to the company for sale.

11. Limitation of actions ⟸124—Amended complaint bringing in new defendants is "commencement of action" as to them.

An action is commenced as to defendants, who were not made parties to the original complaint, but were made defendants in the amended complaint, only at the time of the filing of the amended complaint.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commencement of Action.]

12. Corporations ⟸244(1)—Failure to have stock transferred to buyer leaves seller liable to creditors.

A stockholder, who sold his stock to another but failed to have it transferred on the books of the corporation, remains liable to the creditors of the corporation.

13. Corporations ⟸244(5)—Stockholder must participate or have notice of watered stock to be liable to creditors.

A stockholder in the corporation is not liable to creditors for the issuance of the corporate stock for overvalued property, unless he either participated in the original transaction, or thereafter accepted a transfer of the stock with notice of the transaction.

14. Appeal and error ⟸934(1)—All presumptions are to be indulged in favor of the judgment.

On appeal, all presumptions are to be indulged in favor of the judgment.

15. Corporations ⟸268(1)—Complaint held to show all defendants except one were transferees of stock.

The complaint by a creditor against stockholders of a corporation which alleged that all the stock of the corporation was issued to one of the defendants as the purchase price of an oil lease, and alleged that the other defendants immediately thereafter acquired by a transfer portions of such stock as part of the same transaction, shows by a fair construction that all except the first-named defendant were transferees of the stock.

16. Corporations ⟸268(2)—Answer held to show transferees of stock participated in watering transaction.

An answer to a creditor's bill which alleged that all the stock was issued by the corporation to one defendant, who returned a portion thereof to the corporation and divided the remainder among the other defendants in specified sums, shows that the defendants so answering participated in the original transaction, so as to cure the omission of an allegation to that effect from the creditor's complaint.

17. Appeal and error ⟸916(3)—Reasonable inference of liability from answer not drawn on appeal from judgment for defendants.

Though from an answer to a creditor's bill alleging that two of the defendant stockholders were associates of a third, who was shown by the answer to have participated in the stock-watering transaction, it was a reasonable inference that those two also participated in that transaction, such inference will not be drawn on appeal from a judgment in favor of defendants.

18. Corporations ⟸268(1)—Complaint held not to state cause of action against transferee of watered stock.

A complaint by a creditor against the stockholders of a corporation to recover the amount by which the property for which the corporate stock was issued was overvalued does not state a cause of action against one of the stockholders, who was not alleged to have participated in the stock-watering transaction, and who was not charged with notice of that transaction at the time he acquired his stock.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by W. H. A. Sherman, assignee of Charles A. Meyer, against the S. K. D. Oil Company and 41 stockholders to enforce a stockholders' liability. Judgment for all defendants served except two, who made default, and plaintiff appeals. Judgment affirmed except as to four defendants, and as to those defendants reversed.

Stutsman & Stutsman, of Los Angeles, for appellant.

Goodwin & Morgrage, Willoughby Rodman, Simms & Fulwider, and Birney Donnell, all of Los Angeles, for respondents.

WILBUR, J. This is an action brought to recover upon stockholders' subscription liability. Forty-one stockholders were joined as defendants. Nine of these stockholders appeared and answered, and after trial of the issues judgment was rendered in their favor. Two made default and judgment was rendered against them. The S. K. D. Oil Company, defendant, was organized August 12, 1910, with a capital stock of 500,000 shares of a par value of $1 each. The corporation issued its entire capital stock to G. M. Kyle as fully paid stock in exchange for a lease on 30 acres of land upon which to prospect for oil. As a part of the same transaction it was agreed between Kyle and the corporation that 375,000 shares of such stock should be returned to the corporate treasury to be sold by the corporation for its benefit. It was found by the trial court at the time of the exchange of the property for the stock the oil lease was actually worth $90,000, and that the exchange was made in good faith and in the honest belief on the part of the directors that the property acquired by them was equal in value to the stock given in exchange therefor. It is not entirely clear whether the trial court intended to find that the directors actually believed that the oil lease was worth $500,000 or whether they believed it to be worth $125,000. The evidence, however, is undisputed on the part of the directors that they believed the lease was worth $3,000 per acre, owing to the fact that an oil well producing 1,000 barrels a day had been developed on the adjoining property and that if a successful well was obtained upon the property it would be worth much more. The finding of the trial court of good faith in the exchange of said stock is not supported by the evidence, for the directors' own testimony shows that in their judgment $90,000 was the outside value of said lease.

Plaintiff's cause of action is based upon three promissory notes assigned to him, the first promissory note dated October 15, 1911, for $4,280.34, bearing 7 per cent. interest, due February 16, 1912, payable to Fairbanks, Morse & Co.; the second note was to J. F. Lucey Company for $2,780.23, dated November 13, 1911, payable 90 days after date, and bearing 7 per cent. interest; the third note was dated November 13, 1911, payable 60 days after date, for $2,038.53, at 7 per cent. interest.

The plaintiff alleged that on November 30, 1911, the corporate charter was forfeited for nonpayment of the license tax, and that at the same time "the corporation became insolvent and bankrupt and unable to pay its debts and without properties to pay the promissory notes belonging to the plaintiff, and ever since that time has been and now is wholly insolvent and bankrupt." The court further found that such insolvency and cessation of business was on November 30, 1911, known to the payees named in each of the promissory notes. The trial court held that the plaintiff's cause of action was barred by the statute of limitations. This conclusion was sustained by the District Court of Appeal, Second District, Second Division, which held that the statute of limitations began to run as soon as the corporation dissolved, to wit, November 30, 1911, and, therefore, that plaintiff's cause of action was barred on all three promissory notes. This conclusion by the District Court of Appeal was based upon the proposition that the mere dissolution of the corporation for failure to pay its license tax at once matured all obligations against it, regardless of whether or not they were due. The petition for transfer to this court was granted because of our doubt as to the correctness of this ruling.

[1] It seems clear that the dissolution of the corporation by operation of law for failure to pay the license tax would not have the effect of maturing its obligations. The policy and effect of the laws of this state forfeiting the corporate charter for failure to pay a license tax are discussed in the recent case of Hanson v. Choynski, 180 Cal. 275, 180 Pac. 816, and it is unnecessary to repeat that discussion. It was there held that creditors of such a corporation must ordinarily pursue their usual remedies at law against the directors or trustees of the corporation. There is no statutory authority for holding that the notes, bonds, and other obligations of a corporation become due upon its dissolution for nonpayment of license tax, and the policy of the law is opposed to such a conclusion, as is clearly shown in Hanson v. Choynski, supra. If we regard this suit as an action upon three promissory notes against the defendant corporation, or its directors and trustees, the action is not barred.

Is the action barred against the stockholders on their liability in equity as holders of watered stock before action is barred against the corporation or its representatives on its note?

[2] The general rule is that the right of action by a creditor against a stockholder on such liability does not accrue until judgment first has been obtained against the corporation and execution thereon is returned nulla bona. Harmon v. Page, 62 Cal. 448. Ordinarily, therefore, a creditor may wait up to four years after the maturity of his promissory note before bringing suit against the corporation, and upon obtaining judgment and return of execution nulla bona may thereafter bring a creditor's bill in equity against the stockholders. The statute of limitations on this latter cause of action would not begin to run until the return of the execution nulla bona.

[3] There is an exception, however, to the rule requiring that judgment be first had

against the corporation in cases where the corporation is insolvent. In such a case the creditor may bring an action against the corporation and stockholder without first securing a judgment against the corporation and a return of execution nulla bona. "Insolvency or return of execution nulla bona is prerequisite to maintain an action against stockholders on their subscription liabilities." Merchants' Mutual Adjusting Agency v. Davidson, 23 Cal. App. 274, 137 Pac. 1091; Helliwell on Stock and Stockholders, § 450; Clark and Marshall on Private Corporations, p. 2459, notes, 513, 514; Id. p. 3867; Id. p. 2474, note 586; 1 Cook on Corporations, § 108, p. 380; Id. § 200, p. 532; Thompson on Corporations (2d Ed.) § 3888; 14 C. J. § 1725, p. 1103. Obviously there is some difficulty in determining the exact date when the statute of limitations begins to run in favor of the stockholders in cases of insolvency, in the absence of any assignment for the benefit of creditors, or bankruptcy proceedings to fix the date of insolvency. In disposing of the contention that insolvency per se started the statute of limitations running in favor of a stockholder against a creditor's bill, the Supreme Court of Ohio, in Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798, aptly stated:

"Such a rule would be not only uncertain, but deceptive to the creditor. The right to commence the action would be a matter of speculation. It could not be determined before bringing the action and taking an account whether the company was indebted in a sum greater than its assets would pay or not. A rule of certainty, applicable to such cases, should be adopted. The true rule, and that which is usually adopted where the company has property and continues to do business, is to require the creditor first to obtain a judgment against the corporation and cause an execution to be issued, and, if it is returned not levied for want of goods, then the creditor has the right to commence suit against the stockholders upon their individual liability, and the statute of limitations begins to run against the right of action from that time, and not earlier.

"So long as the company is possessed of corporate property and continues to transact its business, the stockholders should be regarded as estopped from averring that the right of action against them as individuals accrued, by reason of the insolvency of the company, at a period earlier than the return of an execution unsatisfied issued upon the judgment of a creditor of the company. Stockholders have the means of knowing the condition of their company much better than creditors, and, if the company continues to do business upon an insolvent basis, it should be regarded as permitted by the stockholders, as the directors and officers of the company derive their authority from and are the agents of the stockholders."

In Schofield v. Turner, 213 Pa. 548, 62 Atl. 1068, it was said:

"A misapprehension of what was decided in Swearingen v. Dairy Co., 198 Pa. 68, is doubtless responsible for this appeal. * * * This is what was decided in that case, summed up in the following sentence: 'The right of action of the plaintiff, whatever it was, accrued upon the fact of insolvency of the dairy company shown by the assignment for the benefit of creditors and the statute of limitations began to run from that date.'"

In Helliwell on Stock and Stockholders, § 450, it is said that such a creditor's bill may be brought against stockholders "where it appears that the corporation is insolvent, has entirely ceased to do business, has made an assignment for the benefit of creditors, and has neither money, credit, nor materials with which to do business or pay its debts."

In Chilberg v. Siebenbaum, 41 Wash. 663, 84 Pac. 598, the court distinguishes between the right of action against the corporation on the original debt and the right of action to recover against the stockholder on a creditor's bill in case of insolvency. It is there held that the bringing of an action against the corporation does not suspend the running of the statute of limitations against the stockholders until the recovery of the judgment, because judgment and return nulla bona are unnecessary where it is shown the same would be futile. In that case there was no property or assets of any kind belonging to the corporation. The court there said:

"From the foregoing statement it will appear that the only question presented on this appeal is, When does the right of action in favor of the creditors of an insolvent corporation, as against its stockholders, to enforce the stock subscription liability, accrue? We are of opinion that such right of action accrues, at least, as soon as the corporation disposes of all of its property and assets, ceases to be a going concern and becomes notoriously insolvent, and that is as far as we are required to go in this case. * * *

"The appellant contends, however, that his action against the stockholders is based on his judgment against the corporation, not upon the original corporate indebtedness which is merged in the judgment, and that his cause of action against the stockholders did not accrue until the recovery of his judgment against the corporation and the return of nulla bona, or, at least, until the recovery of the judgment. If this be true, it must be for one of two reasons; first, because his right of action against the stockholders did not accrue until he exhausted his legal remedies against the corporation by the recovery of a judgment and a return of nulla bona; or, second, because the stockholders continue liable as long as a liability exists against the corporation, and cannot interpose the statute of limitations as a defense, unless the statute has also run in favor of the corporation. What we have said is sufficient to demonstrate the fallacy of the first proposition. An action of this kind is in the nature of a creditor's bill, and, in the absence of statute, it is not necessary to first obtain a judgment against the corporation, when it is otherwise shown that such a proceeding would be utterly futile and subserve no useful purpose. Benham v. Ham, 5 Wash. 128, 31 Pac.

459, 34 Am. St. Rep. 851; Cook, Corporations, § 200, and authorities above cited. Nor does the liability of the stockholder continue as long as the creditors may be able to keep their obligations alive against the corporation."

The Supreme Court of Arkansas has adopted the rule that actual notice of the corporation's insolvency would start the statute of limitations running in favor of a stockholder.

In the case of Lester v. Bemis Lumber Co., 71 Ark. 379, 74 S. W. 518, that court said:

"The period of limitation to an action based on the written subscription of a stockholder in a corporation is five years, and commences to run whenever an execution has been issued against the corporation and returned unsatisfied, or whenever the creditor has notice that the corporation is insolvent."

In the case of Lester v. Bemis Lumber Co., supra, that court holds that the statute of limitations, if no execution had been issued and returned, begins to run when a creditor has notice of the insolvency of the corporation, and that such notice would probably be presumed when the insolvency of the corporation became a matter of general notoriety. In this case it is held that the corporation had been insolvent more than the statutory period before the suit was brought, but the fact was not generally known, and hence the suit brought was in time.

In the case of Harmon v. Page, 62 Cal. 448, supra, the cause of action against the corporation accrued May 9, 1873. Judgment against the corporation recovered May 2, 1878. A complaint was filed on stockholders' liability August 30, 1878. The court quotes with approval from Curry v. Woodward, 53 Ala. 376, as follows:

"'Until the call was made, or there was an evident disbandment of the company and a relinquishment of business, the statute of limitations would not begin to run.' To the same effect is the case of Cherry et al. v. Lamar et al., 58 Ga. 541, in which a bill was filed by the creditors of a corporation to subject to the payment of their judgment against it certain unpaid stock subscribed by the defendants."

In 1 Cook on Corporations, § 200, p. 532, it is said:

"The corporate funds are the corporate creditors' primary resources, even where the liability of the individual stockholder is declared to be primary, like that of an original contractor or partner. Where, however, the corporation has been adjudged a bankrupt, the remedy against the corporation need not first be exhausted. Such, also, has been held to be the rule where the corporation is notoriously insolvent, or has been formally dissolved. * * *"

See, also, 4 Thompson on Corporations (2d Ed.) § 3888.

The rule is thus stated in 14 Corpus Juris, p. 1103, § 1725:

"*Where Liability Secondary.* Where the stockholders' liability is secondary, as a general rule, the creditor's right of action against the stockholders on their statutory liability does not accrue, so as to set the statute of limitations running, until judgment has been recovered against the corporation, or until such judgment has been recovered and execution thereon against the corporation has been returned unsatisfied. Where, however, the corporation has done, or suffered to be done, any act which would render judgment and process against it impossible or of no avail, the creditors' right of action against the stockholders may accrue without first obtaining judgment and execution against the corporation; and, within this rule, limitations begin to run in favor of stockholders from the time the corporate property is placed in the hands of an assignee in insolvency or bankruptcy, or of a receiver, or the corporation has been dissolved, or suspended business, or from the time when by some other legal proceeding its property has been put in process of application to the payment of its debts. But the creditors' right of action against the stockholders does not accrue upon the corporation becoming insolvent in the sense, simply, that its property is insufficient for the payment of its liabilities; nor on the appointment of a receiver for the corporation merely for the purpose of carrying on its business, and not on account of its insolvency, or to wind up its affairs."

[4] In the case at bar three things co-operated on November 30, 1911, to the accrual of a cause of action against the stockholders; the dissolution of the corporation, the insolvency thereof, and notice of the latter to the creditor. Unless, however, the creditor was bound to commence an action against the stockholders before his right accrued against the corporation, we may assume the dates when the plaintiff's rights of action accrued against the corporation as the dates when such rights also accrued against the stockholders. In considering this matter it should be borne in mind that the corporation was never declared an insolvent or bankrupt, and that the dissolution resulted as a penalty for nonpayment of a license tax without judicial proceedings of any kind; that no assignment was made for the benefit of creditors; and that it was a mere coincidence that the bankruptcy of the corporation and the dissolution thereof by operation of law occurred at the same time. Plaintiff's notes only ran 60 and 90 days. The credit was extended only a few weeks before the dissolution of the corporation upon representations of the stockholders and directors as to the status of the corporation. No case has been called to our attention and we have found none in which it has been held that the right of the creditor against the stockholder matured and the statute of limitations began to run before his obligation against the corporation matured. While it is true that a creditor may bring a suit against the stockholders upon the ground that the corporation is insolvent,

the question we have to deal with is, When must the creditor bring his action? In this case we are dealing with a corporation carrying on a speculative business. The indebtedness to plaintiff's assignors was for materials used in sinking an oil well. The financial status of the corporation depended upon the success of its well-drilling operations. It was drilling in territory that was regarded as proved territory, and it could not be ascertained until the oil stratum was reached or until the stratum which was supposed contained oil had been passed whether or not the venture was a success or failure. The plaintiff after November 30, 1911, had the right to sue the trustees of the defunct corporation upon the obligations due to him and to attach the property of the corporation as soon as his claims were due. Under such circumstances, there being no assignment to creditors and nothing to prevent the plaintiff from pursuing his legal remedies against the corporation, or its trustees, it cannot be said that his right of action in equity against the stockholders to recover for fraudulent overvaluation of the property issued in exchange for their stock would acrue until it was manifest that the corporation or its trustees did not have sufficient property subject to attachment to pay the plaintiff's claim in full. It would seem clear that under the circumstances of this case the creditor was fully justified in waiting to bring his action against the corporation and the stockholders until the maturity of its obligation against the corporation. We are of opinion, then, that the cause of action against the stockholders for their amount due, because of the issuance of the watered stock, accrued when the notes became due.

[5] The corporation could not have successfully interposed the statute of limitations to a suit brought by the plaintiff upon the promissory notes in question at the time this suit was brought, to wit, February 11, 1916, except as to the third cause of action on the note which matured January 12, 1912. As it is conceded by the appellant that the statute of limitations had run upon this last-mentioned note, we need not give it further consideration. As to the first notes, assuming that the statute of limitations on the action upon the notes against the corporation and the statute of limitations upon the action against the stockholders were running concurrently because of the insolvency of the corporation, it remains to consider whether or not that period lapsed before the bringing of the suit. If that period is four years or more, the statute of limitations had not run as against the first two notes. If the period is three years or less, the statute has run as to all the notes. The defendants plead practically all the sections fixing limitations upon actions, and the court found in accordance with the allegations of the answer. In the argument it is claimed that section 359 of the Code of Civil Procedure applies to the action against the stockholders. This statute regulates the time for commencing actions against stockholders of a corporation to enforce a liability created by law, and provides that such an action must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability was created. Of course, in one sense every liability is created by law and by the acts of the parties. In that sense, and only in that sense, is this action upon a liability created by law. Obviously, the section does not apply to suits in equity brought to enforce the implied obligation of the stockholder to pay the par value of the stock owned by him.

[6] It is suggested that section 338, subdivision 4, applies. This section provides that an action must be begun within three years "for relief on the ground of fraud or mistake." The cause of action in such case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. In one sense the action at bar is an action based upon fraud, that is to say, upon the fraud of the incorporators in accepting property at an overvaluation. This section makes the cause of action mature when the fraud is discovered, and is not applicable to the case at bar, where the right of action does not arise upon the discovery of the fraud nor before the assets of the corporation are exhausted. This is an equitable action in the nature of a creditor's bill, and the time for filing such action is regulated by section 343 of the Code of Civil Procedure, which provides: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." This section applies to equitable actions, such as a creditor's bill. See discussion in Piller v. S. P. Ry., 52 Cal. 42; Hecht v. Slaney, 72 Cal. 363, 366, 14 Pac. 88; Nougues v. Newlands, 118 Cal. 102, 106, 50 Pac. 386.

It follows from the foregoing that the plaintiff's action as to the first two promissory notes, which matured within four years from the commencement of the action, is not barred by the statute of limitations.

[7] It remains to consider the effect of the initial transaction by which the corporation issued its entire corporate stock and later to consider the effect of that situation upon appellant's rights against the respondent stockholders. The pleadings of the defendants, as well as their arguments before this court, would indicate that they do not claim that the lease in question was worth $500,000, or any other sum in excess of $125,000. As between the corporation and Mr. Kyle, who transferred the lease to the corporation in exchange for all its stock, the corporation was only out 125,000 shares of stock for the lease. In any action between the corporation or its stockholders and the vendor of the

lease, 125,000 shares, no doubt, would be taken to be the purchase price of the lease in determining whether or not the corporation had been defrauded. We are not considering the rights of the corporation. It is bound by the action of its directors. Nor are we considering the rights of the stockholders against the corporation or the assignor of the lease. We are considering the transaction solely from the standpoint of a creditor. As between the creditors of the corporation and the stockholders, the purpose, and the only purpose, of the transaction by which 375,000 shares of stock was issued by the corporation to the assignor of the lease and by him reconveyed to the corporation, was to enable the corporation to sell such shares as paid-up stock for less than par. If the land conveyed to the corporation was reasonably believed by the directors to be worth $500,000, the stock would have been thereby paid up, and it would make no difference whether the corporation subsequently sold the stock returned to it for more or less than par. As between the creditor of the corporation and the stockholders, the validity of the transaction does not depend upon the fact that the corporation subsequently received back a large proportion of the stock originally issued in payment for the lease. The rights of the parties must be determined with reference to the original transaction, from which it appears that the directors issued $500,000 of stock for $90,000 worth of property. Under our decisions the stockholders who received this stock in exchange for the property and those subsequently taking the stock with notice of the original transaction were bound to make good the difference between the value of the property transferred and the par value of the stock to creditors extending credit without notice of such overvaluation. Rhode v. Dock-Hop Co., 194 Pac. 11.

[8, 9] At this juncture we pause to consider a point raised by the defendants, which, if determined in their favor, will require the affirmance of the judgment. It is claimed by the defendants that the creditors who extended credit to the corporation had full knowledge of the issuance of the stock at an overvaluation. If the creditor had full knowledge of the transaction, he could not recover in a court of equity on a creditor's bill. Rhode v. Dock-Hop Co., supra. It was found by the trial court that all the facts with reference to the issuance of said stock were fully known to J. F. Lucey Company, in whose favor the last two notes were executed, before it extended the credit to the corporation, and that such facts were fully known to the payee of the first note at least four months before the note was executed. All of said notes were executed in payment of an antecedent obligation. This finding, however, is not supported by the evidence. It appears therefrom that the creditors to whom these notes were given were informed that the corporation had issued 125,000 shares of its stock in payment for the oil lease. This statement was far short of informing them that 500,000 shares of stock had been issued for the oil lease. Of course, if the transaction amounted to a sale of the 125,000 shares of stock for the lease, the representations were substantially true and plaintiff could not recover, but, as we have held, the two transactions were not equivalent so far as creditors were concerned.

[10] As to the second action, based upon the notes to the J. F. Lucey Company, as the original obligation was incurred in the belief that 125,000 shares of stock had been issued in payment for the lease, the plaintiff as to that note would be estopped to claim that the lease was worth less than $125,000, and would be restricted in his recovery to the difference between $125,000 and $500,000 prorated among the various stockholders. The question as to whether or not the plaintiff is similarly restricted with reference to the note issued to the Fairbanks, Morse Company is somewhat different, because in that case the credit upon which the liability was founded was extended before the creditor had notice of the situation. However, as the promissory note was accepted in payment of the precedent obligation, so the court finds, with knowledge that the property had been taken by the corporation at a valuation of $125,000, the same rule would apply to the plaintiff on that cause of action.

It remains to consider the cause of action against the respective stockholders who appeared and defended the action, and, in order to discuss that question, it will be necessary to state further facts in regard to the several defendants involved.

[11] The defendants W. H. Davies and Birney Donnell were not made parties to the original complaint, but were first made defendants in the amended complaint filed September 28, 1916. At that time the notes against the corporation had been due for more than four years. The statute of limitations on the right of action against the stockholders was running at the same time, and hence was operating at the time of the filing of the amended complaint, which, so far as they are concerned, is taken as the date of the beginning of the action. Jeffers v. Cook, 58 Cal. 147, 150; Matteson v. Wagoner, 147 Cal. 739, 746, 82 Pac. 436. The judgment in their favor must therefore be affirmed.

Of the 125,000 shares of stock which were issued in consideration of the lease and were retained by the assignor, G. M. Kyle, 15,625 shares were transferred to defendant P. E. Spellacy, the same number to defendant T. Spellacy, and 31,070 shares to defendant J. F. Davies. These shares were owned by said defendants from that time until the trial of the action. In the same manner 15,625 shares were issued to J. M. Danziger and afterwards sold by him in good faith to J. F. Davies,

but the transfer was not recorded on the books of the corporation, and at the time of the trial said shares of stock still stood on the books of the corporation in the name of J. M. Danziger. In the same manner 15,625 shares were issued to W. Morgrage. He sold and transferred to defendant Fred C. Clift 1,875 shares of stock, to defendants W. H. Davies and Birney Donnell 2,500 shares each, and to persons unknown 3,750 shares, all of which were transferred upon the books of the corporation. Defendant W. Morgrage also sold the balance of 5,000 shares to J. F. Davies, but no transfer was made upon the books of the corporation, and the same remained in the name of defendant W. Morgrage up to the time of the trial.

[12] The failure to make the transfer on the books of the corporation requires that such transfer be disregarded in considering the rights of a creditor of a corporation, for the stockholder remains liable to the creditors of the corporation in the absence of a proper transfer. Realty & Rebuilding Co. v. Rea et al., 194 Pac. 1024; McCarthy v. More, 181 Cal. 738, 186 Pac. 140; Geary Street P. & O. R. Co. v. Bradbury Estate Co., 179 Cal. 46, 175 Pac. 457; Shean v. Cook, 180 Cal. 92, 179 Pac. 185, 5 A. L. R. 1042. See, also, Security Commercial & Savings Bank of El Centro v. Imperial Water Co., 192 Pac. 22.

As the liability of defendants Birney Donnell and W. H. Davies, transferees of stock, has been disposed of on the statute of limitations, it is not necessary to further consider the assignment of stock to them.

[13] It is apparent from an examination of the record that the parties in the preparation of their appeals in the trial of the case and the court in its finding did not have in mind the distinction between subscribers for stock and purchasers and transferees of watered stock pointed out in Rhode v. Dock-Hop Co., supra. That case was decided subsequent to the filing of briefs and argument of this case in this court. It was there announced that, in an action to recover the difference between overvalued property and the par value of the stock in case of watered stock, it was necessary to prove that the holders of such stock participated in the transaction, or, if transferees, that they acquired this stock with notice, actual or constructive, of such fraudulent overvaluation.

[14] As all presumptions are to be indulged in in favor of the judgment, we will examine the record with a view to applying the rules announced in Rhode v. Dock-Hop Co., supra, to the balance of the defendants. The complaint alleges that all of the 500,000 shares of stock were issued to G. M. Kyle in full payment of the purchase price of the oil lease, as fully paid stock. It is further alleged: That at said day and date and at said meeting of said board of directors, or immediately thereafter, but as a part of the same transaction, the said corporation, by its officers duly authorized, executed and delivered certain of the said shares of the said capital stock, by issuing certificates therefor to the following named defendants, all of whom subscribed for or acquired by transfer and at all times herein mentioned owned and now own the said shares represented by the said certificates, as follows: J. M. Danziger, 15,625 shares; J. F. Davies, 31,250 shares; G. M. Kyle, 240 shares; L. B. Kyle, 31,010 shares; W. Morgrage, 5,000 shares; P. E. Spellacy, 15,625 shares; T. Spellacy, 15,625 shares; W. H. Davies, 2,500 shares; Birney Donnell, 2,500 shares; and Frederick C. Clift, 1,875 shares. In addition to these defendants who appeared, answered, and are respondents upon appeal, the balance of the entire list of stockholders of the corporation is included in the above statement, as is shown by the succeeding paragraph of the complaint, in which it is alleged that the foregoing constitute all the stockholders of the defendant corporation.

[15] It would be a fair construction of this complaint, and one that must be indulged in in support of the judgment in favor of the other defendants, to conclude that all of the defendants named in the allegation, other than G. M. Kyle, acquired their stock as transferees. The recital "but as a part of the same transaction" in the foregoing allegation is hardly sufficient to justify the conclusion that all the stockholders of the corporation specifically set forth in this paragraph participated in the original transaction, as it is elsewhere alleged that 500,000 shares of stock were issued to G. M. Kyle.

[16] However, in the joint answer of J. M. Danziger, Wilbert Morgrage, P. E. Spellacy, T. Spellacy, G. M. Kyle, and J. F. Davies, it is affirmatively alleged that G. M. Kyle was the owner of the above-mentioned lease, dated July 7, 1910; that on July 8, 1910, it was agreed between defendants G. M. Kyle, J. F. Davies, P. E. Spellacy, and T. Spellacy that the defendant corporation should be formed, and that Kyle should assign said lease to the corporation and that said corporation should issue in the name of said Kyle 499,995 shares of its capital stock, 249,995 of which said shares should be retained by said Davies as fully paid and nonassessable and by him divided between himself and his associates, and the balance of 250,000 shares returned to the treasury of said corporation, to be sold by it and the proceeds arising therefrom to be used for the benefit of said corporation; that on July 8, 1910, the corporation was formed and Kyle assigned his lease to the corporation, which caused to be issued and delivered to said Kyle 449,995 shares of its capital stock as fully paid and nonassessable; that said Kyle immediately returned to the corporation 250,000 shares of said stock. The finding of the trial court upon the matter under discussion is as follows:

"That thereafter and on August 16, 1910, said G. M. Kyle offered to sell and convey said lease to said S. K. D. Oil Company for 500,000 shares of its capital stock fully paid, and when so issued to immediately return to the treasury of said company, for the use and benefit of said company, 375,000 shares of said stock. Thereupon the said corporation, at a meeting regularly called for that purpose, accepted said proposition by resolution regularly passed and spread upon the minutes of said corporation, and on the same day, to wit, August 16, 1910, said G. M. Kyle assigned, transferred, and delivered said lease to said S. K. D. Oil Company, and said S. K. D. Oil Company thereupon caused to be issued and delivered to said G. M. Kyle 500,000 shares of its capital stock as fully paid, and said G. M. Kyle on said day returned to the treasury of said company 375,000 shares of said stock, to be sold and the proceeds thereof to be applied to the use and benefit of said corporation; the remaining 125,000 shares of said stock *so issued to him* as fully paid was then divided as follows, to wit, to T. Spellacy, 15,625 shares; to G. M. Kyle, 31,420 shares; to J. F. Davies, 31,070 shares; to P. E. Spellacy 15,625 shares; to L. B. Kyle 10 shares; to J. M. Danziger 15,625 shares; to Wilbert Morgrage 15,625 shares, all of which shares *were issued in the respective amounts to said parties respectively*, and since said issuance have stood and now stand on the books of said company in the names of said respective parties, except as to the stock of said Morgrage, as hereinafter in these findings set out. * * *" (Italics ours.)

[17] The defect of the complaint in failing to sufficiently allege that the respondents participated in the original transaction is cured so far as the defendants T. Spellacy, P. E. Spellacy, J. F. Davies, and G. M. Kyle are concerned by the affirmative allegations of their answer. We might also infer that W. H. Davies and Wilbert Morgrage, who each received 15,625 shares, were associates of J. F. Davies, within the meaning of that expression as used in their answer, in the light of the finding that the stock was divided between them and the above-mentioned defendants. Such a conclusion, however, would be a mere inference. There is no allegation in the complaint, no direct admission in the answer, and no express finding holding that W. H. Davies and Wilbert Morgrage participated in the original transaction or received their stock with knowledge thereof. All inferences are to be drawn most strongly in favor of the judgment upon appeal, and for that reason the judgment in their favor must be affirmed. As to the defendants T. Spellacy, G. M. Kyle, J. F. Davies, and P. E. Spellacy the judgment must be reversed.

[18] It remains to consider the case of the respondent Frederick C. Clift. As already stated, he purchased 1,875 shares of stock from defendant Morgrage and caused the transfer to be recorded upon the books of the corporation. There is no allegation in the complaint that he took this stock with knowledge or notice of the original transaction. He alleges in his answer that he purchased the stock on the open market paying therefor the full market price. He does not allege whether he received such stock with or without notice of the original transaction, and there is no finding upon that question. As the complaint fails to state a cause of action against him, the judgment in his favor must be affirmed. Rhode v. Dock-Hop Co., supra.

The judgment of dismissal included all the defendants other than two who had made default, although many of the defendants had not been served and had not appeared in the action. No point, however, was made upon this feature of the judgment, and it need not receive further consideration.

The judgment will be affirmed, except as to the defendants P. E. Spellacy, T. Spellacy, G. M. Kyle, and J. F. Davies; as to the said named defendants the judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

51 Cal. App. 739

TRASK v. GARZA et al. (Civ. 3361.)

(District Court of Appeal, First District, Division 1, California. March 15, 1921.)

1. Appeal and error ⊜907(3)—Assumed on appeal on judgment roll that evidence was ample to sustain finding.

On an appeal upon the judgment roll alone, the appellate court must assume that the evidence was ample to sustain all the findings made by the trial judge.

2. Escrows ⊜14(1)—Complaint held to state cause of action against depositary.

A complaint, alleging that plaintiff deposited a note and money with one defendant to be delivered to other defendants when a lease had been secured and delivered to the depositary for the plaintiff, and that the property deposited was delivered to the other defendants without their having complied with their agreement, and after plaintiff had demanded a return of the deposited property, *held* to state a cause of action in trover, upon which a judgment could be predicated for damages against the defendant; the value of the property appearing by the very description of its kind, and it not being necessary to specifically allege the particular amount of value.

3. Escrows ⊜14(1)—Liability of depositary for damages arising from violation of duty.

One with whom was deposited money and note to be delivered to certain persons upon delivery of a certain lease, etc., was equally liable in damages with the persons to whom he delivered such deposited property, without their having complied with their agreement, being charged as depositary with the duty of obeying

the instructions of the parties as to the delivery of the property deposited with him, a violation of which duty would result in a liability being cast upon him for damages to the person who might suffer injury, and hence depositary was properly joined with defendants in an action for damages for the wrongful conversion of the deposited property.

4. Appeal and error ⟸1170(1)—Misjoinder of parties no ground for reversal, in absence of miscarriage of justice.

If a liability for the amount recovered existed against a defendant, the fact that he may have been improperly joined with other parties as defendant in the action wherein the recovery was secured must be deemed to be without prejudice to any substantial right, and a reversal may not be had, under Const. art. 6, § 4½.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Grover C. Trask against Ramon B. Garza and others. Judgment for plaintiff, and defendants appeal. Affirmed.

E. L. Johnson and Ralph F. Twombly, both of San Diego, for appellants.

J. K. Stickney, of San Diego, for respondent.

JAMES, J. This appeal is taken by the defendants from an adverse judgment, and is presented upon the judgment roll alone.

The points urged as ground for reversal rest upon the ruling of the trial judge in refusing to sustain a demurrer interposed by the defendants to the second amended complaint of the plaintiff. The grounds of that demurrer to be here considered are: (1) That said complaint did not state facts sufficient to constitute a cause of action as against defendants or either of them; (2) that there was a misjoinder, in that appellant Johnson was improperly included as a defendant in the action.

The plaintiff alleged in his complaint that in September, 1919, a written agreement was entered into between plaintiff and the two Garzas, whereby plaintiff agreed to buy, and said defendants agreed to sell, a certain poolhall and business, with the furnishings and fixtures, for the sum of $700. Other terms and conditions were alleged in the complaint to be as follows:

"Plaintiff to execute his promissory note for the sum of $350.00 payable to said defendants Garza, sixty days after date and deliver the same together with $350.00 in cash to the defendant E. L. Johnson; and defendants, Garza, to execute to plaintiff a bill of sale of said business, furnishings, fixtures and equipment and deliver same to the said E. L. Johnson, all of which were to be held by the said E. L. Johnson for a period of time not to exceed 7 days; that within said 7 days defendants Garza were to secure a lease from the owner of the building in which said business, furnishings, fixtures and equipment were located in favor of plaintiff for a period of one year from and after date of said sale, at a monthly rental of $40.00 and deliver same to the said E. L. Johnson; and upon the delivery of said lease to the said E. L. Johnson within the time aforesaid and not otherwise, the said E. L. Johnson to deliver said $350.00 in cash and said promissory note to the said defendants Garza and the said bill of sale and the said lease to plaintiff; and if the said lease was not so delivered to the said E. L. Johnson within the said ten days' time the said E. L. Johnson should redeliver to plaintiff the said promissory note and $350.00 in cash upon demand of plaintiff so to do, and to return said bill of sale to said defendants Garza."

[1-4] Plaintiff further alleged that he executed his promissory note and delivered the same to Johnson, together with $350.00 in cash, upon the express condition that it should not be delivered to the Garzas until the lease referred to in the allegations quoted had been secured and delivered to Johnson for the plaintiff; that Johnson was a practicing attorney, and was fully informed by all the parties of the conditions upon which the note and cash were deposited with him, and that he knew of the agreement and the terms requiring him to dispose of the money and papers in the manner aforesaid. It is then alleged that the Garzas did not, within 10 days, or at all, secure the lease for the plaintiff which they had agreed to furnish. It is further alleged that defendant Johnson, notwithstanding the conditions of the agreement under which the deposit was made with him, and notwithstanding that plaintiff "repeatedly notified" said Johnson not to deliver the note and cash to the defendants, did before the expiration of 10 days deliver the note and money of the plaintiff to defendants Garza, in violation of the agreement and in violation "of his instructions given him by both plaintiff and defendants Garza." Further allegations of the complaint set out that plaintiff had repeatedly demanded of defendants Johnson and Garzas that they return to him his note and money, which demand had at all times been refused. Prayer for judgment was, first, for the sum of $350, with legal interest thereon; second, that the defendants be required to deliver up the promissory note; that the same be canceled and that, if this could not be procured to be done, then that plaintiff have judgment for the sum of $350 with legal interest, and for costs of suit. The court made its findings determining the facts in accordance with the allegations of the complaint, with the additional findings that plaintiff had tendered back to the defendants all the personal property that he had received, and had offered to make accounting for all proceeds of the business during the time he had had possession, and that the defendants Gar-

za had disposed of the promissory note of the plaintiff. The judgment was for the principal sum demanded, with the proviso that, if within ten days defendants should file a bond to indemnify plaintiff against liability upon the promissory note which had been converted by them, then the amount of the judgment should be reduced to the sum of $362.25, which sum represented a recovery of the cash payment made by the plaintiff under his agreement with Garza, together with interest. Having the judgment roll only to look to, we must assume, of course, that the evidence was ample to sustain all the findings made by the trial judge. We think that the complaint stated sufficient facts upon which to predicate a judgment for damages against the defendants. The defendants in effect were charged with having converted the property of the plaintiff in violation of their duty under the contract, and were hence liable for all damages which the plaintiff might sustain, with interest from the date of conversion. The value of the property appears by the very description of its kind; hence it was not necessary to specifically allege the particular amount of value. The complaint set out the conditions under which the deposit was made, alleged a violation of the agreement, and showed that all of the defendants were parties to the act of conversion. Upon these facts plaintiff was entitled to a judgment. We may give brief attention to the claim that the court erred in overruling the demurrer of the defendant Johnson. This demurrer, a special one, stated in effect the contention that the liability of Johnson, if any, was different from that of the other defendants; hence, he could not be made a party to the same cause of action. We think that the liability of Johnson under the facts of this case was precisely the same in amount as the liability of the other defendants. As a depositary he was charged with the duty of obeying the instructions of the parties as to the delivery of the property deposited with him. A violation of this duty would result in a liability being cast upon him for damages to the person who might suffer injury, and the damage in this case was the value of the property converted. Riggs et al. v. Trees, 120 Ind. 402, 22 N. E. 254, 5 L. R. A. 696; 10 R. C. L. par. 16. Were we to concede that the liability of Johnson, because of a violation of his duty as a depositary, is different from that of the other defendants, and that the special demurrer for misjoinder might have been properly sustained by the trial court, the concession is of no avail here. This for the reason that under section 4½ of article 6 of the Constitution it could not be said that the overruling of the demurrer was such an error as had produced a miscarriage of justice. If a liability for the amount recovered existed against the defendant, the fact that he may have been improperly joined with other parties in an action wherein the recovery was secured must be deemed to be without prejudice to any substantial right. This court has had occasion heretofore to suggest that under the section of the Constitution referred to, it would be a rare case indeed which would call for a reversal of a judgment for the sole reason that the trial judge had overruled a demurrer interposed upon some special ground not going to the sufficiency of the cause of action stated.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

51 Cal. App. 747

ERNST v. HALL et al. (Civ. 2223.)

(District Court of Appeal, Third District, California. March 16, 1921.)

1. Adverse possession ⟸114(1)—Evidence held to support finding of adverse occupancy.

In a suit to quiet title, evidence *held* sufficient to support a finding of plaintiff's adverse occupancy of the disputed strip.

2. Adverse possession ⟸89—Payment of taxes unnecessary when title complete before April 1, 1877.

It was unnecessary to prove payment of taxes to establish title by adverse possession where title was complete prior to April 1, 1877, the date the amendment of Code Civ. Proc. § 325, requiring payment of taxes as a necessary element of such title, became effective.

3. Quieting title ⟸49—Judgment quieting title held proper, though action was to determine conflicting claims.

Though an action was one to determine conflicting claims to real property under Code Civ. Proc. § 749, where the complaint embraced every averment required under section 738 to quiet title, the judgment quieting plaintiff's title was not erroneous, though he failed to prove a fact essential to a judgment under section 749.

4. Estoppel ⟸62(4)—May be invoked against municipal corporation in exceptional case.

As a general rule the principle of estoppel in pais will not lie against a municipal corporation, but it may be invoked in exceptional cases where justice and right require it.

5. Estoppel ⟸62(8)—Payment of taxes to city insufficient to create estoppel to claim title by adverse possession.

Where a strip embraced in the west half of a lot was inclosed with the east half which belonged to the city, the mere fact that defendant had for 20 years paid taxes to the city on the west half including such strip was not sufficient to estop the city's grantee from claiming title by adverse possession where he and his grantors had been in the adverse occupancy of the land for more than 50 years.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by A. G. Ernst against R. A. Hall and others. From a judgment for plaintiff, the defendant Elbert R. Tiel appeals. Affirmed.

M. S. Wahrhaftig, of Sacramento, for appellant.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for respondent.

BURROUGHS, Justice pro tem. This is an action to determine conflicting claims to real property under the provisions of section 749, Code of Civil Procedure. The allegations of plaintiff's complaint bring him within the provisions of that section of the Code and also embrace every averment required under section 738 of the Code of Civil Procedure to quiet title to real property.

The property described in the complaint is the east half of lot No. 2 and a strip of land contiguous thereto in lot No. 3, all of said land being in the block bounded by Ninth and Tenth and O and P streets, in the city of Sacramento, and designated by counsel as "the colored school lot."

All of the defendants, with the exception of defendant Tiel, either filed disclaimers or suffered their defaults to be entered. Defendant Tiel answered, denying plaintiff's ownership of the land described as a portion of lot No. 3, alleged title thereto in himself, and asked that the same be quieted.

The court found that the plaintiff is now, and that he and his predecessors in interest have been, in the actual, exclusive, and adverse possession of the land in controversy continuously for 50 years prior to the filing of the complaint. The date of the filing of the original complaint does not appear in the record, but the amended complaint, upon which the cause was tried, was filed January 4, 1917.

The court entered its judgment quieting plaintiff's title to all of the lands described in the complaint, and defendant Tiel has appealed from the judgment.

Appellant contends that the evidence is insufficient to support the finding of the court that plaintiff had been in the adverse occupancy of that portion of the premises within the school inclosure and described as a part of lot No. 3.

[1, 2] The undisputed testimony of all the witnesses establishes the fact that the lot described in the complaint, together with the building thereon, had been used as a school for colored children, since at least as early as the year 1877, and that the fences on the exterior boundary thereof were in the same place at the time of the trial as they were in 1877, and that in 1877 they had the appearance of being at least 10 or 12 years old. One witness, R. T. Carrington, testified that he had lived in Sacramento continuously since 1871 or 1872, that the location of the fences had never been changed, and that he was almost sure that the fences were there in 1871 or 1872. This uncontradicted evidence was sufficient to support the finding complained of. It was unnecessary to prove payment of taxes to establish title by adverse possession, as respondent's title was complete prior to April 1, 1877, the date the amendment of section 325, Code of Civil Procedure, requiring payment of taxes as a necessary element of such title, became effective.

[3] Appellant further contends that, the action having been brought under the provisions of section 749, Code of Civil Procedure, plaintiff was not entitled to relief, except upon strict proof in accordance therewith; that, having failed to prove payment of taxes, as provided in said section, he was not entitled to a judgment quieting title under the general provisions of the law relating to actions of that character.

In support of this proposition he cites Mondran v. Goux, 51 Cal. 151, Bryan v. Tormey, 84 Cal. 126, 24 Pac. 319, and Shenandoah M. & M. Co. v. Morgan, 106 Cal. 417, 39 Pac. 802. An examination of these cases shows that in each instance the findings of the trial court were without the issues raised by the pleadings, and not, as in the case at bar, findings upon issues presented by the pleadings. The point has been decided contrary to appellant's contention in Faxon v. All Persons, 166 Cal. 107, 137 Pac. 919, L. R. A. 1916B, 1209. That action was brought under the McEnerney Act. Stats. 1906 (Ex. Sess.) p. 80. The defendant answered the complaint and submitted his claim to the property to the jurisdiction of the court for adjudication. Plaintiff's proof failed to bring him within the scope of said act, but notwithstanding, upon the allegations of the complaint and answer, and the proof adduced, the court rendered judgment quieting plaintiff's title to the land in controversy. The defendant appealed, presenting the same question now raised by this appellant. In disposing of this branch of the appeal it was held that, as between the plaintiff and the appealing defendant, by reason of the issues raised by their pleadings, the action was in substance and effect one to quiet title to real property and the judgment was affirmed.

The rule promulgated in that case is to be applied with equal force to the case at bar. The issue of title was raised by the pleadings of the parties, and was therefore properly before the court for determination.

[4, 5] It is the final contention of appellant that, as the city of Sacramento levied and collected taxes on the property, the respondent, as the successor in interest of said city, is estopped to claim title thereto.

It appears from the record that for 20 years prior to the commencement of this action the west half of lot No. 3 which in-

cludes the strip of land in controversy, had been assessed to appellant, and the taxes had been paid by him.

It is a general rule that the principle of estoppel in pais will not lie against a municipal corporation, but that it may be invoked in exceptional cases where justice and right require it. The case of the City of Los Angeles v. Cohn, 101 Cal. 373, 35 Pac. 1002, upholds this rule. It is there held in substance that possession of land for 40 years, the erection of valuable buildings thereon after the city, through its city council, had found that the city had no claim or title to the property, and that a judgment in its favor would result in a destruction of the defendant's buildings, constituted a case within the exception to the general rule that estoppel in pais will not lie against a municipality, and, commenting on this doctrine, the Supreme Court says:

"The question being a new one in this state, and a most important one, we will content ourselves with an application of it to the facts of the present case, and not attempt to promulgate any general rule by which every case invoking the doctrine may be weighed and measured. If we concede the existence of the principle of estoppel in pais against the public in certain exceptional cases, then this case is rightly decided."

The judgment was affirmed.

In Ruling Case Law, vol. 10, p. 712, it is said that the wrongful or erroneous collection of a tax on public property does not estop a municipal corporation from asserting its legal title thereto.

In the instant case payment of taxes is the only circumstance relied upon by appellant to take the case out of the general rule. Standing alone, this fact is insufficient to justify such holding, especially when it appears that plaintiff and his grantors have been in the adverse occupancy of this land for more than 50 years.

We find no error in the record.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

51 Cal. App. 718

MILLAR v. MILLAR et al. (Civ. 2220.)

(District Court of Appeal, Third District, California. March 14, 1921. Hearing Denied by Supreme Court May 12, 1921.)

1. Set-off and counterclaim ⊜10—Allowance involves practically consolidation of independent actions.

The purpose of allowing a cross-complaint is to avoid a multiplicity of suits, and for all practical purposes the situation involves a consolidation of two independent actions, arising out of or related to the same transaction.

2. Marriage ⊜62—Wife entitled to execution for alimony where husband in action for maintenance filed cross-complaint for annulment of marriage.

Where, in a wife's action for maintenance without divorce, the husband filed a cross-complaint to annul the marriage for fraud, the wife is entitled to an execution on an order allowing alimony pendente lite, notwithstanding Civ. Code, § 137, providing for execution in the discretion of the court in a suit for maintenance.

3. Appeal and error ⊜77(1)—Order allowing alimony in action for maintenance appealable as "final judgment."

An order, allowing alimony pendente lite in an action for maintenance, is appealable under Code Civ. Proc. § 963, subd. 1, authorizing appeals from final judgments in actions or special proceedings, as a "final judgment" is one completely adjudicating the rights of the parties submitted to the court for determination, and the order is really a separate judgment in an intermediate proceeding, and its appealability is not affected by Civ. Code, § 137, making the issuance of execution discretionary with the court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

4. Appeal and error ⊜467—Undertaking on appeal from order allowing alimony in suit for maintenance not without consideration.

Under Code Civ. Proc. § 942, providing for an undertaking to stay execution on appeal from a judgment or order for the payment of money, and section 946, providing that an appeal, perfected as provided in the preceding sections, stays further proceedings, an undertaking on an appeal from an order allowing alimony pendente lite in a suit for maintenance stayed execution, and was not without consideration, though, under Civ. Code, § 137, the issuance of execution was in the court's discretion, and there was no application therefor as the undertaking deprived the court of discretion to order its issuance.

5. Executors and administrators ⊜224—Judgment need not be presented when filed with the clerk.

Under Code Civ. Proc. § 1505, providing that where judgment is obtained in defendant's lifetime no execution shall issue after his death, except as otherwise provided, and section 1502, providing that, if an action is pending the claim must be filed with the clerk or presented to the executor or administrator, where a judgment for alimony from which an appeal was pending was filed with the clerk, it was not necessary to present it.

6. Executors and administrators ⊜224—Claim for alimony in pending action need not be presented; "Arising upon contract."

Code Civ. Proc. § 1502, providing that if an action is pending against a decedent at the time of his death the claim must be filed with the clerk or presented to the executor or administrator for allowance or rejection, applies only to claims requiring presentation if no action were pending, and has no application to an

allowance for suit money or temporary alimony in a pending suit; it not being a "claim arising upon contract" required to be presented by section 1493.

7. Appeal and error ⊂⊃1240—Sureties on undertaking to stay execution cannot require presentation of claim to principal's executor.

Where an undertaking to stay execution on an appeal from a judgment for alimony pendente lite was conditioned as required by Code Civ. Proc. § 942, for payment of the judgment if the appeal was dismissed, and the appeal was dismissed, their liability was fixed, and they could not inject into the undertaking a condition not expressed that the obligee should make an effort to collect the judgment by presenting it to the principal's executor.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Katherine A. Millar against James Millar, in which Robert F. Millar and another, as executor and executrix of the original defendant, were substituted as defendants. From a judgment against the sureties on an undertaking for payment of alimony to plaintiff, Agnes H. Etzel, as administratrix of Joseph Etzel, deceased, and Forest Lee Atkinson appeal. Affirmed.

A. E. Bolton, of San Francisco, for appellants.

Metson, Drew & Mackenzie, R. G. Hudson, and Garret W. McEnerney, all of San Francisco, for respondent.

BURNETT, J. Two appeals involving the same subject-matter have been submitted together upon one set of briefs, and they will be considered in one opinion. In one, Joseph Etzel and Forest Lee Atkinson, sureties on an undertaking to stay execution of an order for alimony pendente lite appealed from a judgment rendered against them in favor of Katherine A. Millar on said undertaking on September 23, 1918. The other is by said Katherine A. Millar from an order of the superior court of November 20, 1918, vacating and setting aside said judgment.

The original action was brought by a wife against her husband to obtain maintenance without divorce. The husband filed an answer and also cross-complaint, in which latter pleading he sought to annul the marriage upon the ground of fraud. After the cause was at issue upon said cross-complaint the plaintiff moved for alimony pendente lite. The motion was granted, and from the order the husband took an appeal and gave the undertaking in question. While this appeal was pending, the case was tried upon its merits, and the marriage annulled upon the ground set forth in the cross-complaint. The wife appealed from this decree, but it was affirmed by the Supreme Court in Millar v. Millar, 175 Cal. 797, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184. The defendant died after said order for alimony was made, and after said judgment was rendered in the superior court. His executors were substituted, and they prosecuted an appeal from the order granting alimony pendente lite. This appeal was thereafter dismissed by the Supreme Court in the following order:

"It appearing that defendant, James Millar, is dead, and that his executors have been substituted in his stead by order in the superior court, it is ordered that said executors be substituted as defendant herein. Motion to dismiss granted, and appeal ordered dismissed."

More than 30 days after the filing in the superior court of the remittitur thereon, the plaintiff moved for judgment against the sureties, which was granted. During the pendency of the two appeals herein, Joseph Etzel, one of the sureties, died, and by order of this court his administratrix has been substituted in his place and stead.

It does not appear upon what grounds the order setting aside said judgment was made, but the contentions of the sureties in support of said order and in opposition to said judgment may be summarized as follows: (1) The order for alimony was not appealable, and the undertaking given to stay the execution of said order was therefore without consideration, and no liability was or could be incurred on said undertaking. (2) The action in which the judgment against the sureties was recovered abated by reason of the failure of Mrs. Millar to present a claim against the estate of her husband, and hence it was improper to render judgment against said sureties.

As to the first point, they assert:

"There must be at the time the undertaking is given an appealable order and one upon which execution has been issued, or can be issued, as a ministerial act by the clerk of the court."

It is claimed that the order herein was not enforceable because the court had made no order directing the issuance of execution. This position is grounded upon the peculiar language of section 137 of the Civil Code in reference to a suit for maintenance. Therein it is provided that—

"During the pendency of such action the court may, in its discretion, require the husband to pay as alimony any money necessary for the prosecution of the action and for support and maintenance, and execution may issue therefor in the discretion of the court."

The first answer of plaintiff to this contention is that—

"The defendant's cross-complaint transformed the action into one for annulment of marriage and gave to the plaintiff whatever rights in respect of temporary alimony she would have had in 'an independent suit for annulment.'"

Since, therefore, it is not disputed that, in such action for annulment, execution would issue as of course upon an order for alimony, and application for said order was made after issue joined in said cross-complaint, it is urged by plaintiff that the case is not one for the application of said section 137. The force of the argument depends manifestly upon the effect of the cross-complaint. In section 808 of Pomeroy's Remedies and Remedial Rights it is said:

"The only real difference between a complaint and a cross-complaint is that the first is filed by the plaintiff, and the second by the defendant. Both contain a statement of the facts, and each demands affirmative relief upon the facts stated. In the making up of the issues and the trial of questions of fact, the court is governed by the same principles of law and rules of practice in the one case as in the other. When a defendant files a cross-complaint, and seeks affirmative relief, he becomes a plaintiff, and the plaintiff in the original action becomes the defendant in the cross-complaint."

It is accordingly held that a cross-complaint must contain every allegation which would be essential to an original complaint upon the same cause of action. Coulthurst v. Coulthurst, 58 Cal. 239.

In fact, where the complaint sets forth an action in law and the cross-complaint contains a cause of action which is of equitable cognizance, it is the duty of the court to determine first the issues involved under the cross-complaint. Whittier v. Stege, 61 Cal. 238; Fish v. Benson, 71 Cal. 428, 12 Pac. 454.

[1] Undoubtedly the purpose of allowing a cross-complaint is to avoid a multiplicity of suits and thereby save vexation and expense; and for all practical purposes, as claimed by plaintiff, the situation involves a consolidation of two independent actions arising out of, or related to, the same transaction.

[2] At any rate, in view of the cross-complaint herein it cannot be said that the action is wholly for maintenance, but it involves also the annulment of said marriage. Assuredly, then, the plaintiff would be entitled to an execution for the allowance, which may as well be referred to the cross-complaint as to the complaint in the action.

We find nothing in the opinion of the Supreme Court in Lowe v. Superior Court, 165 Cal. 708, 134 Pac. 190, inconsistent with the generally accepted views as to the nature of a cross-complaint. The gist of that decision may be seen from this quotation taken from the syllabus:

"The filing of a cross-complaint, although for some purposes treated as the commencement of a new action, is a proceeding in the action commenced by the filing of the plaintiff's complaint which is expressly authorized by statute, the design of the statute being to enable all matters in dispute between the parties 'relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates,' to be determined in a single action, and by a single judgment which shall give to a defendant seeking it such affirmative relief as he is entitled to."

Since it was held to be a proceeding in the action which was instituted by the filing of the complaint, the cross-complaint was deemed pending from the beginning to the extent of applying the provision of the statute:

"Provided always that no action pending against any corporation shall abate thereby [the forfeiture of its charter], but may be prosecuted to final judgment, the same may be enforced by execution with the same force and effect and in like manner as though no forfeiture had occurred."

In this connection plaintiff cites two decisions from other jurisdictions that are very much in point: Slocum v. Slocum, 86 Ark. 461, 111 S. W. 806, and Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883.

In the former the wife filed an unverified complaint for divorce, and the husband filed an answer and cross-complaint. She thereupon made application for alimony pendente lite. The rule in that state is that a plaintiff wife cannot obtain such relief except upon sworn evidence, but a defendant wife is not required to make such showing. The trial court treated the cross-complaint for the purposes of the plaintiff's application as though it were an independent action in which the wife was a defendant, and allowed her temporary alimony, including costs and counsel fees. The Supreme Court upheld the ruling, saying in the course of the opinion:

"It is recognized and permissible practice for the defendant to file a cross-bill and ask independent relief in divorce suits. When he does so, his suit is as separate and distinct from that of his wife as if the wife had brought no suit, and the finding of the court should be upon each separately."

In Willits v. Willits the wife sued for maintenance. Her husband filed an answer and also a cross-complaint for annulment. Suit money was allowed to the wife, although the court annulled the marriage on the cross-complaint. The husband appealed from the order of allowance, claiming that it was unauthorized because it was made in an action for maintenance. In affirming the order the Supreme Court said:

"So far as the suit money is concerned, the defendant takes the position that because the wife's suit was not brought for a divorce, but merely for maintenance, she is not entitled to suit money. Whatever the rule may be with regard to an allowance for suit money in an action brought merely for maintenance, it is well settled that in an action by the husband to annul the marriage, the wife is entitled to alimony pendente lite and counsel fees, and

the fact that the defendant proceeds by cross-petition, instead of an original suit, does not change the rule."

[3] Moreover, if we disregard the cross-complaint and treat the case as involving an order for alimony in an action solely for maintenance, the order is nevertheless final and appealable. In other words, its appealability does not depend upon its enforceability by execution. There is no doubt that, while we usually refer to such allowance as an order, it is really a separate judgment in an intermediate proceeding, and as such is appealable by virtue of subdivision 1 of section 963 of the Code of Civil Procedure. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709. The authorities hold that a final judgment is one that completely adjudicates the rights of the parties submitted to the court for determination. Herein the question was whether the plaintiff was entitled to any allowance for "alimony," so called. The application was regularly heard, and upon the evidence submitted the court determined that she was entitled to an allowance, and adjudged the amount thereof. The fact that an order of the court might be required to have an execution issue does not affect the finality of the judgment itself any more than if an order were made to stay the execution. The judgment and the execution of the judgment are two separate and distinct considerations. Necessarily, the finality of a judgment precedes and does not follow its enforceability.

In Blake v. Blake, 80 Ill. 523, the plaintiff, upon the ground that the execution of the order was not demandable as of course, but only in the discretion of the court, moved to dismiss the appeal from an order allowing temporary alimony in a suit for divorce. But the court held that such circumstance did not affect the finality or appealability of said order, as this depended, not upon whether it was presently enforceable, but whether the court had the power to award an execution to enforce it.

In Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696, is found an interesting discussion of the difference between an interlocutory and a final judgment, and it is held that a judgment is final if it determines the rights of the parties and nothing remains but to carry it into effect, although some action may be required of the court to enforce the judgment.

Many other authorities are cited by plaintiff to the same effect, but there can be no necessity for noticing them specifically. To show that this quality of the judgment does not depend upon its present enforceability she suggests this apt illustration: Suppose in a suit for divorce an order for alimony is made payable in 65 days after the making of the order. Of course, an execution could not issue until the money became due. But an appeal from said order would have to be taken within 60 days after it was made. No one would contend that the provision of the order extending the time for payment would toll the period for taking an appeal. If an appeal were not taken at least 5 days before the money was due, in other words, before an execution could issue, the appeal could be dismissed.

Upon this particular question that an order staying execution does not affect the appealability of the judgment, plaintiff cites Vickers v. Tyndall, 168 Ill. 616, 48 N. E. 214; Hamill v. Bank of Clear Creek County, 7 Colo. App. 472, 43 Pac. 903; Meredith v. Peterson, 108 Iowa, 551, 79 N. W. 351; State v. Downing, 40 Or. 309, 58 Pac. 863, 66 Pac. 917; Gaston v. Boyd, 52 Tex. 282; Arnold v. Sinclair, 11 Mont. 556, 29 Pac. 340, 28 Am. St. Rep. 489; Winthrop Iron Co. v. Meeker, 109 U. S. 180, 3 Sup. Ct. 111, 27 L. Ed. 898.

[4] But as we understand the position of the sureties, they attach more importance to the contention that since an order of the court was required to make the execution issuable, it cannot be said that their undertaking operated to stay the execution, and therefore said undertaking was without consideration and void. In opposition to this, plaintiff contends, and cites authorities in support of the contention, that "but for the filing of the surety's undertaking to stay execution a writ of execution to enforce the order for alimony would have issued as of course and without any express direction for its issuance." Plaintiff's view is that the judgment is itself a judicial declaration that she was entitled to the money, and that the provision of the statute reserving to the court a discretion as to withholding the issuance of the execution requires the court, by an express provision to that effect in the order or judgment itself, to prohibit or stay its issuance for a definite or indefinite time, or else the execution will issue as of right.

But be that as it may, we are entirely satisfied that the undertaking was effective to stay the execution and therefore the consideration was supplied. It deprived the court of any discretion to order its issuance as it also prevented the clerk from performing the ministerial act that would ordinarily follow such order. If, not withstanding such undertaking, plaintiff had applied to the court for the order, can it be doubted that the undertaking could have been successfully urged as a bar to the proceeding?

The case is one that falls clearly within the provisions of sections 942 and 946 of the Code of Civil Procedure. The appeal is from "a judgment or order directing the payment of money." The undertaking bound the sureties "in double the amount named in the judgment or order" to pay the amount if said judgment or order should be affirmed or "the appeal be dismissed." The undertaking, therefore, as declared in the latter

section, stayed "all further proceedings in the court below upon the judgment or order appealed from." The section is too plain for controversy. However, a case in point is McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020, wherein it is said:

"The stay of proceedings on the alimony order, thus effected, operated as a supersedeas, and during its operation deprived the superior court of all power to enforce the order appealed from, either by execution or by proceedings for contempt, or through the appointment of a receiver."

Furthermore the court said:

"If the order appointing the receiver in this case was an act in furtherance of the enforcement of the alimony order which was stayed by the appeal, it was prohibited by the statute, which in such cases forbids further proceedings upon the order appealed from and matters embraced therein (Code Civ. Proc., § 946), and it was, in a certain sense, in excess of the jurisdiction of the court."

An application in the instant case for an order for the issuance of execution would assuredly be "in furtherance of the enforcement" of the judgment, and is certainly prohibited by said statute.

Nor can it be assumed that if the undertaking had not been given, the court would not have made such order. The presumption is to the contrary. It is not to be supposed that the court would make an allowance and then decline to do whatever might be necessary to carry such order into effect. At any rate, the undertaking prevented the plaintiff from taking any steps towards securing the fruits of the judgment, and it does not lie in the mouth of the sureties to say that, if the undertaking had not been given, an execution might not have issued. The probability that it would issue, and the certainty that any such probability was forestalled by reason of said undertaking furnished sufficient basis for the obligation of the judgment debtors. The contention of the sureties seems to resolve itself to this: We have given an undertaking and have thereby tied the hands of the court and its ministerial officer in relation to the execution, but since plaintiff did not apply for a "preliminary" order, which the court would be powerless to grant, we deny the plaintiff's right to claim that the execution was stayed. We do not understand that plaintiff was required to do such a vain and useless thing in order to urge successfully the validity of the bond.

The second contention of the sureties is based upon the provision of section 1502 of the Code of Civil Procedure, as follows:

"If an action is pending against the decedent at the time of his death, the plaintiff must in like manner file his claim with the clerk, or present it to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of such filing or presentation."

Millar died, as we have seen, after the trial of the action and before the appeal was heard in the Supreme Court. It is admitted that this claim for alimony was not presented as required by said section 1502. Hence the assertion of the sureties that the action abated and no further proceedings could be taken for the purpose of enforcing said claim. The position is, if we understand it, that the judgment for alimony was suspended, was virtually rendered of no force and effect until the claim therefor was so presented, and that only by such presentation could the judgment be revived. They insist that this does not involve the release of one only of several obligors, as was the case in Bank of Stockton v. Howland, 42 Cal. 129, which concerned the joint makers of a promissory note, wherein a claim was not presented to the administrator of one who had died, but it affects, so they claim, an essential condition of the liability of the sureties on their bond. In other words, the liability of the sureties depended upon the liability of Millar, that the suspension of his liability would likewise produce a suspension of theirs, and that while this condition existed no legal proceeding could be taken to enforce the liability of the sureties.

[5] In the first place, although the statute provides (section 1049, Code Civ. Proc.) that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied," it is at least doubtful whether the term "pending" is thus used in said section 1502. It would seem quite reasonable to hold that it is limited to the period of time after the filing of the complaint and prior to the rendition of judgment in the trial court. No particular reason appears why a claim that has become merged into a judgment should be thus presented. Of course, a judgment of the superior court is entitled to full faith and credit until reversed or modified on appeal. Indeed, the particular statute applicable to the situation herein is found in section 1505 of the same Code. Therein it is provided that where a judgment is obtained in his lifetime, no execution shall issue thereon after his death "except as provided in section six hundred eighty-six." As to a judgment for the recovery of money—which was this case—it "must be filed with the clerk or presented to the executor or administrator, like any other claim." Said judgment was filed with the clerk, and hence it was not necessary "to present it to the executor or administrator." As stated before, it would constitute a recognized claim against the estate, to be paid as other claims, subject, of course, to any adverse ruling upon appeal.

In the matter of the Estate of Brennan, 65 Cal. 517, 4 Pac. 561, the party against whom a judgment was rendered died after moving for a new trial but before the motion was heard. The judgment was modified on the hearing of the motion, and the Supreme Court held that said section 1505 of the Code of Civil Procedure did not require the presentation of the judgment. It was considered sufficient that the executrix had been made a party to the action and had fully represented the estate.

[6] Moreover, the claim herein involved was not such as the statute requires to be presented to the administrator or executor. Said section 1502 must be read in connection with section 1493 of the Code of Civil Procedure. In Hibernia, etc., Soc. v. Wackenreuder, 99 Cal. 503, 34 Pac. 219, it is said that section 1502 "simply means that when an action is pending against a decedent at the time of his death, the plaintiff therein is not relieved from the duty of presenting for allowance the claim upon which it is based, when this claim is of that character that he would have been required to make such presentation in order to preserve its validity as a claim against the estate if such action had not been brought in the lifetime of the decedent." And in the same decision it is held that we must look to said section 1493 to determine the character of claims that must be thus presented. Such claims are those "arising upon contracts." It cannot be said in any just sense that an allowance for suit money or for temporary alimony involves a claim "arising upon contract." It is a matter entirely of statutory regulation, and is not affected by any agreement of the parties.

In Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, it is said:

"Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife."

Many decisions to the same effect from state jurisdictions are therein cited.

In the subsequent decision, in Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211, the foregoing case was quoted with approval, and the court held that alimony paid to a divorced wife was not subject to an income tax.

[7] Again, the sureties bound themselves, as we have seen, to pay the judgment "if the appeal be dismissed." The appeal was dismissed, and therefore the very condition happened which was to fix irrevocably their liability. It was not a condition of their obligation that plaintiff should make any effort to collect the judgment from Mr. Millar. He was not a party to the undertaking and defendants cannot inject into said instrument some condition that is not expressed therein. While they cannot be bound by anything not found in said undertaking, they must stand upon its terms. This, of course, is elementary. It follows necessarily that plaintiff was not required to take any steps towards the enforcement of the judgment against Millar. It was to the interest of the sureties to have it so enforced, but it was a matter of indifference to plaintiff as far as this action is concerned. Plaintiff might elect to rely entirely upon the responsibility of the sureties, and do nothing toward presenting any claim to the executor or administrator, if we assume that such presentation was necessary to keep the claim alive against the estate.

To restate the situation: The undertaking was given in consideration of the stay of execution. It was effectual for that purpose. The sureties promised in consideration thereof that they would pay the judgment if the appeal was dismissed. The appeal was dismissed, and thereby their obligation became absolute. Plaintiff might have brought an action directly against the sureties, but the statute provides (section 942, supra) an alternative remedy, which was adopted by the plaintiff. Indeed, in their undertaking, defendants expressly agreed that:

"If the appellant does not make such payment within thirty days after the filing of the remittitur of the Supreme Court in the court from which the appeal is taken, judgment may be entered in said action, on motion of the respondent, against the undersigned sureties for the whole amount which may be then due pursuant to the terms of said order."

The remittitur was so filed; plaintiff waited more than 30 days, no part of the amount due under said judgment was paid, and, upon motion, judgment was entered against the sureties for said amount. No valid defense was offered to said motion, and the facts were undisputed. Of course, if the sureties had shown that they were misled by the conduct of plaintiff, or that the obligation was extinguished, a different question would be presented, but that plaintiff may or may not have endeavored to secure payment from the estate of Millar is a matter of no consequence as far as this case is concerned.

We do not understand the sureties to claim that the judgment for alimony was rendered inoperative by reason of the judgment in the main action nullifying the marriage, although there may be an intimation to that effect in their brief. At any rate, as it is not urged, for the reason, no doubt, that it does not possess merit, we need not consider it.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

51 Cal. App. 792

MILLAR v. MILLAR et al. (Civ. 2221.)

(District Court of Appeal, Third District, California. March 14, 1921. Hearing Denied by Supreme Court May 12, 1921.)

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Katherine A. Millar against James Millar, in which Robert F. Millar and another, as executor and executrix of the original defendants, were substituted as defendants. From an order setting aside a judgment on an undertaking against Agnes H. Etzel, as administratrix of Joseph Etzel, deceased, and another, plaintiff appeals. Reversed.

Metson, Drew & Mackenzie, R. G. Hudson, and Garret W. McEnerney, all of San Francisco, for appellant.

A. E. Bolton, of San Francisco, for respondents.

BURNETT, J. This is the appeal from the order setting aside the judgment against the sureties, and for the reasons stated in the opinion in No. 2220, 197 Pac. 811, filed herewith, the said order is reversed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

53 Cal. App. 298

SCHAEFER v. SCHAEFER. (Civ. 3731.)

(District Court of Appeal, First District, Division 1, California. April 18, 1921.)

Marriage ⊂=65—Court held to have abused discretion in setting aside default judgment of annulment.

In divorce case where defendant husband allowed the court to enter a default and judgment of annulment of marriage upon ground that plaintiff had former husband living, on affidavit by the defendant that plaintiff agreed that if defendant would not contest her action she would obtain an annulment of her former marriage and immediately remarry him, that it was due to such promises he permitted the default to be entered, and that after the hearing he was surprised to find that plaintiff had testified in court that he had forced her into marriage with him through fear and intimidation, *held*, that court abused its discretion in setting aside the default; the testimony of plaintiff objected to being upon a matter collateral to the real issue of the case.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Luelle Marie Schaefer against Arthur Herman Schaefer. From an order granting a motion to vacate the default and judgment, plaintiff appeals. Reversed.

Reisner & Honey, of San Francisco, for appellant.

Cleveland R. Wright, of San Francisco, for respondent.

WASTE, P. J. The plaintiff brought this action to have the marriage between herself

and defendant annulled. Summons and a copy of the complaint were served upon the defendant, who obtained an order from the court granting him 10 days within which to appear, demur, or answer. While this order was in force, defendant and his counsel each signed a stipulation which was filed, withdrawing the extension. Thereupon the court entered the default of the defendant, and proceeded with the hearing. After taking the testimony of the plaintiff and considering certain documentary evidence, it entered its decree of annulment upon the ground that at the time of the marriage with defendant, plaintiff had a former husband living, the marriage with whom was then in force. Four days later the defendant gave notice of motion to vacate the default and judgment upon the ground of "mistake, inadvertence, surprise, and excusable neglect." The motion was granted, and from that order the plaintiff appealed.

The defendant's affidavit fails to show any such mistake, inadvertence, surprise, or excusable neglect as would justify the court in granting the motion. The facts therein stated are that after service of summons upon defendant the plaintiff admitted to him that she was already married to one Northrup, from whom she had not obtained a divorce at the time of her marriage to him; that if defendant would not contest her action she would obtain a decree of divorce, or annulment of her former marriage, and immediately remarry defendant; that due to such promises he withdrew the extension of time which he had obtained, and permitted his default to be entered; that after the hearing he was surprised to read in the daily newspapers that plaintiff had testified in court that he had forced her into marriage with him through fear and intimidation; that if he had known plaintiff intended to accuse him of having forced her to marry him, he would have contested the annulment proceedings.

Plaintiff filed no counter affidavit. The fact remains, however, that she only sought to have her marriage annulled upon the ground alleged in her complaint, which, when established, rendered her marriage with respondent utterly void.

From the evidence taken by the trial court in the annulment action it appeared without contradiction that the plaintiff and Northrup were formerly married and that they had not been divorced or the marriage annulled at the time of the marriage of the plaintiff to defendant. The defendant, in his affidavit, did not attempt to contradict that testimony, or to show that it was not true. Neither did he in his affidavit deny the testimony of the plaintiff, partially elicited on cross-examination by the court, that at the time he was seeking to induce plaintiff to marry him he exhibited a bottle of acid and also a pistol, and threatened to disfigure her and to kill himself.

We think in this instance the trial court abused the wide discretion vested in it in passing upon motions to set aside default judgments. The respondent had no defense on its merits to the action, or if he had he failed to establish it. The fact that the appellant gave testimony upon a matter collateral to the real issue of the case, which may have been unsatisfactory to the respondent, creates no ground for invoking the legal discretion of the court to set aside the judgment.

The order is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

(185 Cal. 582)

ZEIMER v. WEIKEL. (Sac. 3131.)

(Supreme Court of California. April 25, 1921.)

Landlord and tenant ⇐156—Landlord not liable to tenant for failure to collect insurance on improvements.

Where insurance was taken in the name of the property owner for the value of improvements by the tenant under an agreement that such insurance should be for the benefit of the tenant who took possession of the policy, the property owner is not bound after loss occurred to take steps necessary to collect the insurance, at least until the tenant delivered the policy to him with request that he make proof of loss.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Albert Zeimer against J. B. Weikel. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. S. Butler and B. F. Van Dyke, both of Sacramento, for appellant.

Martin I. Welsh and Robert H. Schwab, both of Sacramento, for respondent.

OLNEY, J. This is an appeal by the defendant from a judgment against him for $400. It appears that the defendant was the owner, and the plaintiff the lessee, of a certain building; that the plaintiff made certain improvements to the building of the value of $400; that to protect his interest in these improvements it was agreed that insurance on the building in the amount of $400 would be taken out in the name of the defendant, but for the benefit of the plaintiff; that this was done; that the building was burned and the loss incurred, but the insurance policy was not collected, and that prior to the commencement of the action all right to recover upon it had been lost by failure to present proofs of loss within the required time. The foregoing facts appear without dispute. The dispute is over the nature of the agreement with relation to the taking out of the insurance, the plaintiff claiming that the agreement was that the defendant should collect the insurance in case of loss, so that he is responsible for its not being collected, and the defendant claiming that the agreement was only that the plaintiff might take out the insurance in the defendant's name without any responsibility on the defendant for its collection.

The agreement in question was made upon the advice of an insurance agent, a Mr. Deason, that the insurance, while intended for the protection of the plaintiff, would have to be in the name of the defendant, as he was the owner of the building. The agreement was purely oral at first, but after the policy

had been issued in the name of the defendant the plaintiff wished something to evidence his right under it, and the defendant signed and gave him a writing for that purpose. The defendant complains that evidence of the terms of the oral agreement was admitted when there was a subsequent written agreement, but the point is not material, since so far as the question involved here is concerned there is no difference between the terms of the oral agreement and those of the writing. The plaintiff's testimony as to the original oral agreement is:

"Yes, we (plaintiff and defendant) talked about insurance with Mr. Deason, who represented Mr. Weikel (the defendant), and he said the only way for me to do would be to take the insurance—the insurance amounted to $400—for me to take out a policy and pay him for it; he would put it in Mr. Weikel's name; Mr. Weikel said it was satisfactory to him."

The writing subsequently signed by the defendant and given to the plaintiff read:

"Sacramento, Cal., Oct. 31, 1916.

"It is hereby agreed and understood by and between the parties hereto that the Prussian National Insurance Policy No. 663572, issued July 31, 1916, in the name of J. B. Weikel, was issued in the behalf of, and cost to A. Zeimer, to protect the said A. Zeimer, in the event of a fire, to the amount thereof ($400) for money spent by him, at his own expense, in the improvements of the building so covered.

"[Signed] J. B. Weikel."

The policy referred to in this writing expired in July, 1917, a year after its issuance, and thereupon another policy for the same amount and for the ensuing year was issued through Deason at the request of the plaintiff and in the name of the defendant. While this second policy was in effect the loss occurred. We may assume that this policy, as well as the first, came within the agreement between the parties; but the facts are that the defendant had nothing to do with its issuance, that its issuance was a matter of arrangement between Deason and the plaintiff solely, that it was delivered to the plaintiff, who retained possession of it at all times, and that the defendant, so far as appears, did not know of its issuance until the morning after the fire, and never before or after had possession of it. The morning after the fire there was a meeting of the plaintiff, the defendant, and the sheriff. The last inquired as to the amount of insurance on the building, and the plaintiff told him the defendant had $1,000 and he (the plaintiff) had $400, and showed the policy for the latter. The defendant acquiesced in the statement that the $400 was for the plaintiff. The plaintiff, however, did not then or at any time give or offer to give the policy to the defendant, and he himself testifies that he never presented it to the defendant for collection. He does testify that shortly after the fire he asked the defendant about the $400 of insurance and the defendant replied that he did not care a snap about it. But even then the plaintiff took no steps either to collect the policy himself or to insist upon the defendant collecting it for him. So far as appears, he simply kept the policy and did nothing until the time had passed for presenting proofs of loss. Then he demanded of the defendant the $400.

Now, it is evident that neither by the terms of the oral agrement, nor by those of the writing, was there any express assumption by the defendant of an obligation to collect the policy in case of loss or of responsibility for its collection. If the plaintiff be entitled to recover, it must be because there was an obligation to collect on the policy implied in the defendant's assent that it might be taken out in his name. The written notice of loss and the verified proof of loss required by the policy would, of necessity, have to be given and made in his name, and it would seem that the obligation would be fairly implied that he should sign any proper notice and verify any proper proof of loss that might be prepared and presented to him by the plaintiff. It may possibly be, also, although this would be going much further, that if the defendant was in a position where he could take the routine steps required for collection, such as giving notice and preparing proofs of loss, he should himself affirmatively have taken these steps. But he was not in a position to take these steps unless he had the policy, and when the situation was that the policy was not in his possession, but that of the plaintiff, it was certainly a condition of any obligation on his part to do the things necessary to collect the policy, that the plaintiff put it in his hands for that purpose. Until this was done and the defendant was thereby put in a position where he could proceed, he could not justly be held responsible for not proceeding. Just how or why it happened that proofs of loss were not presented does not appear. All that appears is that while the plaintiff, himself, had the policy and was alone beneficially interested in it, he apparently did nothing whatever either to collect it himself or to have the defendant collect it for him. Under these circumstances, the responsibility for the failure to collect it was his own and not the defendant's.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; WILBUR, J.; SLOANE, J.; LENNON, J.

185 Cal. 604

Ex parte TAMBARA. (Cr. 2371.)

(Supreme Court of California. April 27, 1921.)

Habeas corpus ⊂=25(1)—Application for writ on ground commitment by magistrate for embezzlement without probable cause denied.

Where the transcript of proceedings on preliminary examination of defendant charged with embezzling certain bonds discloses probable cause for holding defendant for trial on the theory that after the debt was fully paid for which the bonds were security, he without lawful right retained them and converted them to his own use by pledging them for his own obligation, defendant's application for writ of habeas corpus on the ground that the magistrate committed him without showing of probable cause will be denied.

In Bank.

Application for writ of habeas corpus by M. Tambara to secure release after commitment by a magistrate on ground of lack of probable cause. Application denied.

A. A. Montagne, of San Francisco, for petitioner.

PER CURIAM. This is an application for a writ of habeas corpus based on the ground that the prisoner has been committed by a magistrate for trial on the charge of embezzling certain bonds, without a showing of probable cause. The application is accompanied by a transcript of the testimony taken before the committing magistrate. An examination of this transcript satisfies us that it discloses probable cause for holding for trial on the theory that after the debt was fully paid the prisoner without lawful right retained the bonds and converted the same to his own use by pledging the same for his own obligation.

The application for a writ is denied.

All concur.

185 Cal. 486

LOS ANGELES ROCK & GRAVEL CO. v. COAST CONST. CO. et al.

AMERICAN SURETY CO. OF NEW YORK v. EMPIRE SECURITIES CO. et al.

(L. A. 5379.)

(Supreme Court of California. April 25, 1921.)

1. Subrogation ⊂=33(2)—Surety of contractor has no rights to money or bonds due under contract superior to assignee first giving notice.

As materialmen and laborers whose claims the contractor's surety has discharged have no rights in the moneys or bonds due under the contract, the surety cannot claim rights in such moneys or bonds by subrogation or otherwise superior to those of the contractor's assignee who first gave notice of assignment.

2. Municipal corporations ⊂=373(2)—Materialmen and laborers held to have no lien upon money or bonds coming to contractor; "incidental expenses."

Under the Vrooman Act, §§ 7, 8, and 9, requiring assessments of property benefited by public improvement to be made on completion of the work by the contractor, and the warrant, assessment, and diagram to be recorded in the office of the superintendent of streets, whereupon the contractor or his assignee is entitled to receive the same on demand, but not until payment to the superintendent of streets of the incidental expenses not previously paid by the contractor or his assigns, "incidental expenses" being defined by section 34 as including the cost of printing and advertising, making assessments, and compensating city engineer and superintendent, there being no provision for withholding the warrant until the claims of materialmen and laborers have been discharged, such claimants are not given a right or lien equitable or otherwise upon the money or bonds going to the contractor.

[Ed. Note.—For other definitions, see Words and Phrases, Incidental Expenses.]

3. Municipal corporations ⊂=373(2)—Laborers or materialmen held not to have liens against property owners for public improvement under statute for owner's withholding money.

Code Civ. Proc. § 1184, providing for the withholding of money by the owner or person who contracted with the contractor after receiving notice from one who performed labor or furnished materials, may not be applied to a public improvement within the city, since the Vrooman Act provides a comprehensive, self-sufficient, and exclusive plan for the improvement of streets covering the protection of the laborers, materialmen, the city and owners of property, and such Code section is also inapplicable because it is limited to "the persons mentioned in the preceding section," none of which persons are laborers or materialmen.

4. Municipal corporations ⊂=353—Contractor's surety cannot trace claim to any right of materialmen or laborers as against assignee of funds payable to contractor.

Funds due the contractor upon completion of work contracted for under the Vrooman Law being free from any claim or lien of materialmen or laborers, the contractor's surety cannot trace any claim thereto through such creditors of the contractor to the prejudice of intervening bona fide assignees of said fund, and the mere fact that the assignee knew of the existence of plaintiff's claim at the time of the assignment does not in itself indicate lack of good faith in making the assignment.

5. Municipal corporations ⊂=353—Contractor's surety cannot compel assignee of fund payable to contractor to pay materialmen and laborers.

While a contractor's surety can enforce the performance of the legal obligation to pay materialmen and laborers, embodied in a contract provision, the surety cannot compel performance by a third person who is a total stranger to the suretyship relation created by the bond,

and who is a bona fide assignee to make payments from such funds.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the Los Angeles Rock & Gravel Company against the Coast Construction Company and others, in which certain cross-complaints were filed. Injunction granted as prayed for, but motion for the appointment of a receiver denied without prejudice and from the order granting the injunction, the defendants appeal. Order reversed.

Geo. W. Crouch and Donald Barker, both of Los Angeles (James M. O'Brien and Wm. H. Neblett, both of Los Angeles, of counsel), for appellant Empire Securities Co.

Albert Lee Stephens, City Atty., and Henry N. James, Deputy City Atty., both of Los Angeles, for appellant City of Los Angeles.

Jensen & Jensen, of Los Angeles, for respondent Los Angeles Rock & Gravel Co.

Oscar Lawler and James E. Degnan, both of Los Angeles, for respondent American Surety Co., of New York.

LENNON, J. The plaintiff, who claims to have furnished materials used in certain street improvement work performed in the city of Los Angeles, brought suit upon the contractor's bond to recover the purchase price of said materials. Plaintiff's right to recover is not disputed; the controversy upon the present appeal is the result of issues raised by the cross-complaint.

Defendant Coast Construction Company, hereinafter referred to as the contractor, entered into a contract, in accordance with the provisions of the Vrooman Act (Deering, Gen. Laws 1915, p. 1714, Act 3930), for the performance by said contractor of street work in the city of Los Angeles. Concurrently with the execution of the contract, the contractor, as principal, and the defendant and cross-complainant, American Surety Company of New York, as surety, executed and delivered to the city of Los Angeles the bond required by section 6½ of the Vrooman Act for the benefit of those performing labor upon and furnishing materials for said street improvement work. Thereafter the plaintiff furnished certain material used in said street work, and, receiving no part of the purchase price thereof, filed with the board of public works of Los Angeles a verified statement of its claim, which contained the averment that it was filed pursuant to the provisions of the Vrooman Act and also to section 1184 of the Code of Civil Procedure, and purported to require said board to withhold payment from the contractor until plaintiff's claim was paid. Immediately after the filing of this notice, plaintiff brought suit against the contractor and the surety for the recovery of the said purchase price. In that action the defendant surety company filed a cross-complaint against the following, as cross-defendants: The plaintiff materialman, the contractor, the city of Los Angeles, the board of public works of said city, and the Empire Securities Company, a corporation. The cross-complaint alleges that prior to the commencement of this suit and prior to the filing of plaintiff's claim the contractor had assigned to the Empire Securities Company its right to the warrant, assessment, and diagram which, by the terms of the Vrooman Act, are issuable to the contractor upon the completion of the contract and make it possible for the contractor to collect the assessments levied upon the property benefited by the street improvement work. The assignee filed this assignment with the city and with the board of public works prior to the filing of plaintiff's claim. The cross-complaint admits the validity of plaintiff's claim and seeks an injunction restraining the city and its board of public works from delivering to the contractor, or its assignees, the warrant, assessment, and diagram, and to enforce the delivery thereof to a receiver to be appointed by the court, to the end that the assessment against the property benefited by the street improvement work may be collected and applied first in payment of the claim of plaintiff and "all other claims similarly situated." The aggregate amount due the contractor on account of said contract is $15,310. Plaintiff's claim amounts to $2,083.70, and it does not appear that any other claims remain unpaid. The trial court granted the injunction as prayed for, but denied the motion for the appointment of a receiver, without prejudice to the right of cross-complainant to renew the same or of the court to grant such relief should equity require it. Upon the present appeal from the order granting the injunction, prosecuted by the Empire Securities Company, the city of Los Angeles, and the board of public works of said city, appellants contend that the right of the Empire Securities Company, the assignee of the contractor, to the proceeds of the contract, is superior to any claim of the contractor's surety.

[1] The decision of Adamson v. Paonessa, 180 Cal. 157, 179 Pac. 880, rendered subsequent to the granting of the injunction in the present proceedings, is determinative of the questions raised upon the appeal now before the court. The facts of that case, in so far as material to a discussion of the instant case, were as follows: A contract for street work, which was executed under the provisions of the "Improvement Act of 1911" (Stats. 1911, p. 730), was assigned by the contractor to one Lloyd, who immediately gave notice of the assignment to the proper authority. Thereafter the contractor's surety was compelled to pay claims amounting to

approximately $10,000 for material and labor furnished and rendered in completing the contract. Upon the completion of the contract, the surety company claimed its rights in the assessments collected from the property owners were superior to those of the assignee, Lloyd, basing its contention in part upon the theory that, by virtue of its payment of the claims against the contractor, it acquired by subrogation an equitable lien upon any moneys or bonds due under the contract in payment for the work, which lien was superior to any assignment or other disposition which the contractor may have made. The court decided against the surety's claim to subrogation, holding that the materialmen and laborers whose claims the surety had discharged had no rights whatever in the moneys or bonds due under the contract, and that therefore the surety could not claim rights in the said moneys or bonds superior to those of an assignee who had first given notice of his assignment. The same is true of the rights of the plaintiff materialman and the surety company to the funds due the contractor in the present case.

[2] Under sections 7, 8, and 9 of the Vrooman Act the assessments of the property benefited must be made upon the completion of the work by the contractor, and the warrant, assessment, and diagram must be recorded in the office of the superintendent of streets. Thereupon the contractor, or his assignee, is entitled to receive the said warrant, assessment, and diagram "on demand, but not until after the payment to the said superintendent of streets of the incidental expenses not previously paid by the contractor, or his assigns." The term "incidental expenses" is defined in section 34 of the act as including the cost of printing and advertising required by the act, expenses of making assessments authorized by the act, and the compensation of the city engineer and superintendent. Upon the payment of "incidental expenses," and regardless of whether the claims of materialmen and laborers have been discharged, the contractor, or his assignee, becomes, by virtue of the express provisions of the act, entitled to the warrant and assessment, and, upon receiving the same, he is authorized to immediately demand and receive from the respective property owners the amounts of the several assessments. There is no provision for the withholding of the warrant until the claims of the materialmen and laborers have been discharged. Since a precisely similar method of procedure was prescribed by the act under consideration in Adamson v. Paonessa, supra, the language of the court in that case is equally applicable to the case at bar. In the Vrooman Act, as in the "Improvement Act of 1911," the sole provision for the security of materialmen and laborers is the requirement—

"that every contractor to whom a contract is awarded under the act must file with the superintendent of streets a good and sufficient bond inuring to the benefit of any and all persons performing labor on or furnishing materials used in the work or improvement. There is no provision which gives such claimants any right or lien, equitable or otherwise, upon money or bonds coming to the contractor. In particular, there is no provision in the act authorizing or permitting the retention by the municipality, or by the owners whose lands are assessed, of anything which may be due the contractor in order to pay the claims of materialmen or laborers, or permitting the deduction of the amount of such claims from anything that may be due the contractor. * * * It contemplates that the contractor be paid directly by the property owners whose property is assessed for that purpose, each paying for himself his own assessment. * * * It is manifest that under such circumstances there is no single fund out of which the contractor is to be paid, and it is likewise clear that, in view of the fact that payment may be made to the contractor without the interposition of the city treasurer or any other city official or common conduit of payment, any right to have moneys or bonds coming to a contractor retained to meet claims against the contractor would be quite impracticable." Adamson v. Paonessa, 180 Cal. 157, 161, 179 Pac. 880, 881.

[3] From what has been said, it is also obvious that in the present case, as in Adamson v. Paonessa, supra, the provisions of section 1184 of the Code of Civil Procedure cannot be invoked. This section provides for the withholding of money by the owner, or person who contracted with the contractor, after receiving notice from one who has performed labor or furnished materials. The Vrooman Act provides a comprehensive, self-sufficient, and exclusive plan for the improvement of streets, etc., which covers not only the doing of the work and the protection of laborers, materialmen, the city and owners of property, but likewise provides a complete and comprehensive scheme for the payment of the contractor, which, as previously stated, is irreconcilable with any process for withholding the funds such as that provided in section 1184 of the Code of Civil Procedure. But this is not the only reason that said section must be held inapplicable to proceedings under the Vrooman Act. That section is, by its own terms, limited in its application to "the persons mentioned in the preceding section," and none of the persons there mentioned are persons performing labor or furnishing materials for work of the character of that dealt with by the Vrooman Act, namely, work upon "streets, lanes, alleys, courts, places, sidewalks, and * * * sewers." Kreuzberger v. Wingfield, 96 Cal. 251, 257, 31 Pac. 109; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986.

[4] It is clear that the decision in Adamson v. Paonessa, supra, is conclusive upon the point that the funds due the contractor

upon completion of work contracted for under the Vrooman Act are free from any claim or lien of materialmen or laborers, and consequently that the contractor's surety cannot trace any claim thereto through such creditors of the contractor to the prejudice of intervening bona fide assignees of the said funds. Respondent, however, seeks to distinguish the present case upon the ground that the surety in the instant case does not claim to be subrogated to rights of creditors of the contractor, but is seeking exoneration. That is to say, respondent claims that, by virtue of his right to compel the principal to perform an obligation when due (Civ. Code, § 2846), the surety may proceed in equity to compel the contractor to pay the claims of materialmen and laborers from the assessments to be collected under the contract. "It seems to be well settled that a surety against whom a judgment has been rendered may, without making payment himself, proceed in equity against his principal to subject the estate of the latter to the payment of the debt, in exoneration of the surety." Dobie v. Fidelity, etc., Co., 95 Wis. 540, 70 N. W. 482, 60 Am. St. Rep. 135; Holcombe v. Fetter, 70 N. J. Eq. 300, 67 Atl. 1078; Tillis v. Folmar, 145 Ala. 176, 39 South. 913, 117 Am. St. Rep. 31, 8 Ann. Cas. 78; Pomeroy's Equity Jurisprudence (2d Ed.) vol. 5, § 2342. The difficulty with the position of the respondent surety lies in the fact that in the present proceeding the surety is not seeking to compel the principal to pay his obligation from the principal's own property, but is attempting to sequester funds which have passed, by assignment, to a third party, and in which the principal no longer has any right. This can only be done in the event that the surety has such an interest in the proceeds of the contract merely by virtue of the suretyship that the contractor can make no assignment of the contract or the proceeds thereof except subject to the right of the surety to compel a resort to such proceeds in payment of claims for labor and material incurred in the prosecution of the work. As previously stated, assessments collected or to be collected upon completion of an improvement contracted for under the Vrooman Act are the property of the contractor free from claims arising in connection with the work called for by the contract. This being so, the surety can compel the contractor to resort to that fund in payment of claims of materialmen and laborers incurred in the prosecution of the work contracted for only in the event that the fund constitutes part of the estate of the principal at the time the surety seeks to compel such payment. In the instant case the right to the proceeds of the contract had, by assignment, passed to third parties prior to the surety's attempt to reach them, and the warrant and assessments represented thereby do not, therefore, constitute part of the principal's assets which the surety has the right to subject to the payment of claims. The bona fides of the assignment are not attacked. The mere fact that the assignee knew of the existence of plaintiff's claim at the time of the assignment does not in itself indicate lack of good faith in the making of the assignment. There is nothing to indicate that the assignee had any knowledge that any claim would not be paid by the contractor; it does appear that the assignment was made in consideration of the payment of money to the contractor by the assignee; the surety's attempt to reach the proceeds of the contract was not made until after the assignment was consummated and notice thereof had been given.

[5] Respondent surety calls attention to a clause in the contract for the street work in question which provides that the contractor is to turn over the work free and clear of all claims of laborers and materialmen. It is urged that this clause gave such claimants and the surety the right to resort to the proceeds of the contract for payment of the claims and that, as regards this right, the assignee of the proceeds of the contract is in no better position than the original contractor, for it took with notice of the rights under this clause of the contract. We need not consider the question of the validity of a clause inserted in a contract for the purpose of imposing upon the contractor's right to demand the warrant a restriction not sanctioned by the act. The clause in question merely expresses the general legal duty on the part of the contractor to pay all materialmen and laborers. It imposes no additional burden upon the contractor, but simply reduces to writing the nature of the legal duty in regard to such matters assumed by the contractor and which would exist whether in writing or not; it does not attempt in any way to increase the security for the performance of that legal duty on the part of the contractor or provide any additional protection in any form for the claimants in question, but leaves them to their right to sue upon the bond required by the act. The surety can enforce the performance of this obligation by the principal, but it cannot compel the performance by a third party which is a total stranger to the suretyship relation created by the bond; in other words, it cannot compel payment of the claims from the funds due under the contract after the right thereto has passed to a bona fide assignee.

The order granting the injunction is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; OLNEY, J.; LAWLOR, J.

185 Cal. 598

GRAY v. GRAY. (L. A. 5808.)

(Supreme Court of California. April 26, 1921.)

1. Appeal and error ⊜934(2)—Intendments in favor of judgment where findings waived.

Findings having been waived, every intendment is in favor of the judgment, so that on all the issues raised by the pleadings it must be presumed that the trial court in effect found all the facts necessary to support the judgment in favor of plaintiff.

2. Husband and wife ⊜297—Evidence held to justify inference husband's abandonment of wife and his charge of adultery not justified.

In a wife's suit for separate maintenance, evidence *held* to warrant the trial court's inference that defendant husband's abandonment of plaintiff wife and his charging her with adultery were not justified or in good faith.

3. Appeal and error ⊜712—Matter not of record may not be considered.

A matter which does not appear of record may not be considered on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Martha J. Gray, also known as Mattie Gray, against Everett E. Gray. From judgment for plaintiff, defendant appeals. Affirmed.

Earl Rogers, Harrison Cassell, and G. Stuart Silliman, all of Los Angeles, for appellant.

Samuel D. Weil, of Los Angeles, for respondent.

LENNON, J. Plaintiff and defendant are husband and wife, and in this action for separate maintenance, instituted under the provisions of section 137 of the Civil Code, the plaintiff sought and secured a decree directing the defendant to pay her the sum of $50 per month for the permanent maintenance and support of herself and minor child. One of the three causes of action pleaded in the plaintiff's complaint was abandoned, and the cause proceeded to trial upon the remaining two causes of action, namely, willful desertion and extreme cruelty. The desertion complained of consisted of the alleged refusal of the defendant, willfully and without any sufficient cause, to live with the plaintiff, and his willful and causeless living separate and apart from her from the 16th day of August, 1917, up to the time of the institution of the action on October 30, 1917. The extreme cruelty pleaded was based upon allegations of the plaintiff's grievous mental suffering and bodily ill health, resulting from the conduct of the defendant in falsely charging the plaintiff with adultery and the repetition of said charge to certain friends and relatives of the plaintiff, coupled with the statement of the defendant, repeatedly made to the plaintiff and to her said friends and relatives, that he was not the father of the child born to the plaintiff during wedlock with the defendant. The defendant, answering the plaintiff's complaint, denied the alleged desertion and the charge of cruelty, but admitted that he did tell plaintiff that he was not the father of the child born to plaintiff, and alleged that in truth and in fact he was not the father of that child. It should be noted that the answer of the defendant failed to deny the allegation of the plaintiff's complaint to the effect that he had charged her with adultery and had repeated said charge to certain friends and relatives of the plaintiff, and therefore it may be taken as an admitted fact in the case that he made said charge against the plaintiff, and disseminated it among her friends and relatives. At the conclusion of the trial of the case the court announced that it would render judgment for the plaintiff, and thereupon, findings having been waived, the judgment appealed from was entered in favor of the plaintiff.

[1] Findings having been waived, every intendment is in favor of the judgment, and, therefore, upon all of the issues raised by the pleadings, it must be presumed that the trial court, in effect, found all the facts necessary to support the judgment in favor of the plaintiff. Antonelle v. City Hall Com'rs, 92 Cal. 228, 28 Pac. 270; Bruce v. Bruce, 16 Cal. App. 353, 116 Pac. 994. The only point made in support of the appeal is the claimed insufficiency of the evidence to warrant and support the implied findings of the trial court which, had findings in fact been made, must necessarily have been to the effect that the defendant had, without cause, deserted and abandoned the plaintiff, and was guilty of extreme cruelty toward the plaintiff in the particulars narrated in the plaintiff's complaint.

[2] We are satisfied, and it is conceded by counsel for appellant, that the evidence adduced upon the whole case amply supports the implied findings of willful abandonment and extreme cruelty upon which the judgment rests, unless, as counsel for appellant contend, it can be fairly said that the evidence compels the conclusion that the defendant had good cause for believing the plaintiff unfaithful to him, and that he was therefore justified in separating from her and charging her with adultery and asserting to her and to her friends that he was not the father of the child born to her. Conceding it to be the law that, if the defendant honestly, though mistakenly, believed the plaintiff to have been unfaithful to

him, he would have been justified in doing and saying the things charged against him, and therefore absolved in the eyes of the law from the charge of desertion and extreme cruelty, still we are satisfied that the evidence as a whole warrants the inference, which the court doubtless drew therefrom, that the defendant's abandonment of the plaintiff and his charging her with adultery were not justified or made in good faith.

The evidence offered and received in support of the plaintiff's case, in substance and in effect, is as follows: Plaintiff and defendant intermarried in the city of Los Angeles on January 9, 1907, and they lived together as husband and wife until August 9, 1917, when the defendant separated from the plaintiff and refused further to live with her. During the first nine years of their married life the couple were childless, but on November 13, 1916, a child was born to them. For about nine months thereafter the couple continued to live together harmoniously until on or about the said 9th day of August, 1917. The defendant came home late in the evening of that day very much excited. The plaintiff at that time was in the family bedroom with the baby. The defendant went in there, opened the drawers of a chiffonier, shuffled his hands around the tops of things therein contained, and then went into another bedroom and did the same thing with the dresser there. He then came into the room where plaintiff and the baby were. He then went out into the kitchen, and the plaintiff followed him there, and asked him what he was doing with the revolver which he had. He replied that he had just begun to realize that she, meaning the baby, did not belong to him. The plaintiff asked what put that thought in his head. He said that he had had visions. The plaintiff was so shocked and stunned by the declaration and conduct of the defendant that she had nothing to say at that time. On the following day the plaintiff sought an explanation from the defendant of his conduct and his statement on the night before, and all that he would say was that he had had visions. When the defendant came home on the following evening, he paid no attention to the plaintiff or to the baby, and during the dinner, of which he partook, he had nothing to say to either the plaintiff or the baby. After dinner he went into the front room, where he sat down in a Morris chair and slept for a while, and then went out for a walk. He returned about midnight, very much excited, and when he came into the room where the plaintiff was, said to her: "Who would have ever thought that the thing could have happened?" The plaintiff's cousin was present at this time, and she said to the defendant that he might be wrong in his belief; that his suspicions may not have been well founded, and he replied by saying, no, that his father had materialized and come to him, and that his father would not have done so if it was not that his father was such a good man. The next morning the defendant left the house for his work as usual, but the plaintiff did not hear from him until several days later, and then only when the plaintiff's cousin got into communication with the defendant by telephone, to whom he said that he was not coming home any more. Later on in the middle of the month of September the plaintiff called upon the defendant at the store where he was employed, when he again declared to the plaintiff that the child was not his, and told the plaintiff to have the father of the child support it, to which the plaintiff replied that he was the father of the child, and that she wanted him, as its father, to support it. He again declared that he was not the father of the child, and that he would not support it, and abruptly left the plaintiff. A few days later defendant called upon the plaintiff at her home for the purpose of talking things over and making arrangements as to what they should do temporarily. Never at any time did the defendant give any reason to the plaintiff as to why he believed he was not the father of the child, except that the spirit had told him that he was not the father. From the day of their marriage, on January 9, 1907, to the day that the defendant left the plaintiff, in 1917, they lived together continuously as husband and wife. From the time the child was born and up to the time that the defendant separated from the plaintiff, he was very kind and attentive to the child. When he would come home in the evenings he would always see her the first thing, and then, after his dinner, he would pick her up and play with her, and oftentimes took her out for a ride in his automobile, and always liked to have her sitting in the seat beside him. He always carried the baby to the front door in the mornings, and there said good-bye to her. Prior to August 9, 1917, the defendant never at any time said anything to the plaintiff, directly or indirectly, concerning the paternity of the child and, until then, the relations of the plaintiff and the defendant were harmonious and affectionate. The child resembles the defendant in a marked degree. From the day of their marriage up to the day the baby was born, the plaintiff and the defendant continuously and habitually occupied the same bed. All during her married life the plaintiff was desirous of having a child and, with that end in view, sought and secured medical treatment for the purpose of enabling her to become pregnant with child. The physician who attended her diagnosed her case as one of an undeveloped uterus. He so successfully treated her that she became pregnant.

The defense interposed by the defendant, namely, that he was justified in believing the plaintiff to have been unfaithful to him, and therefore was warranted in separating from her and charging her with adultery, was rested primarily upon the fact that, although the plaintiff and the defendant had lived together as husband and wife during the several years preceding the birth of the child in question, the plaintiff had never been enceinte until the said child was conceived. No competent showing, however, was made or attempted to be made, upon behalf of the defendant, that he was impotent during all or any part of the time that he and the plaintiff lived and cohabited together as husband and wife, and therefore the circumstance that the plaintiff had failed to conceive during the first several years of her married life cannot, in and of itself, be held to be sufficient to warrant the belief in the mind of the defendant that the child born to her was fathered by some one other than himself. It is claimed, however, that this circumstance, coupled with a claimed indiscretion of the plaintiff, testified to by the defendant, warranted the defendant in doubting the chastity of the plaintiff, and justified him in declaring his doubts to her, to her relatives, and to her friends.

[3] It must be admitted that the circumstances connected with the claimed indiscretion might well arouse the suspicion and indignation of the defendant, and, if believed by the trial court, would have justified a further finding that it ultimately culminated in the conviction in the mind of the defendant that plaintiff was untrue to him. In this connection it is asserted upon behalf of the plaintiff that she offered to take the witness stand in rebuttal and denial of the defendant's testimony upon this phase of the case, but that the trial court waved her aside, and declined to hear her upon the theory, apparently, that a denial of the defendant's testimony in the particulars stated was wholly unnecessary. This does not appear of record, and therefore we may not now consider it. The trial court was, however, at liberty to believe or disbelieve the defendant's testimony upon this as well as upon every other phase of the case, and the fact does appear of record that the defendant at the time of the claimed indiscretion did not attach much, if any, significance to the incident, and made no complaint thereof until the time of the trial.

The fact that the defendant did not consider the incident in question of any significance is best indicated by his testimony to the effect that until the plaintiff became pregnant he never had occasion to doubt her chastity. The incident in question, so the defendant testified, occurred on January 15, 1916, and the record shows that it was in April, 1916, that the defendant discovered that his wife was pregnant. The defendant's testimony in this behalf doubtless impelled the trial court to treat the incident of the plaintiff's claimed indiscretion as indifferently as did the defendant at the time of its occurrence.

The order appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOANE, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.

185 Cal. 594

Ex parte NELSON. (Cr. 2339.)

(Supreme Court of California. April 26, 1921.)

1. Prisons ⟹15—Credits given on sentence for good conduct pure matter of grace.

The credits given a convict on the time of his sentence for good conduct, under Pen. Code, § 1588, are a pure matter of grace, which can be withdrawn by the same legislative authority which created it, subject only to such conditions as the Legislature prescribes.

2. Prisons ⟹15—In forfeiture of good conduct credits on sentence the prisoner should be informed, but the board of prison directors should inform itself as to facts.

While the rights of a convict in respect of the forfeiture of his credits on his sentence time for good conduct should in every instance be safeguarded by the prison authorities with scrupulous care and fairness, all that is required by Pen. Code, § 1588, relative to a forfeiture, is that the prisoner shall be informed of the charge against him, and that the board of prison directors shall inform itself by such reasonable means as it may in its discretion adopt of the merits of the case, and the courts will not, on habeas corpus, consider the sufficiency of the evidence on which the board acted.

3. Prisons ⟹15 — Evidence insufficient to show prison board acted without investigation or in disregard of rights in forfeiting good conduct credits.

In habeas corpus proceedings by a convict claiming to be unlawfully imprisoned in the state prison on account of forfeiture of his good conduct credits on his sentence, under Pen. Code, § 1588, by the board of prison directors for his alleged participation in a riot, evidence *held* insufficient to show that prison board acted without fair investigation, or in disregard of petitioner's rights under the statute.

In Bank.

In the matter of the application of Charles Nelson for writ of habeas corpus, directed to James A. Johnston, Warden of San Quentin Prison, to secure prisoner's release from an alleged unlawful imprisonment by reason of forfeiture of credits on sentence time. Writ discharged.

Petitioner, in pro. per.

U. S. Webb, Atty. Gen., for respondent.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

SLOANE, J. The petitioner claims to be unlawfully imprisoned and restrained of his liberty in the state prison at San Quentin. He is held in custody in said prison under a judgment of commitment on a sentence of 15 years for robbery. He was received at the prison on November 1, 1907. The full term of his sentence will not expire until November 1, 1922.

Under section 1588 of the Penal Code, however it is directed that every convict who shall have conducted himself in conformity to the prison rules and requirements shall have deducted from his term of imprisonment two months in each of the first two years, four months in each of the next two years, and five months in each of the remaining years of said term. With the full allowance of credits thus provided for, petitioner's term of imprisonment would have expired April 1, 1917.

Prior to that date, however, the prison board declared forfeited for alleged misconduct all credits the petitioner had earned or might thereafter earn and the prison authorities have refused and still refuse him his discharge on the ground that the term of his sentence is not yet expired. Petitioner seeks his discharge from custody under the writ of habeas corpus on the ground that he has been illegally deprived of his credits.

Section 1588 of the Penal Code, which provides for the allowance of such credits, also provides for the forfeiture for flagrant disregard of prison rules and discipline, under the condition that—

"Such forfeiture, however, shall be made only by the board of directors after due proof of the offense and notice to the offender; nor shall any forfeiture be imposed when a party has violated any rule or rules without violence or evil intent, of which the directors shall be the sole judges."

The petitioner here was charged with having participated in a riot within the prison, and on this charge he was found guilty and his credits, existing and prospective, were by the board declared forfeited.

The ground of his complaint is set forth in his petition as follows:

"That, therefore, on or about July, 1912, your petitioner was haled before the state board of prison directors, then in session at San Quentin Prison, and without having received due notice, or any notice theretofore, was summarily charged with participating in riot within the prison. He was questioned thereon and denied that he had so violated any rule of the prison and pleaded not guilty; that he was not confronted with any witnesses then or any time therefor or thereafter concerning said charge; that no due proof, or any proof or evidence whatsoever, was produced in his petitioner's presence, if at all, in support of said charge, but without any show of compliance with the provisions of said section 1588 of the Penal Code, he was called from the solitary dungeon cell and taken before the board of prison directors at about 6 o'clock at night, and had no knowledge of the reason for so taking him before said board until actually in their presence. He had no opportunity of preparing or presenting any defense on said charge, and his credit of 67 months which were allowed by the Code were forfeited by the board of prison directors, without evidence; no testimony was taken in his presence. He was not confronted by any witnesses and was not given any chance to call witnesses or to defend himself.

"Petitioner further alleges that he had no notice that any credits were to be forfeited from him, and was in ignorance that the same had been forfeited until on or about the 1st day of April, 1916, when he should have been discharged from custody in compliance with the provisions of section 1588 of the Penal Code of the state of California."

The evidence on the hearing shows that he was brought before the board of prison directors and notified and informed of the charges made against him, to which he pleaded not guilty; that testimony on said charges was then and there taken by the board; that the warden of the prison and the captain of the yard and others testified in support of the charges; and that thereupon he was found guilty and all credits earned or to be earned were revoked.

The proceeding was evidently summary and informal. He was served with no notice of the charges prior to being taken before the board. He pleaded not guilty and apparently had an opportunity to tell his own story. He did not ask for a continuance or for time to prepare for further defense, and makes no claim that he demanded or was refused an opportunity to produce evidence in his own behalf. He was not confronted with the witnesses against him, and had no opportunity to cross-examine them.

[1] If the Code provision which calls for "due proof of the offense and notice to the offender" entitles the prisoner to a formal hearing, the law was not complied with in this case. But, as is held in the Matter of the Application of Stanton, 169 Cal. 607, 147 Pac. 264: "It is settled that the board is not required to proceed with the formality required by the courts." No constitutional rights to process of law, formality of procedure, or to being confronted by the witnesses, or having the privilege of cross-examination, are involved. The credits given a convict are a pure matter of grace, which can be withdrawn by the same legislative authority which created it, and subject only to such conditions as the Legislature prescribes.

[2] While the rights of the convict should in every instance be safeguarded by the prison authorities with scrupulous care and fairness, all that seems to be required by the statute, in view of the decisions, is that the prisoner shall be informed of the charge against him, and that the board shall inform itself, by such reasonable means as it may in its discretion adopt, of the merits of the

case, and the courts will not on habeas corpus consider the sufficiency of the evidence on which the board acted. Matter of the Application of Stanton, supra; In re Knowlton, 136 Cal. 107, 68 Pac. 480; Ex parte McDonald, 187 Pac. 991.

[3] We find no evidence in this case that the prison board acted without fair investigation or in disregard of the petitioner's rights under the statute.

The writ is discharged.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SHAW, J.; OLNEY, J.; LAWLER, J.

185 Cal. 557

In re WEMPE'S ESTATE. (S. F. 9198.)

(Supreme Court of California. April 25, 1921. Rehearing Denied May 23, 1921.)

1. Wills ⊂=230—Contest held not to be stricken on ground contestant had previously petitioned for probate.

Where one O., named as executor, executed a written renunciation of his right to letters testamentary in favor of one W., conditional upon the latter's appointment as administrator with the will annexed, and filed a petition signed by himself for the probate of the will and for the appointment of W., and W. also filed a petition, stating that he did not know whether or not the decedent was of sound mind when the instrument offered for probate was executed, and praying that if it were admitted to probate he (W.) be appointed administrator with the will annexed, *held* that W.'s subsequent contest of the will should not be stricken from the files as sham, on the ground that he had petitioned for the probate of the will, thereby assuming an inconsistent position.

2. Wills ⊂=384—Refusal to strike out answer to will contest held not prejudicial.

In a will contest, the refusal of the court to strike out the answer to the contest filed on behalf of the proponent of the will was not prejudicial, where he had full opportunity to amend it or substitute another for it, and no claim was made that it was insufficient, or that he had been prejudiced in any way in presenting his defense to the contest by the court's allowing the answer to stand.

3. Wills ⊂=384 — Striking from files proponent's second petition for probate of will held not prejudicial.

In a will contest, where by his first petition the proponent of the will renounced his right under it to act as executor, and asked that W. be appointed administrator with the will annexed, there was no prejudicial error in striking from the files his second petition for the probate of a will, in which he withdrew his renunciation and asked for letters for himself; the only question on the contest being whether the will should be admitted to probate.

4. Trial ⊂=6(1)—Requirement of notice of trial applies only where court proceeds in absence of party.

Code Civ. Proc. § 594, requiring five days notice of trial, applies only where the court proceeds in the absence of a party.

5. Appeal and error ⊂=920(1)—Regularity of procedure is presumed.

The presumption on appeal is that the lower court pursued its authority regularly, and, if it is claimed that it did not, as, for example, for want of due notice, the facts showing the irregularity must affirmatively appear.

6. Trial ⊂=90—Objection to evidence tentatively admitted waived by failure to move to strike out.

Where testimony objected to was admitted only tentatively, and subject to a motion to strike out to be argued later, the failure to make such motion constituted a waiver of the objection.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

In the matter of the estate of William C. Wempe, also known as and called William Wempe, deceased, in which one Ottens petitioned for probate of a will of decedent, which was contested by Gerhard Wempe. From an order refusing to admit the will to probate, Ottens appeals. Order affirmed.

Charles Baer and Ervin S. Best, both of San Francisco, for appellant.

Drown, Leicester & Drown, of San Francisco, for respondent.

OLNEY, J. One William C. Wempe died March 30, 1919, leaving as his only heirs his two minor children. He also left an instrument purporting to be his will, whereby he left his estate in trust for his two children as beneficiaries, with contingent remainders over, and named one Ottens as executor. Ottens executed a written renunciation of his right to letters testamentary in favor of one Gerhard Wempe, conditional upon the latter being appointed administrator with the will annexed, and filed a petition, signed by himself, for the probate of the will and for the appointment of Wempe. Wempe also filed a petition, stating that he did not know whether or not the decedent was of sound mind when the instrument offered for probate by the petition of Ottens was executed, and praying that if it were admitted to probate, he (Wempe) be appointed administrator with the will annexed. Thereafter, Wempe, as the guardian for the two minor children, filed a contest to the petition of Ottens for the probate of the will on the ground that the decedent was of unsound mind when the instrument was executed. Thereupon Ottens withdrew his renuncia-

tion, and filed a second petition for the probate of the will by a different attorney. The next day the attorney by whom the first petition for probate was filed on behalf of Ottens filed an answer on his behalf to the contest filed by Wempe. Ottens then gave notice to the last-mentioned attorney that he had acted without authority and gave notice of motion to strike from the files both the contest and the answer thereto. Wempe, on his part, moved to strike from the files Ottens' second petition for probate. These motions were heard on June 2d and 10th, submitted on the latter day for decision, and on June 11th the motion of Ottens was denied and that of Wempe granted. At the hearing of the motions the attorney by whom Ottens had filed his second petition for probate appeared as representing him in urging his motion and resisting that of Wempe, and the same attorney represented Ottens in all subsequent proceedings. At the hearing on June 10th, the court called attention to the fact that there was a contest, and asked if it was agreeable to all parties to have it heard on June 16th. Ottens' attorney agreed to this date, and it was fixed, although apparently there was no formal order of court made. On the 16th the contest was called for trial, and Ottens' attorney appeared and objected to the trial proceeding because notice of motion to set for trial had not been given, and there was no formal order setting it. There was no showing or claim made that Ottens or his attorney were taken by surprise, or were not as prepared then as they ever would be to proceed with the trial. The sole point of the attorney was that the cause had not been properly set, although the date had been fixed upon his statement that it was agreeable to him, and although he was then actually present in court, so that the purpose of requiring notice had been served. The court somewhat indignantly—and quite justifiably so—overruled the objection and proceeded with the contest. The attorney then announced that he wished to retire from the courtroom, and, upon the assurance by the court that he might do so with the full consent of everybody, he did retire.

It should also be said that on June 2d or 10th, the testimony of a number of witnesses who could not appear subsequently, was taken by agreement for the purposes of the contest. Among these was a physician who had attended the deceased, and who, over objection on behalf of the proponent, Ottens, testified as to what he had observed and the conclusions he had reached in the course of his professional treatment of the decedent.

Upon the conclusion of the contest, the court made its order denying the admission of the will to probate, and from this order Ottens appeals.

[1] The alleged grounds of error are five. The first is that the court erred in denying the motion of Ottens that Wempe's contest be stricken from the files. The ground of the motion, so far as the contest was concerned, was that it was sham, and the reason assigned why it was sham was that Wempe had filed a petition for the probate of the will, so that he appeared both as asking for and contesting the probate of the instrument. The answer to this is that Wempe had not petitioned for the probate of the will. All that he had done had been to petition to be appointed administrator with the will annexed in case the will was admitted to probate, and in his petition he states explicitly that he does not know whether the decedent was of sound mind when the purported will was executed, and does not ask for its probate.

[2] The second alleged error is the refusal of the court to strike out the answer to the contest filed on behalf of Ottens. This was asked for by Ottens on the ground that the attorney by whom it had been filed was not authorized to represent him. The notice of motion specified that the motion would be made upon oral evidence to be produced at the time of the hearing of the motion, and it does not appear that any evidence of a want of authority on the part of the attorney was produced. If there was not, the court was justified in denying the motion on the ground that the want of authority did not appear, and we cannot presume error, and that want of authority did in fact appear. But passing this, there is another and complete answer to the appellant's contention. It is that at the hearing of the motion the appellant's attorney was informed that if he desired to file a different answer for the appellant he could do so, and the contest was set for trial on June 16th in view of the statement of the attorney that this would give him time to file such an answer. Furthermore, the answer filed, whether filed by an authorized attorney or not, denied all the material allegations of the contest, and no claim is made that it was insufficient in any respect. The situation then is both that if the answer was insufficient in any respect the appellant had full opportunity to amend it or to substitute another for it, and also that no claim is made that it was insufficient, or that the appellant has been prejudiced in any way in presenting his defense to the contest by the court's action in allowing the answer to stand. In other words, the appellant suffered no prejudice whatever and, in fact, no prejudice is claimed.

[3] The third alleged error is the action of the court in striking from the files Ottens' second petition for the probate of the will. The only reason asserted why this was error is that by the first petition Ottens renounced his right to act as executor, and asked that

Wempe be appointed administrator with the will annexed, and that he had thereafter withdrawn his renunciation. It is claimed that because of these facts Ottens' second petition for probate, in which he withdrew his renunciation and asked for letters for himself, should have been permitted to stand. But this is an appeal from the order denying the will admission to probate, and unless the making of this order was affected by the action of the court in striking the appellant's second petition from the files, it is evident that the court's action was wholly inconsequential. Now both of Ottens' petitions asked for the probate of the will, and the only substantial difference between them was in respect to the appointment of Ottens as executor. Such difference did not affect in the slightest the issues presented by the contest, and could not affect the determination of the question as to whether or not the will should be admitted to probate, the question, and the only question involved in the order appealed from. Indeed, it is not claimed that the determination of that question was affected by action of the court in striking the second petition for probate from the files. In other words, it is evident that in this instance also the appellant was not prejudiced by the ruling complained of.

[4] The fourth alleged error is the action of the court in proceeding with the trial without, according to appellant, the five days' notice of trial required by section 594, Code of Civil Procedure. In view of what took place this closely approaches trifling. The appellant's attorney was present in court six days before the trial when the trial day was fixed, agreed to the time fixed, and actually appeared at the time fixed. He certainly had five days' notice in the first place, in the second place he waived any right to notice by agreeing to the time fixed, and in the third place the Code provision has application only when the court proceeds in the absence of a party. Sheldon v. Landwehr, 159 Cal. 778, 116 Pac. 44.

It is claimed that what occurred on June 10th does not properly appear in the record, since the reporter's notes (the record is brought up by the so-called alternative method) did not show what took place on that date, and the occurrences were inserted in the reporter's transcript by the judge from his recollection. But assuming that there was no authority for the judge making such insertions in the transcript, the reporter's notes did show that appellant was present in court by his attorney on the 16th when the contest was called for trial. This alone was enough to justify the action of the court. But the reporter's notes also showed a colloquy on the 16th between court and counsel, wherein what occurred on the 10th was stated by the court and not denied by counsel, and showed that it was upon the basis of the occurrences of the 10th as so stated that the court took its action in proceeding with the trial. This was sufficient, in the absence of any showing in the record that the statement of the court as to what had taken place was not true. In addition to this, the order appealed from itself recites the occurrences of the 10th, and these recitals must be taken to be true in the absence of any showing to the contrary. In fact, the situation would not be changed even if the colloquy mentioned did not appear and the order had contained no recitals.

[5] The presumption on appeal is that the lower court pursued its authority regularly, and if it is claimed that it did not, as, for example, for want of due notice, the facts showing the irregularity must affirmatively appear. This has been settled law in this state for many years. In the present case, even if the appellant's contention as to the insertions by the judge in the reporter's transcript be correct, a contention which is at least doubtful, there is nothing to show affirmatively that the court had proceeded irregularly with the trial of the contest. For all that would appear in the absence of the colloquy and the recitals, the appellant might have expressly waived notice in open court, as he in effect actually did.

[6] The fifth and last alleged error is the admission over objection of the testimony of the decedent's physician, previously mentioned. But whether the testimony was competent or not, the appellant's objection to it was waived. The testimony was admitted only tentatively, and subject to a motion to strike out to be argued later. Such motion was not made. The failure to make it under the circumstances was a waiver of the objection. King v. Haney, 46 Cal. 560, 13 Am. Rep. 217; Tarpey v. Veith, 22 Cal. App. 289, 294, 134 Pac. 367, Ann. Cas. 1912C, 711. The other evidence, furthermore, is overwhelming to the effect that the decedent was of unsound mind when the purported will was executed, so that the admission of the testimony objected to could not have affected the result.

The foregoing are all of the errors relied upon as justifying this appeal. It must be evident that there is not a semblance of merit in any of them, and that the appeal was wholly without justification. Furthermore, not a single step taken on behalf of the appellant in the court below after the filing of the contest seems to have been directed to assisting the determination of the question as to the validity or invalidity of the instrument offered for probate, the only question on the merits which the cause presented. On the contrary, every step would seem to have been directed to complicating and delaying the determination of that question. We cannot avoid the conclusion that the appeal is of like character, and that damages should be assessed against the appellant for

a frivolous appeal, whose only rational result could be delay. It is therefore ordered that the order appealed from be affirmed, and that there be added to the costs assessable against the appellant the sum of $100 damages for an appeal taken for delay.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

51 Cal. App. 774

FLETCHER v. ALLEN et al. (Civ. 3479.)

(District Court of Appeal, Second District, Division 1, California. March 18, 1921. Hearing Denied by Supreme Court May 16, 1921.)

1. Trusts ⊂=357(3)—Purchaser in good faith for valuable consideration not involuntary trustee.

Where transferee of oil lease in default agreed with plaintiff and another that plaintiff should be employed as attorney in litigation on the lease, that the amount of recovery should be divided equally, and that no settlement or compromise should be made by any of the parties to the agreement without the consent of all parties thereto, and, after plaintiff had performed services as attorney in the matter and obtained a judgment against the defaulting parties on the lease, the transferee of the lease sold to such parties all his right and interest in the lease and actions pending arising out of it, and entered satisfaction of the judgment, for which settlement the defaulting parties paid the transferee $2,469, *held*, that no trust under Civ. Code, § 2219, was impressed on the property in plaintiff's favor as against the defaulting parties, in view of section 2243, where the purchase price was paid by them without notice of plaintiff's rights.

2. Attorney and client ⊂=104—Principal and agent ⊂=177(1)—Notice to attorney or agent is notice to principal.

Knowledge by notice to attorney or counsel or agent, acquired during the negotiations for a purchase, is constructive notice to their principal; but the notice must be of a character which would put a prudent man on such inquiry that, if prosecuted with reasonable diligence, it would lead to actual knowledge of the true facts with reference to the subject of the transaction.

3. Trusts ⊂=357(2)—No trust raised in attorney's favor against third persons by client's agreement to pay attorney share of recovery.

Where an attorney relied on his client's promise to make no compromise without the attorney's consent, and defendants in the litigation conducted by the attorney knew of no contract between the attorney and his client, except that the client was to pay the attorney a share of the amount recovered, there was nothing in notice of such an agreement, which is not an unusual kind of agreement, calculated to lead a reasonably prudent man to prosecute an inquiry whether such contract, in addition to the personal obligation assumed by the client, created a trust for the attorney's benefit, so that such defendants, in compromising the litigation and purchasing the subject-matter, of the litigation for a sum which they paid to the client, were not charged with such notice that, against them, a trust in the attorney's favor was impressed on the property purchased.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Kimball Fletcher against F. H. Allen and others. From judgment for defendants, plaintiff appeals. Affirmed.

Kimball Fletcher, of Los Angeles, in pro per.

Schweitzer & Hutton and A. A. Kidder, Jr., all of Los Angeles, for respondents.

SHAW, J. The purpose of this action was to have certain property and rights therein, legal title to which was vested in defendants Warring, Arundell, and Narver, declared to be the subject of a trust in favor of plaintiff. Judgment went for defendants, from which plaintiff has appealed.

On November 1, 1910, the Southern Refining Company leased certain prospective oil lands, of which it had the possessory right, to defendants Warring, Arundell, and Narver. The lease provided that the lessees should, at their own expense, keep up the assessment work on the lands as required by law, and further provided that, in case they should fail to commence operations under the terms of the lease by July 4, 1911, they should pay to the lessor the sum of $100 per month for each and every month in which they should make such default in the commencement of operations. The lessees made default in performing the covenants of the lease, and thereupon the lessor, on March 6, 1913, by written instrument, transferred and assigned the lease, together with all rights of action arising from the breach thereof to F. H. Allen, who, on March 13, 1913, instituted an action against said lessees to recover as damages the penalty of $100 per month accruing prior to such time. A judgment therein for the sum of $2,469.38 was rendered against defendants, from which they prosecuted an appeal. Thereafter, and while this action was pending on appeal, Allen instituted other actions to recover against defendants for the penalty of $100 per month, in all of which plaintiff acted as his attorney. While these actions were pending, Allen, on March 17, 1916, by written instruments, sold, transferred, and assigned to Warring, Arundell, and Narver all his right, title, and interest in the lease so acquired by him from the Southern Refining Company, together with all right and interest in pending actions arising out of or under the terms of the lease, and entered satisfaction of the judgment in his favor, from which defendants had ap-

pealed, for all of which, and in consideration of the full acquittance granted to defendants, they, in the nature of a compromise, paid him the sum of $2,469.

As stated, the Southern Refining Company, by a naked assignment in writing, transferred all its interest in the lease to Allen on March 6, 1913. On August 1, 1914, an instrument to which Allen, Bacigalupi, and plaintiff were parties was duly executed, the effect of which was to employ plaintiff as attorney, not only in pending litigation therein referred to, but "in all further suits, settlements, or compromises in connection with the contract" in question, and whereby, among other things, it was agreed that out of any money or property recovered as a result of such litigation, or in settlement or compromise in connection therewith, the amount thereof, less expenditures and costs and sums allowed by the court as attorney's fees, which should go to plaintiff, should be divided equally between the parties, by whom it was "further mutually agreed * * * that no settlement or compromise shall be made by any of the parties hereto without the consent of all parties to this agreement."

[1] Plaintiff, under the provisions of section 2219, Civil Code, insists that the agreement impressed the property, legal title to which was in Allen, with a trust in his favor to the extent of one-third of such as might be recovered, either by suit, compromise, or settlement, and that since the contract provided that no settlement or compromise should be made by Allen without plaintiff's consent, which was not given, the defendants Warring, Arundell, and Narver took the property so acquired from Allen subject to the trust and are involuntary trustees thereof, as provided in section 2243, Civil Code.

Section 2219, Civil Code, provides that:

"Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control."

And section 2243, Civil Code, entitled "Third Person, When Involuntary Trustee," provides:

"Every one to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration."

We entertain grave doubt as to whether the contract, as claimed by plaintiff, created an express trust in his favor. However, conceding the contention to be correct and that the acts of Allen were in violation of the trust, defendants could not, under section 2243, Civil Code, above quoted, be deemed involuntary trustees if in purchasing the property and interest vested in Allen they acted in good faith and paid a valuable consideration therefor. That they did so act and make such payment appears from the finding "that the said purchase price ($2,469) was paid by said defendants D. C. Narver, Hugh Warring, and T. F. Arundell to the said F. H. Allen in good faith and without any notice, actual or constructive, prior to or down to the time of the payment of said money, that the plaintiff had any interest whatever in said contract, rights of action, judgments or property referred to in the third amended complaint," and that at the time of said purchase Allen was in the sole possession of all of said property rights and appeared to be the sole owner thereof. The facts so found, if true, must be deemed a bar to the remedy sought by plaintiff against defendants Warring, Arundell, and Narver.

[2] Appellant, however, insists that the finding is not supported by the evidence in that, while conceding the defendants had no personal knowledge of plaintiff's rights, it nevertheless shows their attorneys received notice, the character of which was such as to put a reasonably prudent man upon inquiry as to plaintiff's rights, and that such notice must be imputed to defendants, who as principals must be deemed chargeable with constructive notice.

"Knowledge by notice to attorney or counsel or agent acquired during the negotiations for a purchase is constructive notice to their principal." Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

Whether constructive or actual, the notice must be of a character which would put a prudent man upon such inquiry that if prosecuted with reasonable diligence it would lead to actual knowledge of the true facts with reference to the subject of the transaction. Pomeroy's Equity Jurisprudence (3d Ed.) vol. 2, §§ 597, 599; Bank of Mendocia v. Baker, 82 Cal. 114, 22 Pac. 1037, 6 L. R. A. 833. Conceding the law as stated, appellant insists that the evidence shows that one of the attorneys for defendants had sufficient notice to put him upon inquiry as to the plaintiff's interest in the subject of the controversy. As appears therefrom, the lease provided that defendants should pay $100 per month as a penalty for each and every month during which they failed to comply with certain terms thereof. Under this provision, an action had been instituted by Allen wherein a judgment was recovered, and other actions for accruing penalties were pending, in all of which and during the entire time that Allen owned the lease, plaintiff had acted as counselor and attorney for him, and Schweitzer & Hutton and A. A. Kidder had during said time acted in like capacity for defendants.

Pending the appeal from the judgment obtained in the first action instituted against

defendants to recover the penalties stipulated in the lease, the negotiations which culminated in a settlement of all controversies growing out of the lease were commenced. The testimony of plaintiff tends to show that he acquainted Mr. Kidder with the fact that he had an interest in the lease. This testimony, however, is flatly contradicted by Kidder, who further stated that he was never informed by any one that Allen was not the real owner of the lease and rights assigned by him to defendants, nor apprised of the fact that Fletcher had any interest therein other than as an attorney representing his client; that in a conversation had with Mr. Allen, wherein the latter stated that he and Fletcher did not agree as to what should be exacted in settlement, he mentioned $2,500 or $3,000 in cash as a sum which he would be willing to accept, and further stated that his arrangement with Fletcher was that in case he recovered a judgment and collected it, he would pay Fletcher one-third. Plaintiff himself testified that, in response to an offer of $2,000 made by Mr. Hutton in settlement of the whole proposition, he said that he did not think the amount was sufficient, but that, if Allen and Bacigalupi were anxious to settle the matter, he did not want to stand in their way, but would advise them it was too small. In our opinion, the evidence, while conflicting, is sufficient to support the finding upon which the judgment is based.

[3] Considering the entire record, it is apparent therefrom that plaintiff relied upon Allen's covenant that he would make no compromise of the matter without the former's consent, and that neither he nor Allen made any disclosure of a contract existing between them, other than that out of the proceeds received by Allen he was to pay plaintiff, as compensation for the services rendered, one-third thereof. Such an agreement between an attorney and his client is not unusual, and there is nothing in notice of such fact which is calculated to lead a reasonably prudent man to prosecute an inquiry as to whether such contract, in addition to the personal obligation assumed by the client to his attorney, creates a trust for the latter's benefit.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

52 Cal. App. 36

RIVARA et al. v. BARTOLOZZI et al.

(Civ. 2096.)

(District Court of Appeal, First District, Division 2, California. March 22, 1921.)

1. Partnership ⊂=328(3)—Evidence held to support finding of losses in business.

In action to dissolve a partnership on the ground that it had been a steadily losing venture, a record of the partnership transactions, showing a loss of over $2,000 in the business in about 100 days from its commencement to the date of suit, was sufficient to support a finding that the business had been conducted at a great loss.

2. Partnership ⊂=300—Lease held to become a nullity on dissolution of firm and not to be treated as asset in dissolution proceedings.

Where the owners of the building, furnishings, and supplies of a hotel, bar, and restaurant executed articles of copartnership with other individuals to conduct the business, such articles providing that the partners would pay the owners $250 per month as rental, and that the term of the agreement should be five years, on the dissolution of the partnership as a losing venture prior to the expiration of the five years, the contract as to the premises, even if conceded to be a lease, became a nullity, and could not be treated as an asset of the partnership in the dissolution proceedings.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by A. Rivara and others against Joe Bartolozzi and another. From judgment for plaintiffs, dissolving the partnership, defendants appeal. Affirmed.

Henry L. Corson, of San Francisco, for appellants.

Arnold C. Lackenbach and Roland Becsey, both of San Francisco, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to obtain a decree dissolving the partnership existing between the plaintiffs and the defendants. The trial court awarded the plaintiffs a decree, and the defendants appealed under section 953a of the Code of Civil Procedure.

In their complaint the plaintiffs alleged, among other grounds on which they based their right to a decree, "that at all times since the commencement of said copartnership said business of said copartnership has been conducted at a great loss." These allegations were denied by the answer. A trial was had on the merits, and the trial court made a finding on the above issue in favor of the plaintiffs. The defendants attack that finding as not being supported by the evidence. They also claim that the trial court did not give due consideration to their claim that the partnership was possessed of a valuable leasehold. Before we proceed to consider the point, it should be stated that the plaintiffs Mary Macchetto and A. Rivara were the owners of the building, furnishings, and supplies of a hotel, bar, and restaurant located at 426 Broadway, in San Francisco. On May 13, 1918, they and the defendants executed articles of copartnership to conduct the said business. The ar-

ticles provided that the partners would pay the owners $250 per month as rental, and that the term of the agreement should be five years. The defendants contend that those provisions of the instrument created a leasehold in favor of all the partners, and as such it should have been treated as an asset in the dissolution proceedings.

[1] Taking up the attack on the findings, there is in the record a written account of the financial transactions from the day the business was commenced to the day the suit was filed (a period of about 100 days), showing a loss of $2,092.08. The appellants do not quote any part of the record which tends to weaken or break down the force of this showing. A steady loss of over $20 a day is certainly a sufficient showing that the finding in question has some evidence to support it.

[2] The leasehold existed, if at all, as one of the integral parts of the contract of copartnership. That contract was the very object of the attack by the plaintiffs' cause of action. The judgment in plaintiffs' favor had the legal effect of annulling the partnership contract and every portion thereof. Conceding, without deciding, that the contract was, among other things, a lease, its existence as a lease ceased the moment the contract was dissolved. Thereafter the contract was neither an asset nor a liability—nor was any part thereof. The trial court did not err in treating the alleged lease as a nullity.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

51 Cal. App. 765

GORDON v. GREEN. (Civ. 3679.)

(District Court of Appeal, First District, Division 1, California. March 18, 1921.)

1. Contracts ⊂=75(2) — Agreement by landlord to reduce rent unenforceable, as nudum pactum.

Where, during a period of depression, a landlord agreed to a reduction of rent of a hotel, such agreement is unenforceable, being unsupported by a consideration, and the mere fact that the lessees continued to run and manage the property as was their duty, does not make the contract enforceable, for neither a promise to perform a duty or its performance constitutes a consideration, and the agreement was a mere nudum pactum.

2. Receivers ⊂=199 — Compensation of receiver should be paid out of funds in his hands.

Where, in an action to recover for unpaid rents and for foreclosure of a mortgage on the lessee's furniture, a receiver was appointed, *held* that the compensation of the receiver should be paid out of funds in his hands and an order requiring the receiver's commission to be paid out of rent to accrue after the receiver ceased to act, and which never came into his possession, is improper.

Appeal from Superior Court, Los Angeles County; L. H. Valentine and Grant Jackson, Judges.

Action by Elizabeth Y. Gordon against R. A. Green. From a judgment denying plaintiff part of the relief sought, and an order requiring the receiver to deliver property to defendant, plaintiff appeals, as well as from the order whereby the accounts of the receiver were settled and the receiver discharged. Reversed.

Waldo M. York and H. Parker Wood, both of Los Angeles, for appellant.

Stewart & Stewart and Clair S. Tappaan, all of Los Angeles, for respondent.

KERRIGAN, J. This action was brought to recover certain rents alleged to be due and unpaid under the terms of a written lease. Two causes of action are alleged, the first being one to recover a judgment for unpaid rent and for the foreclosure of a mortgage upon certain furniture, given to secure the payment of the rent, and also the performance of all promises and conditions of the lease. By the second cause of action, plaintiff seeks to recover a judgment of foreclosure of a second mortgage upon the same property, given to secure the payment of a certain promissory note in the sum of $3,500.

As a defense to the first cause of action, defendant alleged that there had been a change in the written contract of lease by an oral executed agreement. To the second cause of action, the defendant alleged payment of interest and tender of the principal.

The lease was entered into by plaintiff and defendant on August 12, 1914, and by its terms was to continue until March 8, 1920, and defendant promised to pay plaintiff as rent for the premises the sum of $625 per month, payable in advance on the 8th day of each month up to the 8th day of March, 1915, and the sum of $666⅔ per month for the succeeding five years of the term. To secure the payment of the rent in accordance with the terms of the lease, one of the mortgages here involved was executed. Defendant entered into the occupancy of the hotel premises under the lease, by the terms of which there became due to plaintiff, as rent, the sum of $43,041.61, and at the time of the commencement of this action, on December 15, 1919, defendant had paid to the plaintiff the sum of $30,666.89, leaving $12,394.77 unpaid. These facts are not disputed by defendant, but he alleges that the lease with reference to the amount of rent due there-

under was changed by agreement between the parties.

The trial court found that defendant had entered into possession of the premises described in the lease set forth in the first cause of action, but further found that such terms were subsequently changed by an oral agreement between the parties, and that such agreement was carried out by the lessee and accepted by the lessor. This change in the lease, as found by the trial court, consisted in an agreement which in substance provided that, pending the hard times and general depression of the hotel, apartment house, and rooming house business in the city of Los Angeles, the lessor agreed to accept in lieu of the amounts specified in the lease all of the income derived from the premises over and above the expenses of the business, and a moderate allowance for the support of the defendant and his wife for managing said business. It further found that this condition had improved after the 8th day of September, 1919, since which time defendant had promptly paid to plaintiff monthly the rent, according to the terms of the lease. The court thereupon entered a judgment that plaintiff take nothing by her first cause of action; and that, as to the second cause of action, she have and recover the sum of $3,500, and ordered the receiver who had heretofore been appointed by the court to forthwith "deliver the said property held by him to defendant, and account immediately as to the receivership."

Plaintiff appealed from the judgment so rendered on the first cause of action, and from the order requiring the receiver to deliver the property in his possession to the defendant. The appeal from this portion of the judgment is taken upon the judgment roll alone. Plaintiff also appeals from the order whereby the accounts of the receiver were settled and the receiver discharged. This appeal is taken upon a bill of exceptions.

We will first dispose of the questions raised by the first appeal.

[1] Appellant claims that the oral change in the written contract, as found by the court, shows that it was never intended by the parties to be other than an agreement for the suspension of the time of payment of the amount of rent due under the contract, for which ample security existed, and that the construction given by the trial court to the agreement can avail defendant nothing, for the reason that the agreement as found is entirely without consideration. In this behalf it is argued that the carrying out of the oral agreement by defendant did not validate the contract, for the reason that it was simply the performance of the very act which defendant was legally obligated by his written contract to do, and that defendant therefore suffered no prejudice by the performance of the alleged modification.

We see no escape from this contention. In the absence of any sufficient consideration, the law supplies no means and affords no remedy to compel the performance of a contract. Neither the promise to do, nor the actual doing of that which the promisor is by law or subsisting contract bound to do, is a sufficient consideration to support a promise made to the person upon whom the legal liability rests, either to induce him to perform what he is bound to do, or to make a promise so to do. Accordingly, it has been held in this state that neither a promise to perform a duty nor its performance constitutes a consideration for a contract. Deland v. Hiett, 27 Cal. 611, 87 Am. Dec. 102; Siddall v. Clark, 89 Cal. 321, 26 Pac. 829; Sullivan v. Sullivan, 99 Cal. 193, 33 Pac. 862; MacKenzie v. Hodgkin, 126 Cal. 593, 59 Pac. 36, 77 Am. St. Rep. 209.

See, also, Goldsborough v. Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; Seymour v. Hughes, 55 Misc. Rep. (N. Y.) 251, 105 N. Y. Supp. 249; Wharton v. Anderson, 28 Minn. 302, 9 N. W. 860. The modified agreement, as found by the court to have been made between the parties, was therefore a mere nudum pactum, which did not relieve defendant from the obligations under his lease.

[2] Under her second appeal, plaintiff complains of the order of the trial court requiring the receiver to deliver property in his possession, and further requiring that the receiver's compensation be paid out of rent due the lessor from the lessee, which accrued after the receiver ceased to act, and which rent never came into his hands. The compensation allowed the receiver should have been paid from the funds in his hands, and the balance retained to be applied to the payment of the judgment to which plaintiff was entitled.

From what we have said, it follows that the judgment in favor of defendant on the first cause of action should be reversed. Upon the second appeal, the order directing payment of the receiver's fees out of the rents accruing after the receiver was discharged is reversed, as is also the order discharging the receiver.

It is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

52 Cal. App. 42

WRIGHT & KIMBROUGH v. DEWEES et al.
(Civ. 3569.)

(District Court of Appeal, First District, Division 2, California. March 23, 1921. Hearing Denied by Supreme Court May 19, 1921.)

1. Brokers ⊜48—Right to commissions depends on broker being procuring cause of sale and completing transaction in contract.

To entitle a broker to recover commissions under the ordinary broker's contract, the evidence must show that he was the procuring cause of the sale, and that the transaction was completed in the contract, unless the delay was caused by the negligence, fault, or fraud of the owner.

2. Brokers ⊜56(3)—Sale by owner after termination of broker's contract held not to entitle broker to commission.

In a contract entitling the broker to a commission for sale during the contract, the clause "or after termination of this contract, if sold to a party to whose attention said property was brought through the agency" of the broker, was designed to protect the broker for his efforts during the life of the contract resulting in a sale not consummated until after the termination of the contract, and did not take the contract out of the general rule requiring the broker to be the procuring and efficient cause of the sale, so that, where such a contract dated January 7, 1916, was for 60 days and thereafter until notice, and the price named was $18,000 cash, and, no sale having been made, the contract was canceled March 31, 1916, and in January, 1917, a purchaser, whom the broker had secured no offer from, offered $12,000 for the property, which the owner accepted, the broker was not entitled to commissions.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Wright & Kimbrough, a corporation, against C. W. Dewees and another. From judgment for plaintiff, defendants appeal. Reversed.

Elliott & Atkinson, of Sacramento, and Oliver Ellsworth, of San Francisco, (Wm. A. Sitton, of Sacramento, of counsel), for appellants.

Downey, Pullen & Downey, and Joseph L. Knowles, all of Sacramento, for respondent.

NOURSE, J. Defendants appeal from a judgment rendered against them in the sum of $600 for commissions, with interest and costs. The action arises out of a contract for the sale of real estate between defendants, the owners, and plaintiff, a corporation engaged in the real estate business, and containing, among others, the following provision:

"The said 'seller' agrees should a sale or exchange of said above-described property upon said or any satisfactory terms be effected during the period of time hereinafter named, by either party to this agreement, or any other party, or after termination of this contract, if sold to a party to whose attention said property was brought through the agency of the said 'agent,' that the said 'agent' shall receive out of the first payment made on said property 5 per cent. of the price for which said property was sold as a commission for promoting said sale."

The contract, dated January 7, 1916, was for 60 days and thereafter until the expiration of 10 days' written notice, and the price named therein was $18,000 cash. After the termination of the contract defendants personally sold the property to one Mull.

The question here presented is the proper construction of the above clause. There is no substantial conflict in the evidence. It appears that Mr. Mull and his wife were well acquainted with the property, defendants' residence located in Sacramento, before plaintiff entered into the situation. More than a year before defendants contracted with plaintiff for its sale the Mulls were looking at other property in the neighborhood, with the object of buying, and defendants at that time talked to Mr. Mull and endeavored to sell their home to him. Thereafter the Mulls frequently looked at the property from the outside of the house and talked with defendants about it; the last conversation occurring just prior to contracting with plaintiff. No offer, however, was made to defendants as a result of these conversations. When plaintiff interviewed the Mulls regarding the property, they told him they knew it was for sale. Defendants also told plaintiff, after the contract was signed, that the Mulls were interested in the property and were good prospects. Plaintiff likewise was unsuccessful in obtaining an offer from the Mulls, although he took them to see the property once or twice, being the first to show them the interior of the house, and endeavored to sell it to them. Mr. Wright, plaintiff's representative in this matter, then reported to defendants that the Mulls were no longer interested in the property and to forget about them as prospective purchasers; that he had seen plans which they had prepared for a home which they intended building. Thereafter, and on March 31, 1916, defendants served upon plaintiff written notice of cancellation of the contract as therein provided, no sale having been made, and no offer whatever having been obtained from Mr. Mull. About a month later plaintiff solicited a new contract of sale from defendants, which they refused. The matter was dropped, so far as the Mulls were concerned, until several months later, when negotiations were entered into between Mull and defendants, as the court found, without fraud as to plaintiff. In January, 1917, about 9 months after the contract was canceled, and after plaintiff had

ceased all negotiations in the matter, Mull offered defendants $12,000, for which defendants sold to them. Mr. Mull testified that he was not influenced in the purchase by anything which plaintiff did, and had dismissed the proposition entirely from his mind; that he did not come to the conclusion of paying $12,000 for the property until practically the day he bought it, when Mr. Dewees offered to sacrifice it. Defendants had, during the life of the contract, refused an offer of $16,000 made by another client of plaintiff. The court found "that plaintiff took no part in these subsequent and final negotiations which resulted in said sale," but nevertheless gave judgment for plaintiff.

[1] The law is well settled by a long line of decisions that in order to entitle a broker to recover commissions under the ordinary broker's contract the evidence must show that he was the procuring cause of the sale.

"The rule is that, to entitle a broker to a commission for the sale of real estate which he has been given by the owner authority to sell, he must produce before the owner a purchaser ready, willing, and able to purchase at the price and on the terms specifically expressed in the contract of employment. While a change made by the owner, when consummating the sale, in the price of the land or the terms of the sale from those specified in the broker's contract, cannot of itself affect or impair in any way the right of the broker to his commission, the latter cannot claim a commission unless his efforts are the procuring or inducing cause of the sale. * * * 'In order for the broker to recover, the evidence must show that his efforts were the procuring cause, and not merely one in a chain of causes.'" Roth v. Thomson 40 Cal. App. 208, 180 Pac. 656; Waterman v. Boltinghouse, 82 Cal. 659, 23 Pac. 195; Snook v. Page, 29 Cal. App. 246, 155 Pac. 107; Dolan v. Scanlan, 57 Cal. 261; Ayres v. Thomas, 116 Cal. 140, 47 Pac. 1013.

[2] The evidence must also show that the transaction was completed within the time limited in the contract, unless the delay was caused by the negligence, fault, or fraud of the owner. Ropes v. John Rosenfeld's Son, 145 Cal. 671, 677, 678, 79 Pac. 354; Brown v. Mason, 155 Cal. 155, 99 Pac. 867, 21 L. R. A. (N. S.) 328; Naylor v. Ashton, 20 Cal. App. 544, 130 Pac. 181. The obvious purpose of the insertion in the above-quoted clause of the words "or after termination of this contract, if sold to a party to whose attention said property was brought through the agency of the said agent" was to protect plaintiff for his efforts during the life of the contract resulting in a sale not consummated until after the termination of the contract. As said in Kimmell v. Skelly, 130 Cal. 555, 559, 62 Pac. 1067, 1068:

"The parties to a brokers' contract are at liberty to make the compensation of the broker depend upon any lawful conditions they see fit to place therein. The single question is: What does the contract provide?"

The contract in the instant case is distinguishable from the provision of the contract under construction in the decision in that case, also in Rucker v. Hall, 105 Cal. 425, 38 Pac. 962, and Maze v. Gordon, 96 Cal. 61, 30 Pac. 962. In Kimmell v. Skelly the contract provided for employment as sole and exclusive agents at a fixed compensation in case of a sale by any one during the term of their employment. In Rucker v. Hall the contract provided, if the owner found a purchaser independent of the agents, she would pay them one-half of the specified commission on a sale to their customer "as compensation for their services in advertising," etc. In Maze v. Gordon the brokers' contract was for 12 months and provided for payment of commission "in the event of withdrawing the sale of said property during the time." Here the contract provided:

"If sold to a party to whose attention said property was brought through the agency of said agent," the broker shall receive 5 per cent. "as a commission for promoting said sale."

This language imports an obligation on the part of the broker, to entitle him to commissions, to do something more than merely show the property and make unsuccessful efforts wholly unconnected with and to no extent traceable to the subsequent sale. His commissions depended entirely upon results accomplished—for "promoting" or procuring the sale. There is nothing in the language of this contract which takes it out of the general rule requiring the broker to be the procuring or efficient cause of the sale in order to entitle him to commissions.

The principles stated in Strout v. Hubbard, 104 Me. 366, 71 Atl. 1020 and Moore v. Holman Real Estate Co., 129 Ark. 465, 196 S. W. 479, cited by respondent, are in conflict with this rule. However, in the former case the facts were far more favorable to a recovery measured by the "procuring cause" requirement than in the instant case. The broker, during the life of the contract, obtained an offer from the subsequent purchaser and brought him into negotiations with the owner. The latter rejected the offer. Five days later he canceled the contract, and but one week later sold to the same party for only $120 more than the offer obtained by the broker. It appears from the facts stated in Moore v. Holman that the broker's efforts were the procuring cause of the sale, which was made within two months from the expiration of the contract, and that he was justly entitled to his commissions. The contract provided for payment of commissions to the broker if the property should be sold "on information secured through this agency." The dissenting opinion criticized the reasoning of the majority opinion, saying a sale "on information secured through this agency" should be construed to mean on informa-

tion sufficient to constitute the moving cause of the sale.

In Williams v. Leslie, 111 Ind. 70, 12 N. E. 102, the provision of the contract under construction was:

"If a customer is *introduced through the agency of the said Leslie* [the broker], and a sale is afterwards consummated with such customer, I agree to pay the commission before mentioned, whether the time of this agreement shall have expired or not." (Emphasis added here.)

The court said:

"The effect of that clause was, that in the event of a sale, where or by whomsoever consummated, if made to a customer introduced through the agency of Leslie—that is, *if the latter was the procuring cause of the sale*—he was to have his commission." (Emphasis added here.)

In Shipman v. Wilkeson (Sup.) 112 N. Y. Supp. 895, in which the facts were very similar to those in the instant case, the decisive question was the meaning of the clause in the contract entitling the broker to commission if the farm was sold after the expiration of the contract "on information obtained through your agency." The court said:

"The only valid purpose of the stipulation in question must be to protect the broker from loss of compensation for successful efforts in procuring a purchaser, culminating in a sale on the stipulated terms after the broker's authority to effect a sale has terminated. It is a shield to protect the agent, not a sword to injure his principal."

For the reasons given, the judgment is reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

(51 Cal. App. 759)

ANAHEIM CITRUS FRUIT ASS'N v. YEOMAN. (Civ. 3416.)

(District Court of Appeal, Second District, Division 1, California. March 18, 1921. Hearing Denied by Supreme Court May 16, 1921.)

1. Damages ⟸79(1)—50 cents per box liquidated damages for fruit marketed outside citrus fruit association held recoverable from member as liquidated damages.

A by-law of a citrus fruit growers' co-operative marketing association requiring a stockholder, failing to permit the association to market his fruit while remaining a member, to pay 50 cents per box for every box of fruit otherwise sold or consigned, *held* enforceable under Civ. Code, §§ 1670, 1671, by action by the association against such a member, as providing for liquidated damages, not a penalty.

2. Contracts ⟸116(6) — Monopolies ⟸18(1)—Citrus fruit growers' association held not a monopoly or in restraint of trade.

A citrus fruit growers' co-operative marketing association *held* not to be presumed, without proof, to have a purpose to do acts in restraint of trade or produce an unlawful monopoly, in view of St. 1909, p. 593, so that its complaint against a member to collect liquidated damages under its by-laws of 50 cents per box for his marketing his fruit through other agencies than plaintiff was not demurrable.

3. Agriculture ⟸6 — Fruit growers' association, though not for profit, could collect liquidated damages from member violating by-laws.

That a citrus fruit growers' co-operative marketing association was a nonprofit organization did not militate against its right to collect from a member liquidated damages incurred by him for marketing his fruit through other agencies, in the absence of a showing of intent to divert the money thus collected to some ultra vires purpose.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the Anaheim Citrus Fruit Association against L. C. Yeoman. From judgment for plaintiff, defendant appeals. Affirmed.

Leonard Evans, of Anaheim, and Frank F. Oster, of Los Angeles, for appellant.

H. C. Head and A. W. Rutan, both of Santa Ana, for respondent.

JAMES, J. In this action there was a judgment for the plaintiff, and defendant has appealed therefrom, adopting the alternative method in bringing up the record. There is printed in appellant's brief material portions of the judgment roll and such evidence as is relevant to a consideration of the questions presented.

The cause of action alleged in the complaint was for the recovery of a sum of money as liquidated damages arising under a term of a contract made by defendant with the plaintiff. In the record presented it is shown that the plaintiff was at all times material to the controversy a corporation organized for the purpose of enabling its members to jointly conduct the operation of harvesting and marketing citrus fruits grown upon land owned by such members. The underlying plan of the organization was co-operative, and no persons were eligible to membership except those who produced citrus fruit which they desired to market. The by-laws which were subscribed by the stockholders provided that the corporation should have the sole and exclusive right to pick, grade, pack, market, and sell the citrus fruit raised by the members on the land described in the certificates of stock—in brief, gave to the association the exclusive right to manage

and control the harvesting and marketing of crops of the several members. The condition expressed in the by-laws under which the alleged cause of action arose was that which required of a stockholder who failed to permit the association to market his fruit, while remaining a member, that he pay the sum of 50 cents per box for every box of fruit otherwise sold or consigned. In the year 1919 the defendant, who was then a member of the association plaintiff, marketed 568 boxes of oranges through agencies outside of the association, and refused to pay the stipulated 50 cents per box to the plaintiff. This action was thereafter brought.

Appellant insists that the judgment rendered in this case cannot be upheld for several reasons, chief of which is that the stipulation expressed in the by-laws providing for the payment of 50 cents per box by each stockholder who should violate the agreement is void and of no effect; this because, as it is argued, the condition imposed a penalty which the law does not permit to be recovered.

[1] Aside from any provisions of statute, it has long been held under decisions having their basis in the common law that a contract is not enforceable where a sum of money as a penalty is provided to be paid in the event of a breach, and where the sum fixed has no reference to, and finds no support in, the amount of actual damage sustained by the complaining party. Anson on Contracts, par. 347. The effort of the law has always been to work the equitable result that for the breach of a simple contract obligation there shall be cast upon the delinquent party a liability to respond to such damages only as will furnish reasonable compensation for the injury done. Hence it has been held that a penalty, so stated to be and answering to its definition strictly, is never recoverable, but that the party shall be remitted to his remedy for compensatory relief. It has also been held, nevertheless, that an agreement fixing the amount of damages for the breach of a contract in advance, where such amount could be shown to be reasonably proportionate to the actual damages sustained, or where, because of the peculiar nature of the contract, it would be extremely difficult to ascertain the amount in which the innocent party has suffered damage, is allowed to be enforced. Sedgwick on Damages, vol. 1, par. 403 et seq. Our Civil Code (sections 1670 and 1671) has narrowed the rule by not allowing the enforcement of a condition fixing damages in advance except "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage"; hence we have only to inquire in this case as to whether the contract was, in its terms and conditions, and as shown by surrounding circumstances, such as to fall within the denominated class. In construing contracts for the purpose of determining whether the damages provided to be secured should be treated as a penalty, or as damages properly liquidated, the courts have paid some attention to the terms used by the parties in describing these damages. For instance, in Tayloe v. Sandiford, 7 Wheat. 13, 5 L. Ed. 384, the court said:

"The parties themselves denominate it a penalty, and it would require very strong evidence, to authorize the court to say that their own words do not express their own intent."

This language is a fair expression of the conclusion expressed in earlier cases. It need only be added that more recent authorities, including decisions of our own Supreme Court, have receded from the view that the language of the parties in characterizing the damages fixed is controlling or of any great force in determining the legal effect to be given the contract; this for the reason that the intention of the parties is not the main fact to be ascertained in such a case, but it is rather that the court shall be enabled to find as to whether, under all the circumstances, the parties have made a contract which is, under the law, enforceable. Under this rule the assertions of the persons concerned as expressed in their contract become items only to be considered in the aggregate of the evidence. Our Supreme Court in Nakagawa v. Okamoto, 164 Cal. 718, 130 Pac. 707, has said:

"In determining whether a provision in a contract is for liquidated damage or for a penalty, 'the fundamental rule so often announced is that the construction of the stipulations depends in each case upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made.'"

Upon analysis it will be seen that the cases of Potter v. Ahrens, 110 Cal. 674, 43 Pac. 388, and Consolidated Lumber Co. v. City of Los Angeles, 33 Cal. App. 698, 166 Pac. 385, announce neither a more extended nor limited construction than is declared applicable in the case first cited. In controversies of this kind the difficulty is not so much in finding the rule of law to apply to a case which admittedly falls within the excepted class described in section 1671, Civil Code, but rather to determine whether under the given facts the case is entitled to be so classified. The parties to the contract here under consideration did denominate the sums which the defendant would be required to pay by reason of a failure to market his fruit through the plaintiff association as "liquidated damages" so that, as an item in the evidence suggesting proper interpretation to be given, the expression used indicates a recoverable damage, and not a penalty. Irrespective of this expression in the contract, we think that the facts and circumstances shown in evidence

all support the plaintiff's contention that recovery should be sustained for the amount fixed by the by-laws of the association. The association was organized for the purpose of the better handling of citrus fruits through the co-operative and joint effort of its members. From the nature of the organization and the statement of its purposes as found in its articles and by-laws, it can be fairly and reasonably inferred that by the co-operation of its members mutual advantages would accrue to all through greater economy in handling and shipping and the securing of more advantageous marketing facilities. These results would be dependent directly upon the performance by the members of their agreement to deliver their fruit into the hands of the association for the purposes declared. Defendant sought to show at the trial that the damage which would accrue to the association by reason of any of its members failing or refusing to market their fruit through the association could be easily and exactly ascertained, and that such damage would consist wholly of a proportionate amount of overhead operating cost. By the line of questioning pursued it was made clear that the association would suffer an actual monetary loss by reason of the failure of defendant to deliver his fruit at the association packing house for market, as he had agreed to do, but in the very nature of the case we do not think that such damage should be the only damage considered to have been suffered by the plaintiff. Other elements have already been suggested. The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the nontransgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern. The argument would be the same, regardless of the quantity of fruit which might have been delivered by the defendant, whether it composed but a small fractional part or one-half or more of the entire product designed to be marketed by the plaintiff agency. Enough has been said, we think, to show that the case falls within the class as to which the law permits damages to be liquidated by contract in advance of their occurrence. It follows as a necessary conclusion that plaintiff was entitled to recover the exact amount fixed in its contract as the sum per box which defendant should pay by reason of his failure to market this fruit in the manner agreed.

[2] There is nothing in the articles of incorporation of the plaintiff or its by-laws, or in the evidence of its methods, which tends to show that any purpose of the association was to do acts in restraint of trade or produce an unlawfully monopoly. The statute of this state defining acts which are made penal as having an improper effect upon merchandising expressly excepts organizations formed for the purpose of conducting operations for marketing at a reasonable profit or the marketing of products "which cannot otherwise be so marketed." Stats. of 1909, p. 593. It will not be inferred, without proof of the fact, that an organization, the purposes of which appear to be legal and legitimate on their face, is actuated by a hidden design to operate in a way that is prohibited by law. None of the cases cited by appellant fit the facts illustrated here. Herriman v. Menzies, 115 Cal. 16, 44 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81, cited by respondent, is in point as sustaining the conclusions which we have just expressed.

The complaint of plaintiff contained a statement of the provisions as to the organization of the plaintiff, the fact that the defendant was a member thereof, and set out that portion of the by-laws relating to the agreement made by the members of the association respecting the marketing of their fruit and the paying of the amount of 50 cents per box for a failure to deliver the fruit to the association; it contained a statement of the number of boxes of oranges which were diverted from the agency of the plaintiff by the defendant, and a statement of the demand made by the plaintiff upon the defendant, and an allegation that plaintiff had suffered damages by the act of defendant, and that it was "impracticable and extremely difficult to fix the actual damage suffered." The demurrer of the defendant to the complaint was, we think, properly overruled.

[3] The plaintiff's existence as a nonprofit association does not in any wise militate against its right to claim the damages recovered. As a corporation considered singly, it designed to make no profit; the advantages, pecuniary and otherwise, resultant upon its operations, descended immediately to the co-operating stockholders. As an agency for the purpose of distributing this benefit in such manner, the corporation existed as such, and by its corporate name it was entitled to prosecute this action. As to whether it might, upon collecting the money, sequester it in a fund not contemplated by the terms of its articles, and so consummate an act ultra vires, is of no concern here. No such intent is shown.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 27

LOS ANGELES GAS & ELECTRIC CORPORATION v. DEPARTMENT OF PUBLIC SERVICE OF CITY OF LOS ANGELES et al. (Civ. 3674.)

(District Court of Appeal, First District, Division 1, California. March 21, 1921. Hearing Denied by Supreme Court May 19, 1921.)

Electricity ⊂1½ — Public service commissions ⊂6—Municipally owned public utilities are not subject to Railroad Commission.

The Railroad Commission is not empowered to regulate and supervise municipally owned public utilities, so that a municipality constructing electric works to supply itself and its inhabitants with electricity, in connection with its aqueduct system constructed under Const. art. 11, § 19, need not obtain from the Railroad Commission the certificate required by Public Utilities Act, § 50, of public convenience and necessity.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Los Angeles Gas & Electric Corporation against the Department of Public Service of the City of Los Angeles and others. From judgment for defendants, plaintiff appeals. Affirmed.

Paul Overton, S. W. Guthrie, and H. J. Goudge, all of Los Angeles, and Samuel Poorman, Jr., for appellant.

Charles S. Burnell, City Atty., W. B. Mathews, Lewis E. Whitehead, and Ray C. Eberhard, all of Los Angeles, for respondents.

WASTE, P. J. Plaintiff brought this action to enjoin the department of public service of the city of Los Angeles, and the board of public service commissioners of that city, from erecting, constructing, operating, or maintaining an electrical distributing system in the city of Los Angeles, until such time as the Railroad Commission of the state should issue a certificate of "public convenience and necessity" therefor. The lower court rendered judgment in favor of the defendants, and plaintiff has appealed.

The plaintiff is a corporation engaged, under proper franchises, in generating, furnishing, and distributing electric energy to consumers in the city of Los Angeles and elsewhere, for compensation, and has erected and constructed poles, wires, conduits, and other electrical apparatus and appliances in the streets and public places of that city for the purpose of carrying on its business. Under the powers conferred by the state Constitution (article XI, § 19) and its own charter, the city of Los Angeles constructed an aqueduct system for the purpose of providing for the use of its inhabitants an additional supply of water from the watershed of the Owens river. This aqueduct, by reason of the fact that its intake is more than 2,000 feet higher than its southerly terminus in the city of Los Angeles, affords opportunites along its course for the development of electric energy from the fall or flow of the water. Since March 23, 1912, the city, through its board of public service commissioners, has been engaged in the construction of works for generating electric energy from the flow of water in the aqueduct, and for transmitting it into the city, where plants and a complete system have been constructed for distributing such energy for domestic, commercial, and industrial uses and purposes, including public street lighting. More than $8,000,000 have been expended in this enterprise. At the time this litigation was initiated, the city of Los Angeles, in competition with plaintiff, was supplying some 15,000 consumers with electric energy, and was furnishing approximately 40 per cent. of all public street lighting in the city.

In bringing this action for an injunction, the appellant takes the position that the respondents, in constructing and operating an electrical distributing system for the purpose of furnishing and supplying electric energy to the inhabitants of the city of Los Angeles, are not performing governmental functions, but are acting solely in a proprietary capacity, to the same extent as the plaintiff and other private corporations. It therefore contends that, in the operation of its public utilities, the city is subject, as are all private corporations thus engaged, to the provisions of the Public Utilities Act. Its particular complaint is that, before beginning the construction of its works, the city did not, and never has, obtained from the State Railroad Commission the certificate required by section 50 of the Public Utilities Act (Stats. 1915, p. 148), "that the present or future public convenience and necessity require, or will require, such construction," The city takes the ground that it was unnecessary for it to obtain such certificate, claiming that the Public Utilities Act has no application to any public service carried on by it as a municipal corporation.

The sole question presented on this appeal is whether or not the Railroad Commission of the state is empowered to regulate and supervise municipally owned public utilities. When the judgment in this action was rendered in the lower court, the proposition was an open one. Further controversy has, however, been precluded by the recent decision of the Supreme Court in City of Pasadena v. Railroad Commission of California, 192 Pac. 25. In that case the city of Pasadena, under authority of its charter, constructed electric works for the purpose of supplying its inhabitants with electricity. It extended its wires to the adjoining city of South Pasadena, and thereafter supplied

electricity to the inhabitants of the latter city for similar purposes. On complaint of the Pacific Gas & Electric Company, which was also engaged in supplying electricity to the inhabitants of South Pasadena, the Railroad Commission, assuming to act under the provisions of the Public Utilities Act, made an order requiring the city of Pasadena to file with it a complete schedule of all of its rates, rules, and regulations for the service of electric energy to consumers within the limits of South Pasadena. The city of Pasadena thereupon applied to the Supreme Court for certiorari to review the order of the commission, taking the exact position now assumed by the city of Los Angeles in the instant case, that the Public Utilities Act, under which the Railroad Commission made the order, has no application to any public service carried on by a municipal corporation. The court, in its decision written by Mr. Justice Shaw, and concurred in by the other members of the court, held that the provisions of the Constitution authorizing the Legislature to make laws conferring on the Railroad Commission power to control, supervise, and regulate public utilities in the state of California, and to fix rates for commodities furnished by public utilities, apply exclusively to private corporations and natural persons, or associations of persons, and do not include public service carried on by municipalities. It also held that the Constitution did not give the Legislature authority to confer upon the commission power to regulate the rates of service charged by municipal corporations operating municipally owned public utilities.

The court, therefore, squarely held that the Public Utilities Act, under which the Railroad Commission assumed to act in the Pasadena Case, the provision of which plaintiff in the instant case attempts to invoke, has no application to any public service carried on by a municipal corporation under the authority of the Constitution and laws of the state. City of Pasadena v. Railroad Commission, etc., supra. A petition for a rehearing of the case after the decision was denied.

No good can be accomplished by further reference or apt quotation from that opinion. Suffice it to say that it comprehensively deals with, and satisfactorily settles, the exact legal question involved in this case. The lower court was correct in holding that the Railroad Commission was without jurisdiction in the instant case, and that it was unnecessary for the city of Los Angeles to apply to the commission for the certificate of public convenience and necessity in the matter of the construction and maintenance of its municipally operated electric plants and distributing systems.

The conclusion we have reached renders it unnecessary to consider the question raised by respondents, whether or not the plaintiff could maintain the action.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

51 Cal. App. 769

HUNSTOCK v. ROYAL SECURITIES CORPORATION et al. (Civ. 3476.)

(District Court of Appeal, Second District, Division 1, California. March 18, 1921. Hearing Denied by Supreme Court May 16, 1921.)

1. Principal and surety ⊂=42—That surety did not know bond for completion of building was to secure purchase price immaterial.

A lot purchaser, not having funds to pay either for the lot or the building he desired to erect thereon, induced the vendor to consent to his mortgaging the lot to obtain funds. The vendor exacted a bond to protect him in case of purchaser's failure to complete the building. The building was never completed, and the security was all exhausted on sale under the mortgage. *Held*, that the surety was liable on the bond, although he did not know that the bond was to secure unpaid purchase money, for, if the building had been completed, the security would have been ample to protect both vendor and mortgagee.

2. Principal and surety ⊂=59 — Strained construction of a contract of suretyship improper.

A surety will not be held bound through any strained construction of his contract, but under Civ. Code, § 2837, the contract should be construed just as the meaning of other contracts is determined.

3. Principal and surety ⊂=59 — Intent being ascertained, responsibility of surety is limited by conditions imposed.

Once the intent of a written contract of suretyship is ascertained, the responsibility of the surety is limited strictly by the conditions imposed by such construction.

4. Principal and surety ⊂=59 — Commercial sureties are not favorites of the law.

A commercial surety who receives a premium for executing a surety bond is not a favorite of the law, and as such entitled to strict construction of the contract as an ordinary surety for accommodation.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Robert H. Hunstock against the Royal Securities Corporation and Frank E. Ruben. From a judgment for plaintiff the first-named defendant appeals. Affirmed.

Muhleman & Crump, of Los Angeles, for appellant.

Seth B. Smith and G. C. De Garmo, both of Los Angeles, for respondent.

JAMES, J. This action was brought and recovery allowed upon a bond executed by one Ruben with the appellant corporation as surety, and in favor of the plaintiff. Judgment was in accordance with the prayer of the complaint, and from that judgment this appeal is taken.

As to the main facts no dispute is shown in the record. It appears that in November, 1916, Ruben was desirous of purchasing from the plaintiff a lot in the city of Los Angeles upon which to erect an apartment house. The price of the property, as agreed upon between plaintiff and Ruben, was the sum of $15,000. Ruben had not the money to pay the whole of the purchase price, or in fact, as appears later, any part of it. However, it was agreed that $4,000 in cash should be paid to the plaintiff, and that the balance of the price, to wit, $11,000 was to be evidenced by two notes, one for $1,000 and another for $10,000, which notes were to mature in 10 and 20 months respectively, and to be secured by a trust deed which was to be second in priority to another debt which is hereinafter referred to. In order to secure funds with which to pay to plaintiff the $4,000 and to erect the apartment house, it was necessary for Ruben to borrow $45,000. Plaintiff understood this and agreed that a trust deed might be given by Ruben to secure payment of the $45,000, which deed plaintiff agreed might be first in point of security to the trust deed made in his favor, which has just been referred to, with the condition, however, that Ruben should secure a bond running to the plaintiff, the penalty of which bond was to be the sum of $10,000, and which bond would guarantee that Ruben would erect and complete the apartment house in accordance with plans and specifications already prepared, and which had been approved by the plaintiff. The various documents were executed simultaneously, the initial payment on the purchase price was made, and the transaction was closed. Ruben commenced the erection of the building and continued the same for a number of months, when he ceased work, leaving the structure uncompleted. He had not only failed to discharge his interest obligations to the beneficiary under the first trust deed, but also to the plaintiff. Before proceeding with a necessary statement of further facts, we here quote the material portions of the bond instrument:

"Know all men by these presents that Frank E. Ruben, as principal, and Royal Securities Corporation, a corporation, as surety, are held and firmly bound unto R. H. Hunstock in the sum of ten thousand ($10,000.00) dollars gold coin of the United States of America to be paid to the said R. H. Hunstock, his executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, successors, and assigns, firmly by these presents.

"Sealed with our seals and dated the 14th day of November, 1916.

"The condition of the above obligation is such that Frank E. Ruben, the principal herein, shall construct and complete a ninety (90) roomed apartment house on the premises known as lot eleven (11) and the north half of lot twelve (12), block K, Knob Hill tract, being located on the west side of Alvarado street between Sixth street and Ocean View avenue, which building shall be completed within six months from the date hereof, according to the plans and specifications, then this obligation to be void, otherwise to remain in full force and virtue."

It will be noted that the six months' term specified in the bond expired on the 14th of May, 1917. At that time Ruben was still at work on the building, and he continued so at work until some time in July of that year, when he abandoned the structure. At or shortly after the date when Ruben ceased to work upon the building, and in July, the plaintiff by his attorneys notified the surety on the bond of the failure of Ruben to complete the structure and advised the surety that plaintiff would look to the former for compensation for any damages which might be sustained by reason of "delay in completing this building." On July 25, 1917, plaintiff exercised his option to declare the principal and interest due on the two promissory notes of Ruben and thereafter proceeded to have a sale made of the property under the trust deed. In October, 1917, the holder of the first trust deed exercised a like option and caused the property to be sold for the sum of $45,000, that being the principal sum advanced under that loan agreement. Under the plaintiff's sale but $500 was realized, leaving a balance due on the principal of $10,500. The sale under the first trust deed wiped out the security and extinguished the interest of the plaintiff. This action was then brought to recover from the surety. The court found upon sufficient evidence that, had the building been constructed by Ruben as agreed, the property would have been worth not less than $65,000, but that in the state it was when abandoned by Ruben it was worth not to exceed $45,000 (that being the amount of the first lien debt). There was also sufficient evidence to support the finding as made that at the time the surety corporation entered into the undertaking in favor of the plaintiff it had knowledge of the transaction between the plaintiff and Ruben in which the bond was required to be given; this with the exception that the court made a further finding in the following terms:

"Said defendant did not know or have any notice that said bond was given to secure any part of the purchase price of said lot or for any purpose other than to insure the completion of said building."

So it is made to appear that, had Ruben completed the building as he agreed to construct it, in accordance with plans and specifications approved by the parties, the property would have been worth enough to have

repaid both the holder of the first trust deed and the plaintiff for the full amount of their debts. That this result would have followed is not made the subject of any serious argument in the case.

[1-3] Appellant's claim that the judgment should not be sustained rests upon the contention that under the terms of the undertaking and the particular finding made by the court as last adverted to the obligation of the surety could in no wise be extended so as to cover any loss suffered by the plaintiff by reason of the failure of Ruben to pay his purchase price notes according to their terms, and the argument is that the only liability which could accrue under the terms of the bond would be liability for the rental value of the property with a completed building thereupon. If there were limiting terms included or suggested by necessary construction of the bond instrument, which would tend to show that the agreement was only as contended for by appellant, that position might be maintained. The case made in the record is that the plaintiff exacted the bond from Ruben for the very purpose of insuring him against the failure of Ruben to erect upon the property a building which would make the value of the whole adequate security for the unpaid portion of the purchase price. Whether the particular intent was expressed to the surety we think of no moment. The instrument executed by it was general in its terms and did guarantee that Ruben would erect and complete the building referred to within the time specified. A breach of the condition would result in the surety becoming liable for any damages which would accrue to plaintiff as a natural and reasonable result of the failure of Ruben to perform his contract. By reason of Ruben's default, the contemplated security was depreciated and plaintiff suffered damage. We think he was entitled to recover. The citations presented by appellant as to the favored position which a surety occupies under the law all state well-known and fundamental propositions. True enough it is that a surety will not be held bound through any strained construction of the terms of his contract. In construing his contract and in ascertaining its meaning, precisely the same rules apply as to parties in other situations. Civ. Code, § 2837; Sather Banking Co. v. Briggs Co., 138 Cal. 724, 72 Pac. 352. Once the intent of the instrument is ascertained, then the responsibility of the surety is limited strictly by the conditions imposed under such construction. Stevens v. Partridge, 88 Ill. App. 665; Brandt on Suretyship (3d Ed.) par. 107.

[4] While there seems to be no occasion for invoking the exception to the rule in this case, it may be remarked that the tenor of more recent authorities is to hold that surety companies issuing their obligations for a price, and being in the business of furnishing bonds, are less entitled to insist that they stand as favorites under the law than those who become bound as a matter of friendly accommodation. The surety here was such a corporation and received a premium for executing the bond.

From the conclusions expressed it follows that the judgment should not be disturbed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 38

Ex parte VAN ZANDT. (Cr. 557.)

(District Court of Appeal, Third District, California. March 22, 1921.)

Criminal law ⊂=212—Verified complaint on personal knowledge sufficient to sustain issuance of a warrant without other depositions.

A verified complaint before a magistrate which contains direct allegations of the commission of a felony, and not merely allegations on information and belief, is sufficient to authorize the magistrate to issue a warrant, without his requiring other depositions in accordance with Pen. Code, §§ 811–813.

Application by J. N. Van Zandt for a writ of habeas corpus to secure his release from custody on a charge of forgery. Writ discharged.

Walter F. Lynch, of Stockton, for petitioner.

Edward Van Vranken, Dist. Atty., of Stockton, for respondent.

PREWETT, Presiding Justice pro tem. The petitioner is held in durance under a warrant issued by a magistrate of the county of San Joaquin, upon a complaint charging him with the crime of forgery. The allegations of the complaint are positive and not on information and belief. He urges the single point in support of his plea for liberty that a magistrate should not, on the complaint alone, unfortified with depositions, issue a warrant for the arrest of a person charged with the commission of a felony. He cites sections 811, 812, and 813 of the Penal Code as authority for this position. It is, we think, universally conceded that a complaint made upon information and belief must be thus supported. Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619. While this case is clearly authority for the claim that a complaint based only upon information and belief will not support a criminal proceeding, it is likewise authority to the effect that the complaint alone may under proper circumstances be entirely sufficient.

We quote from that case the following instructive language:

"Of course, where there was some evidence upon which the magistrate acted, we would not interfere. It may be also true that the original information might be treated as a deposition; and in such view, if it contained positive evidence of facts tending to show guilt, it might be sufficient as a basis for the issuance of a warrant."

This case has been cited as authority in many later decisions, and it has never, so far as we are informed, been either overruled or doubted. It is quoted with approval in Matter of the Application of Mills Sing, 13 Cal. App. 736, 110 Pac. 693, where the court says:

"The complaint which initiates a criminal proceeding need not be verified. Pen. Code, § 806. If verified, however, and containing positive evidence of facts tending to show guilt, the same may be treated by the magistrate as the deposition required by section 812 of the Penal Code."

The Dimmig Case received consideration at the hands of the court in the case of Modern Loan Co. v. Police Court, 12 Cal. App. 582, 108 Pac. 56, and the court comments as follows:

"He also claims that under section 1527 of the Penal Code the evidentiary and not the ultimate facts should be stated. Here the affidavit set forth the commission of the larceny not upon information, but in positive terms, and in view of the decisions in Ex parte Dimmig, 74 Cal. 164 [15 Pac. 619], and People v. Staples, 91 Cal. 23 [27 Pac. 523], this last contention would seem to have as little merit as the first one."

It is possible that this quotation may be treated, in view of the ultimate conclusion of the court, as a dictum; still it is not without value in this connection. In the Staples Case, 91 Cal. 23, 27 Pac. 523, the precise point involved in the instant case was raised, and in passing thereon Chief Justice Beatty, sustained by the entire court, said:

"One ground of the motion was that the magistrate before whom his examination was had issued his warrant of arrest without having taken any depositions of witnesses in support of the charge laid in the complaint, thus violating, as he claims, the provisions of sections 811, 812, and 813 of the Penal Code. In support of this point he cites and relies on the case of Ex parte Dimmig, 74 Cal. 164. But that case lends no support to his contention, for two reasons: In the first place, the complaint in this case, unlike the complaint against Dimmig, is positive and direct in its allegation of every fact necessary to support the charge laid, and is therefore in itself a sufficient deposition within the doctrine of the Dimmig Case. In the second place," etc.

We find no case in the 70 years of our state's history in which an accused person has been discharged by any court of general appellate jurisdiction for the sole reason that the complaint was not corroborated with depositions, and we are confident that no such case can be found. Where the same point arises in tens of thousands of cases and it meets with the uniform acquiescence of the bench and bar, a strong inference arises that their acquiescence is justified.

In addition to the Dimmig Case, the petitioner refers us to a number of cases which he insists support his position. Some of these will be briefly noticed. In Ex parte Blake, 155 Cal. 586, 102 Pac. 269, 18 Ann. Cas. 815, strongly relied upon by petitioner, we find nothing not in harmony with the cases above cited. That was a case where the petitioner was charged in a justice's court with the commission of a misdemeanor of which the court had jurisdiction. The court quotes from the Dimmig Case with approval and points out a difference between complaints for felonies and mere misdemeanors. The case is not in point. He draws our attention to Ex parte Conner, 3 Cal. App. 241, 84 Pac. 999. It is true that in this particular case the court intimates the necessity for depositions in addition to the original information or complaint. But that was a proceeding under section 701 of the Penal Code, and the court justified its conclusion in these words:

"Nor do we think that the written information verified by her shows the facts necessary to justify the issue of the warrant."

This authority does not support the claims of the petitioner herein; on the contrary, the plain implication therefrom is that the verified information would have been held sufficient if it had shown the necessary facts. It seems that in proceedings under section 701 the complaining pleading is called an "information" instead of a complaint.

No more does Ex parte Hartwell, 28 Cal. App. 627, 153 Pac. 730, aid the petitioner. The reported opinion in that case contains a criticism of the complaint upon which the accused was arrested, but the only point before the court was the competency of the complaint as evidence upon the preliminary examination. It was held to be inadmissible for this purpose. The question as to its sufficiency to justify the issue of a warrant did not arise, and no attempt was made to decide it. The case contains no implication that a complaint under oath stating sufficient facts would not justify the issue of a warrant.

People v. Lee Look, 143 Cal. 216, 76 Pac. 1028, throws no more light on the question now under consideration than to show that the point can be raised only before examination and commitment.

Ex parte Spears, 88 Cal. 640, 26 Pac. 608, 22 Am. St. Rep. 341, discussed at the oral argument, does not throw any light on the question. In that case the complaint charged

only "on information and belief," and it comes squarely within the doctrine of Ex parte Dimmig, supra.

Petitioner cites with some confidence the case of Church v. Calhoun, 129 Mich. 126, 88 N. W. 403. That case is not authority on any point involved herein. In that case the defendant was arrested in a civil action on a capias ad respondendum upon an affidavit by a layman charging the defendant with certain acts of malpractice which, it appeared, were within the knowledge only of technically skilled surgeons. The court held that the failure of the affidavit to show that possession of such skill by the affiant rendered it insufficient. It is argued that, as the instant case is a charge of forgery, the affiant cannot have known that the petitioner well or otherwise knew that the check was false, forged, and counterfeit. But this contention is not sound. While there are many cases where one person cannot be heard to say that another possesses knowledge of a given matter, there are nevertheless many cases in which he may, in a variety of ways, very satisfactorily know this. He may have heard the other admit it or he may have heard him make declarations from which the knowledge is infallibly inferred, or, again, he may have seen conditions which impute the knowledge. It is not insisted that any other matters stated in the complaint are such as might not have been known to the deponent.

Our conclusion is that an uncorroborated verified complaint, stating sufficient facts, justifies the magistrate in issuing a warrant of arrest. He must be "satisfied" therefrom that a crime has been committed, and, furthermore, he must find therefrom reasonable cause to believe that the accused is guilty. These things must be shown fully and by positive statement; but the Legislature did not intend to require close technical accuracy in discriminating between probative and ultimate facts. A less satisfactory rule would permit many guilty persons to escape and would render it difficult to apprehend criminals who commit certain classes of crimes.

The petitioner is remanded and the writ discharged.

We concur: HART, J.; BURNETT, J.

51 Cal. App. 756

KATZENBACH & BULLOCK CO. v. BRESLAUER. (Civ. 3661.)

(District Court of Appeals, First District, Division 2, California. March 17, 1921.)

1. Appeal and error ⊂=1011(1)—Finding on conflicting evidence not reviewable.

A finding by the trial court upon conflicting evidence is not reviewable.

2. Sales ⊂=335—Where title retained no lien exists requiring sale in manner of pledged property.

Where title to personal property is retained by the seller, no seller's lien exists, and seller is not required to sell in the same manner as in case of pledged property under Civ. Code, §§ 3002, 3049.

3. Sales ⊂=202(1), 335—No title passes where no cash paid under "cash on delivery" contract, so that resale need not be as if goods were pledged.

Where goods are sold "cash on delivery" and no cash is paid, the title remains in the seller, and in selling the goods for the buyer's account he is not obliged to sell in the manner of one enforcing a lien under Civ. Code, §§ 3002, 3049.

4. Sales ⊂=384(7)—Sale by seller for defaulting buyer's account fixes damages recoverable.

Where the seller, on buyer's refusal to accept, sold the goods and the price obtained by him was the highest price obtainable in the nearest available market, this was sufficient to fix his measure of damages, under Civ. Code, § 3311, in the absence of evidence that the price obtained was not the value of the goods.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Katzenbach & Bullock Company against A. Breslauer. From judgment for plaintiff, defendant appeals. Affirmed.

A. Breslauer, in pro. per.

Willard P. Smith, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him in an action to recover damages for the breach of a contract by defendant for the purchase of a carload of caustic soda. The findings show that the plaintiff is a New Jersey corporation and filed a copy of its articles of incorporation in the office of the secretary of state of the state of California, and a certified copy thereof in the office of the county clerk of San Francisco; that the contract sued upon was entered into between the parties for the purchase and sale of a carload of caustic soda at an agreed price, f. o. b. San Francisco, payable cash on arrival; that upon the arrival of the goods, plaintiff notified defendant, and defendant thereupon refused to accept or pay for said goods; that the plaintiff, because of such refusal, was obliged to warehouse the goods and to sell them in the nearest available market, which was at San Francisco; and that said caustic soda was sold at the best price obtainable in said market.

[1] Some point was made by appellant that it had been mutually agreed between the par-

ties that the contract should be canceled, abandoned, and rescinded. The trial court found, upon conflicting evidence, that it was not so agreed and that said contract was never canceled, abandoned, and rescinded. We are therefore not at liberty to go into this question of fact.

[2] The only other point made by the appellant is that the plaintiff did not have the right to sell the caustic soda without giving notice of sale to the defendant. Appellant contends that the present case falls within the provisions of sections 3002 and 3049, Civil Code, and that notice of sale was necessary. Section 3002 deals with pledged property, providing that notice shall be given to the pledgor of the time and place of sale. Section 3949 provides that one who sells personal property has a special lien thereon, dependent on possession, for its price, and may enforce such lien as in the case of a pledge. It is admitted by respondent that if the title to this caustic soda had passed to the defendant, the plaintiff would have had a lien thereon for its price and would have been bound to give notice of the time and place of sale as in the case of a pledge.

However, it has been held that where title to personal property is retained by the vendor, no lien exists. Eads v. Kessler, 121 Cal. 244, 53 Pac. 656; Rayfield v. Van Meter, 120 Cal. 416, 420, 52 Pac. 666; Gibbs v. Ranard, 86 Cal. 531, 25 Pac. 63. Under such circumstances, the vendor is not required to sell in the same manner as in a case of pledged property. Gibbs v. Ranard, supra.

[3, 4] It has been repeatedly held that where goods are sold to be paid for in cash upon delivery, no title passes until the cash is paid. Hilmer v. Hills, 138 Cal. at page 139, 70 Pac. 1080; Brinkley-Douglas Fruit Co. v. Silman, 33 Cal. App. 643, at page 647, 166 Pac. 371; Hewes v. Germain Fruit Co., 106 Cal. 441, 39 Pac. 853. The trial court has found that the goods were sold to be paid for upon delivery. Payment was never made. Under such circumstances, the title remained in plaintiff and he could not enforce a lien against his own property. Gibbs v. Ranard, supra; Rayfield v. Van Meter, supra. The evidence and findings here are that the price obtained by plaintiff was the highest price obtainable in the nearest available market. That is all that is required of plaintiff under the circumstances here. Hewes v. Germain Fruit Co., supra.

Section 3311, Civil Code, provides the measure of damages in case of a breach of the buyer's agreement to accept and pay for personal property, the title to which is not vested in him. It is provided that in the event the property is not sold in accordance with section 3049, the damages shall be the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market over those which would have been incurred for the carriage thereof, if the buyer had accepted it.

It will be observed from the case of Hewes v. Germain Fruit Co., supra, that in a case where the title to the property has not passed, the vendor may or may not sell the same in accordance with the provisions of section 3049, Civil Code; the advantage of complying with the provisions of said section being that, in such case, the price obtained is conclusive evidence as to the value of the property. Under the method of sale adopted by the plaintiff here, the price obtained by him was not conclusive as to the value of goods. Hewes v. Germain Fruit Co., supra; Meyer v. McAllister, 24 Cal. App. 16, 140 Pac. 42. However, there was no substantial evidence offered that the price obtained was not the value of the goods, and there was evidence that it was the best price obtainable and was the value of the goods at the time, and, as we have stated, the trial court has found that the price was the best price obtainable.

We think there are no other matters that require discussion.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(51 Cal. App. 785)

CORTELYOU et ux. v. VOGEL et al.
(Civ. 3245.)

(District Court of Appeal, Second District, Division 2, California. March 21, 1921. Hearing Denied by Supreme Court May 19, 1921.)

1. Mortgages ⟸596, 597—Substitution of deed of trust for mortgage held valid.

Where the parties to a mortgage, interest to which was in arrears, giving the mortgagee the right to foreclose, agreed that, instead of foreclosing, the parties should execute a deed of trust, that the note and mortgage be canceled, the interest thereon being added to the principal in the deed of trust, that the mortgagee be authorized to make further advances to protect the title, to be secured by the deed of trust, and that no equity of redemption should be allowed the mortgagor under the deed of trust after sale of the property under its power of sale, and that he might pay the indebtedness at any time up to and including a year from date of the agreement, which agreement was carried out by the mortgagee by canceling the note and mortgage and making further advances, the agreement was not invalid as cutting off the mortgagor's right to redeem; Civ. Code, § 2889, not applying to such a case, but only to original transactions.

2. Mortgages ⟸596, 597—Substitution of deed of trust for mortgage held valid.

Where parties to a mortgage, by an agreement subsequent to and entirely independent of the original transaction, moved by new consideration, substitute a deed of trust for a mortgage, such a new contract is legal and binding upon the parties to the deed of trust as a recognized form of security; and when it contains a power of sale it gives the grantee thereunder a right to collect his debt either by foreclosure or by sale under the power contained, and until he has exercised his option to use the power of sale as a means of securing repayment of the debt the equity of redemption which the mortgagor possesses is not defeated.

3. Mortgages ⟸86(3)—Evidence held not to show duress compelling execution of trust deed.

In action involving validity of trust deed substituted for mortgage in arrears, evidence that mortgagor was financially embarrassed by litigation, that he was in some degree of ill health, that he was much worried, and that the mortgagee knew these facts, and still insisted upon being paid the interest due him, and declared that he would foreclose if he was not paid, *held* to fall short of proof that the deed of trust was not fairly and voluntarily executed by one capable of contracting.

4. Mortgages ⟸25(2)—Deed of trust need not be supported by full consideration.

Where deed of trust is not executed under circumstances showing it not to have been freely and voluntarily made, the element of fairness in the consideration is unimportant, the most that is required being a valuable consideration.

5. Appeal and error ⟸1070(2)—Absence of finding on issue where evidence supports appellee is not reversible.

There being evidence which would support a finding of consideration for a deed of trust, the absence of such a finding is not reversible error on the mortgagor's appeal.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by James G. Cortelyou and wife against H. Oscar Vogel and another. From judgment for defendants, plaintiffs appeal. Affirmed.

M. M. Meyers and Leslie E. Clawson, both of Los Angeles, for appellants.

Oscar Lawler and James E. Degnan, both of Los Angeles, for respondents.

CRAIG, J. The contract, whose construction forms the basis of this litigation, consists of a grant deed, trust instructions, and a declaration of trust. There can be no question but that the parties intended these instruments to be read together as a single contract.

"We, the undersigned, do hereby certify and declare that the foregoing declaration of trust No. 3758 correctly and accurately sets forth and declares the trusts under and upon which said real property is held by the said trustee and do also, hereby agree to and do approve, ratify and confirm the same in all particulars.
"To be signed by:
"James G. Cortelyou,
"H. Oscar Vogel.
"[Signed] Jas. G. Cortelyou, Payor.
"Address, 5970 Hayes Ave.
"[Signed] H. Oscar Vogel, Payee.
"Address, Sierra Madre."

It will not be necessary to set forth the declaration of trust in full, but it is sufficient to say that it contains recitals of an indebtedness "from the payor," Cortelyou, to the "payee," Vogel, and of a trusteeship upon the part of the Title Insurance & Trust Company and the provisions of trust, the manner in which it should be executed, a power of sale under certain conditions and directions for the distribution of the proceeds of sale, and other provisions usually found in trust agreements. Regarding the instruments mentioned as one, they constitute a deed of trust to secure the payment by Cortelyou of $10,450, with interest thereon at the rate of 8 per cent. per annum, and further advances to Vogel on or before the 24th day of April, 1917. If this instrument had been executed as an original contract no question would be made as to its validity, for deeds of trust have been upheld in California decisions. Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813; Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 370. But as we understand appellant, he contends that because the deed of trust was substituted for a note and mortgage the deed of trust is inoperative as such, and that it will be considered in equity as a mortgage. Therefore, he claims that Vogel has an equity of redemption.

[1] It is a fact that a note for $10,000 with interest thereon at 8 per cent. per annum, and mortgage to secure the same had been executed dated July 3, 1915, and that on April 4, 1916, Cortelyou was six months in arrears in the payment of the interest; that the mortgage contained the usual provision that upon the default of any installment of interest the mortgagee might declare the whole sum of the principal and interest due and payable, and proceed with foreclosure, and that Vogel had so declared, and had notified Cortelyou that unless payment was made at once foreclosure proceedings would be instituted. The parties then agreed that instead of filing a suit in foreclosure this trust agreement should be executed; that Vogel would cancel the note and mortgage held by him; that the interest then due thereon should be added to the principal in the deed of trust, and that Voggel should be authorized to make further advances to protect the title of the property conveyed, which he did to the amount of

over $6,000; that such advances should also be secured by the deed of trust, and that no equity of redemption should be allowed Cortelyou under the deed of trust after sale of the property under its power of sale; and that he might pay the indebtedness at any time up to and including April 24, 1917. This agreement was carried out, and the note and mortgage were canceled by Vogel. Cortelyou and his wife executed a grant deed by which the legal title to the premises was conveyed to the trustee. Cortelyou made out and signed the trust instructions and the trust company executed its declaration of trust in conformity therewith, and entered upon the performance of its trust. It may be especially noted that after April 24, 1917, Cortelyou signed his approval of this declaration in the language quoted above.

[2] Assuming that the parties to this deed of trust were compos mentis and acting freely and voluntarily, no sufficient legal reason is presented, and we know of none which would prevent them from thus contracting with one another. Section 2889 of the Civil Code has no application to such a case, for it only purports to apply to original transactions. This is clear from the language of the section itself, and our Supreme Court in Watson v. Edwards, 105 Cal. 70, 38 Pac. 527, and Garwood v. Wheaton, 128 Cal. 399, 60 Pac. 961, so held. Appellant cites Henlay v. Hotaling, 41 Cal. 22, and other authorities as holding that—

"The test of whether or not the transaction is a continuing mortgage is, Is there a subsisting continuing debt from the grantor to the grantee?"

But in each of these cases the test thus applied was to determine whether or not the contract in question was a deed or a mortgage. None of them hold that such a test should be applied in determining the question here involved, to wit, whether or not the parties intended, and had the legal right to substitute a deed of trust for a mortgage. Where parties to a mortgage, by an agreement subsequent to and entirely independent of the original transaction, moved by new consideration, substitute a deed of trust for a mortgage, such a new contract is legal and binding upon the parties to the deed of trust as a recognized form of security; when it contains a power of sale it gives the grantee thereunder a right to collect his debt either by foreclosure or by sale under the power contained and until he has exercised his option to use the power of sale as a means of securing repayment of the debt the equity of redemption which the mortgagor possesses is not defeated. Bell Silver & Copper Mining Co. v. First National Bank of Butte, 156 U. S. 470, 15 Sup. Ct. 440, 39 L. Ed. 497.

As we view it, the appellant proceeds upon the erroneous premise that the grant deed executed April 24, 1916, is a contract in itself, and, being absolute upon its face, may be set aside as an attempted disposition of the equity of redemption possessed by Cortelyou under the original mortgage agreement. The deed being only a part of the entire contract made up of the instruments heretofore mentioned, and which, taken together, constitute a deed of trust, it is apparent that the authorities cited by appellant to support his various contentions, except those bearing upon the alleged threats and compulsion claimed to have been used by Vogel against Cortelyou are irrelevant to the issues in this case.

[3] We now proceed to a consideration of the objections to the findings 4 and 6. They are as follows:

Finding 4:

"That it is not true that said litigation caused the plaintiff James G. Cortelyou so much worry and anxiety that he was partially or at all unfitted, during the months of March and April, 1916, to properly carry on his business; that it is not true that said defendant H. Oscar Vogel knew that said plaintiffs were mentally distressed or financially embarrassed by reason of said litigation; that it is not true that said H. Oscar Vogel well, or at all, knew that the financial resources of plaintiffs were being drawn upon to meet and defray the necessary expenses of said litigation."

Finding 6:

"That it is not true that said grant deed mentioned in said complaint, and marked 'Exhibit C,' and made a part thereof, was executed by plaintiffs because of any threats or compulsion on the part of said defendants, or either of them, but, on the contrary, it is true that said deed was executed freely and voluntarily by said plaintiffs, as herein set forth, and not otherwise."

It is claimed that the evidence does not support these findings. Assuming that the plaintiff was financially embarrassed by litigation in the state of Washington; that he was in some degree of ill health, although nothing in the evidence indicates that this was of a serious nature; that he was much worried, and that the defendant knew these facts and still insisted upon being paid the interest due him, and declared that he would foreclose the mortgage if it was not paid, nevertheless these facts fall far short of proof that the deed of trust was not fairly and voluntarily executed by one entirely capable of contracting. Courts must respect the general principles of contract and the strong effort of the law to protect the right to contract from impairment. It may be that the findings complained of contain some redundant matters, but there is no prejudicial error in them. Bradbury v. Davenport, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92, is cited as holding that—

"Whenever the relation of mortgagor and mortgagee is once shown to exist, the court views with distrust and disfavor any arrangements between them, by which it is proposed to transfer the equity of redemption to the mortgagee, and the parties will be held to their original relation, unless the transaction appears to be perfectly fair, and no advantage is taken by the mortgagee of the mortgagor by reason of his incumbrance."

But this and numerous other authorities cited to the same effect deal with the exceptional case of equity's jealousy in preventing the immediate transfer of an equity of redemption, a condition not involved in the case at bar.

[4, 5] Another objection which appellant makes is that the evidence does not support the finding that "there was full value and consideration for the execution and delivery of the grant deed." Having determined that the instrument was a deed of trust, and that it was not executed under such circumstances as to show it not to have been freely and voluntarily made, the element of fairness in the consideration is unimportant. Hall v. Crowley, 12 Cal. App. 30, 106 Pac. 426. The most that could be required would be a finding that a valuable consideration was received by Cortelyou, and the evidence would amply justify such a finding. Under such circumstances its absence is not reversible error. Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309.

There is no merit in the contention that the sale under the deed of trust was not valid because it was not assented to by Ella B. Cortelyou, the wife of James G. Cortelyou. This transaction was completed June 21, 1917. At that time a husband had full power of disposition of the community property. Section 172, Civ. Code.

Certain rulings of the trial court excluding evidence are relied upon for a reversal. In the main these rulings are not erroneous, and no error is found which could affect the substantial rights of the parties.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

51 Cal. App. 677

SEALE v. BALSDON et al. (Civ. 2276.)

(District Court of Appeal, Third District, California. March 8, 1921. Hearing Denied by Supreme Court May 5, 1921.)

1. Subrogation ⟸3(4) — Tenant in common paying charge against property entitled to subrogation.

The liability of cotenants, as between themselves, for the payment of liens against the common estate, is proportionate to their respective interests, and a cotenant relieving the common property from a lien or charge for the joint benefit of the tenants in common is entitled to an equitable lien by subrogation, and to contribution from his respective cotenants of their respective interests in the common property.

2. Statutes ⟸263 — Not given retrospective operation unless legislative intent is clear.

Statutes will not be given a retrospective effect unless the intention of the Legislature that such should be the case is clearly apparent from the context of the act.

3. Waters and water courses ⟸231 — Amendment providing for apportioning assessments of subdivided tracts held not retrospective; "shall have been;" "validated;" "manner."

The amendments of Pol. Code, § 3460, in St. 1915, p. 1286, and St. 1917, p. 1204, providing that when any tract upon which an assessment "shall have been" made shall be subdivided, the assessment thereon shall be reapportioned, do not apply to reclamation district assessments made, under sections 3459, 3462, 3465, before the amendments took effect, for the expression "shall have been" relates to the future perfect tense, something which is to be done and perfected after the date of the enactment of the law in question, and at the time of these amendments section 3466 was also amended by adding the provision that assessments heretofore made in any reclamation district shall be "validated" and collected in the "manner" provided by law at the time such assessments were made; the effect of the word "validated" being to irrevocably fix upon the land a lien for the amount of assessment or assessments theretofore levied, and not upon the several parcels thereof, but upon the land as an entirety and as returned in the assessment lists, and the word "manner" referring to the method of procedure.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manner; Shall Have.]

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Petition by Jessie D. Seale for writ of mandate directed to J. H. Balsdon and others, as trustees of Reclamation District No. 108. From order denying the writ, petitioner appeals. Order affirmed, and petition denied.

John T. Carey, of San Francisco, and Arthur C. Huston, of Woodland, for appellant.

Hiram W. Johnson, Jr., of San Francisco, Devlin & Devlin, of Sacramento, and Thomas Rutledge, of Colusa, for respondents.

PLUMMER, Presiding Justice pro tem. The petitioner is now, and since the 28th day of December, 1916, has been, the owner of 439.74 acres of land situate within the exterior boundaries of reclamation district No. 108.

In the month of August, 1913, an assessment known as and mentioned in the pleadings in this case as assessment No. 1 was

levied upon a larger tract of land, including the lands above referred to as belonging to the petitioner, then owned by the plaintiff and other persons as tenants in common.

In the month of August, 1914, another assessment, known as and called assessment No. 3, was levied upon the tract of land owned by the plaintiff and certain others as tenants in common. In this last assessment 663 acres was assessed as one parcel, and out of this 663 acres has been carved or partitioned the lands belonging to the petitioner by deeds of conveyance executed by the tenants in common owning the larger tract prior to the execution of said deeds in December, 1916.

Of assessment No. 1 levied upon the lands belonging to tenants in common, of which the plaintiff was one, and including the land now belonging to the plaintiff, 40 per cent. has been paid by tenants in common, other than the petitioner herein.

Prior to the beginning of this action the petitioner calculated the amount of the assessments which she deemed to be her proper proportion of the assessments then delinquent and payable on account of assessments Nos. 1 and 3, and tendered the same to the treasurer of Colusa county. The tender of payment was refused.

On the 4th day of October, 1917, the petitioner, in writing, demanded of the respondents, as trustees of the defendant reclamation district No. 108, that a reapportionment be made of the assessments herein referred to in such a manner as would charge the parcel of land then owned by petitioner, and also the parcels owned by her former cotenants in the larger tract, with a just proportion of the balance due of the said assessments Nos. 1 and 3, so as to charge each parcel with its proportionate share of the assessments previously laid upon the larger tracts. The trustees of the reclamation district declined to make this reapportionment, and were proceeding to enforce payment of the assessments as originally levied, by advertising the 663-acre tract of land for sale in the manner provided by section 3466 of the Political Code, when this petitioner instituted this action praying for a writ of mandate herein, and obtained an injunction restraining further proceedings by the trustees until the termination of this action.

In 1915 (Stats. 1915, p. 1286) and in 1917 (Stats. 1917, p. 1204) section 3460 of the Political Code was amended by adding thereto the following:

"When any tract of land upon which an assessment or assessments shall have been made shall be subdivided into smaller parcels, the board of trustees of the district shall reapportion the assessment or assessments upon such tract in such manner as will charge each of said smaller parcels with a just proportion of assessment or assessments previously made upon said tracts so subdivided. Said board of trustees shall file with the clerk of the board of supervisors of the county a list or lists of the charges assessed against each of said parcels. Said reapportionment shall be approved by the board of supervisors in the manner provided in section 3462 of this Code. Said lists after such approval shall be filed with the county treasurer of the county and shall have the same effect as on original assessment."

The only difference between the two amendments lies in the designation of the persons, or body of persons, who should make the reapportionment and report to the board of supervisors.

The Legislature in 1917 (St. 1917, p. 1196) also amended subdivision 17 of section 3454, specifying the duties of trustees of reclamation districts, and, among other things, authorizes them "to reapportion the assessment or assessments upon any tract of land that has been subdivided into smaller parcels in such manner as will charge each of said smaller parcels with a just proportion of assessment or assessments previously made upon said tracts so subdivided, in the manner provided by section 3460 hereof."

At the time these amendments were made, section 3466 of the Political Code was also amended by adding thereto the following provision:

"Assessments heretofore made in any reclamation district shall be validated and collected in the manner provided by law at the time such assessments were made." Stats. 1917, c. 671.

The assessments involved in this action were both made a considerable period of time before the Code amendments just referred to. All the proceedings specified to be taken by sections 3459 and 3465 of the Political Code had been taken as said sections existed at the time of levying, hearing of objections, and validating assessments, and proceedings were being further taken by the trustees to enforce payment as the law existed in relation to said assessments at the time of their levying, validating, and subsequent delinquency.

Do the amendments and additions to the section referred to, made by the Legislature in 1915 and 1917, apply to the assessments levied in 1913 and 1914? If so, the writ of mandate should issue; if not, the petition should be denied.

[1] In the first place, it may be conceded that the law is well settled that the liability of cotenants, as between themselves, for the payment of liens against the common estate, is proportionate to their respective interests, and that a cotenant relieving the common property from a lien or charge for the joint benefit of the tenants in common is entitled to an equitable lien by subrogation, and to contribution from his respective cotenants of their respective interests in the common property. 38 Cyc. 46, and cases there cited.

[2] In Endlich on the Interpretation of Statutes (1st Ed.) § 272, it is set forth as a rule of construction that laws will not be given a retrospective effect unless the intention of the Legislature that such should be the case is clearly apparent from the context of the act.

[3] As heretofore stated, the portion of section 3460 of the Political Code here involved, as amended in 1917, three and four years, respectively, after the levying of the assessments, reads as follows:

"When any tract of land upon which an assessment or assessments shall have been made shall be subdivided into smaller parcels," etc.

The words "shall have been," grammatically construed, relate to the future perfect tense, something which is to be done and perfected after the date of the enactment of the law in question.

In State ex rel. Alden v. City of Newark, etc., 40 N. J. Law (11 Vroom) 92, the words "shall have been" and "shall be" were given interpretation; the court using this language:

"It is claimed that the words 'shall have been,' in the proviso, relate to the past; that their effect is to heal all irregularities in notices named in the act, which have occurred prior to its passage, and that the statute is intended to be retrospective. It is, however, obvious that all the terms used in this act are prospective, and apply only to the future. This is so, without dispute, in that part of the section which precedes the proviso. In the latter part of the sentence, the only words that are alleged to have a retroactive signification are those already quoted—'shall have been.' These words, and the following words 'shall be,' will not, however, relate to acts that were past when the law as enacted. 'Shall have been' is the future perfect tense, which represents an event as completed in future time, and 'shall be' represents what will take place in future time. If the Legislature had intended to make the law retroactive, it would have been easy to express it by the use of the words 'has been' or 'had been,' in the present or past perfect tense, or other equivalent words."

In Dewart v. Purdy, 29 Pa. 113, the Supreme Court, in dealing with this question, holds as follows:

"Nothing short of the most indubitable phraseology is to convince us that the Legislature meant their enactment to have any other than a prospective operation; and when they fix a future day for it to take effect, they stamped its prospective character on its face. Their language in the section before us is, 'that in all cases of partition of real estate in any court wherein a valuation shall have been made of the whole or parts thereof, the same shall be allotted to such one or more of the parties in interest, who shall, at the return of the rule to accept or refuse to take at the valuation, offer in writing the highest price therefor above the valuation returned.' * * *

"This phrase, 'shall have been made,' is an instance of the future perfect tense. It contemplates a valuation perfected, but perfected in future, and the future of this statute was all subsequent to the specified date."

To the same effect is the case of People v. Board of Education, 126 App. Div. 414, 110 N. Y. Supp. 769. In this latter case the court held that the context of the act indicated an intention on the part of the Legislature to give it a retroactive effect, and therefore controlled the interpretation which otherwise would have been given to words which indicated an act to be begun and completed in the future.

As heretofore noted, the amendment made to section 3466, Political Code, specifies that assessments heretofore made in any reclamation district shall be validated and collected in the manner provided by law at the time such assessments were made.

In 1913 and 1914 the law provided for the making of one list against the tract of land involved herein; that this list should be prepared by the commissioners theretofore appointed by the board of supervisors; that when the list was completed it should be filed with the clerk of the board of supervisors, after which event the board of supervisors were to appoint a time when the board would meet for the purpose of hearing objections to the assessment; that after all the proceedings were taken and had as provided by section 3462 of the Political Code no objection to such assessment should be considered by the board of supervisors or allowed in any other action or proceeding, unless made in writing to the board of supervisors, etc., and that, unless an action were begun within 30 days thereafter, no action or defense could be maintained attacking the legality of said assessment in any respect.

As used in section 3466 the word "validation" has a peculiar and forcible meaning. It is to irrevocably fix upon the land a lien for the amount of the assessment, or, in this case, assessments, theretofore levied, and not upon the several parcels thereof, but upon the land as an entirety and as returned in the assessment lists.

In the case of Smith v. Mayor, etc., 113 Ga. 833, 39 S. E. 327–330, the word "validation" has been given the meaning above indicated in reference to an assessment. The language there used is as follows:

"An admission, by the corporation seeking to make the issue, that the notice was regular, or that the requisite number of voters assented to the issue, is good as far as it goes; but, to irrevocably bind the taxpayer—and that is what 'validation' means—chances of mistake of either law or fact must be eliminated, and without the ascertainment and finding that the particular facts necessary to render the issue of bonds legal under the constitutional requirement exist validation should be refused. When the facts appear in such a manner as to evoke a judgment that the requirements of the law have been met, validation follows, under the terms

of the act, but general admissions in pleadings do not authorize a judgment of validation."

In the case at bar all the proceedings requisite to validation appear to have been taken and had. Hence we conclude that the lien held by the district for the amount of the assessments theretofore levied had, under the provisions of the section referred to, become irrevocably fixed.

The amendment last referred to also specifies that the assessments shall be collected in the manner provided by law at the time such assessments were made. As here used, the word "manner" has a definite meaning. It refers to the method of procedure. The manner of doing a thing has reference to the way of doing it—to the method of procedure. See Bankers' Life Insurance Company v. Robbins, 59 Neb. 169, 80 N. W. 484–486; 26 Cyc. 516.

The manner of validating and collecting assessments levied prior to the amendments of 1915 and 1917 were to be had as the various sections of the Code existed at the time of the levying of the assessments in question.

In 1913 and 1914 the board of trustees of reclamation district No. 108 had nothing to do with fixing the amount of the assessment charges of any tract of land lying within the exterior boundaries of the district. The fixing of the charges was, in the first instance, to be made by commissioners appointed for that purpose. The commissioners reported to the board of supervisors, and the assessment so reported was validated as the law then stood. The method of procedure, as the section now stands, specifies that the board of trustees of the district shall, upon application therefor, where lands have been subdivided, apportion the assessment upon the different parcels in accordance with the benefits found by the board of trustees to inure to the respective parcels of land from the work done or contemplated, constituting the basis of the assessment. This proceeding would set aside the procedure had in reference to the assessments in question in this action. It reopens and sets aside a lien which otherwise has become irrevocably fixed upon the lands and premises belonging to the cotenants at the time the assessments were made, and affords a second opportunity to contest the same.

Being remedial in character, it is urged that as no time is fixed for the taking effect of the various sections of the Political Code referred to herein, they are operative immediately, and that such proceedings may be invoked at any time. If this is true, it is evident that an owner of a large tract of land lying within a reclamation district might, by the simple process of subdivision, not only indefinitely delay the collection of an assessment but reopen any judgment, or judgments, that might have been entered by any court adjudging the validity of an assessment as provided by section 3462 of the Political Code, and also give an indefinite number of opportunities to go before the board of supervisors and raise objections to an assessment.

Admitting, without deciding, that such is the law as it now stands, no reason is furnished thereby for holding that the Legislature, by the amendments referred to, intended to give the sections amended any retroactive effect; on the contrary, it furnishes a very strong reason why the court should hold that such was not the intention of the Legislature, and that the Legislature voiced its intention that only a prospective effect should be given to the matter herein discussed by the addition made to section 3466 as set forth in this opinion.

From what has been said, the question whether partition or segregation of interests by cotenants constitutes subdivision within the meaning of section 3460 of the Political Code is apparently immaterial, and for that reason, though discussed in the briefs of counsel, is not further considered herein. The result would be the same if we were to admit in this case that partition or segregation of interests by the cotenants owning the land at the time of the assessments amounted to subdivision within the contemplation of the Code.

The order of the trial court in denying appellant's petition for a writ of mandate will be and the same is hereby affirmed, and the petition denied.

We concur: BURNETT, J.; HART, J.

51 Cal. App. 780

CROSS v. THIELE et al. (Civ. 3110.)

(District Court of Appeal, Second District, Division 2, California. March 19, 1921. Hearing Denied by Supreme Court May 16, 1921.)

1. Landlord and tenant ⊂=233(1)—Failure to find that rent had not been paid held not fatal.

In action for rents, judgment for the landlord was not reversible because there was no finding that the rent had not been paid, where it was stated in the conclusions of law that plaintiff was entitled to judgment in the exact amount alleged in the complaint not to have been paid, this conclusion being inconsistent with the idea payment had been made, and therefore equivalent to a finding that it had not been made, and where, furthermore, the entire evidence and theory of the trial were that payment had not been made.

2. Trial ⊂=395(4)—Finding of fact may be stated as a conclusion.

Where an ultimate fact is to be ascertained, it is none the less a finding of fact be-

cause it is stated as a conclusion from other stated facts.

3. Appeal and error ⊂⊃1033(7)—No reversal for failure to make finding adverse to appellant.

Where, if a finding had been made on a certain issue, such finding must have been adverse to appellant, failure to make the finding is not reversible.

4. Partnership ⊂⊃8 — Lease provision for share of profits did not create partnership.

A hotel lease provision requiring the lessee to pay lessor one-third of the net profits derived from the operation of the hotel, in addition to the payment of a fixed rent charge, *held* not to create a partnership limiting the lessor, on lessee's default, to the remedy of suing in equity for an accounting and preventing him from maintaining an action for the fixed rental.

5. Landlord and tenant ⊂⊃208(1)—Where lease is assigned assignor becomes surety.

Where a lease is assigned, the assignor becomes a surety for the assignee under the obligation of the assignee to pay the rent to the lessor.

6. Principal and surety ⊂⊃123(1)—Surety liable without notice of principal's default.

A surety is liable without notice of the default of his principal.

7. Landlord and tenant ⊂⊃208(1)—Assignor of lease liable for rent irrespective of notice of assignee's default.

Liability of the assignor of a lease for payment of the rent thereunder on which his assignee has defaulted is not dependent upon notice to the assignor, as surety, of the assignee's default.

8. Evidence ⊂⊃441(4)—Conversation between landlord and lessor's agent properly stricken as varying terms of lease.

Where hotel lease contained the usual provisions that lessor might re-enter on nonpayment of rent, and the landlord's consent to the assignment by the lessee provided that the assignor should not be released from any of the obligations of the lease prior to January 1, 1919, and, on the assignee's default in payment of rent between May 1 and October 1, 1918, lessor entered on the last-named day, the court in lessor's action against the original lessee for the rent did not commit error under Code Civ. Proc. § 1856, in striking testimony of the lessee's agent that at the time of the execution of the lessor's written consent to the assignment of the lease the lessor told him that he would notify the lessee before taking any action if the assignee defaulted in the payment of rent, and in such case would give the assignor a chance to go in and run the house himself; the testimony being but an attempt to vary the terms of the lease.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by L. E. Cross against T. B. Thiele, J. S. Thoma, and M. T. Thoma. From judgment for plaintiff, M. T. Thoma appeals. Affirmed.

Francis G. Burke and Earle & McLaughlin, all of Los Angeles, for appellant.

G. C. De Garmo, of Los Angeles, for respondent.

WORKS, J. This is an appeal by the defendant M. T. Thoma from a judgment against her for the recovery of rents. Appellant leased from respondent, for a term of years, a certain furnished hotel. The lease provided for a monthly payment of a fixed rental and also contained a clause to the effect that the lessee should pay to the lessor as rental, but in addition to the fixed rent charge, one-third of the profits arising from the operation of the property. After she had been in possession of the hotel for a part of the term, appellant assigned the lease to the defendant Thiele. He retained possession until he was in arrears in the payment of the fixed rental for a period of five months, whereupon he surrendered the property to respondent, long before the expiration of the original term, without the knowledge of appellant. This action was commenced to recover the fixed rental due for the five months.

[1-3] The appellant's first contention is that the allegation of the complaint that the rent had not been paid, was denied by the answer, and that there is no finding upon that issue. There is some doubt whether the denial in the answer meets the allegation of the complaint in the respect mentioned, but we pass that question and take up the claim that there was no finding upon the subject. There was no such finding, in terms, but there are several reasons why a reversal of the judgment need not result on that account. In the first place, it was stated in the conclusions of law that respondent was entitled to judgment in the exact amount alleged in the complaint not to have been paid. This conclusion was inconsistent with the idea that payment had been made, and was therefore equivalent to a finding that it had not been made. Where an ultimate fact is to be ascertained, "it is none the less a finding of fact because it is stated as a conclusion from other stated facts." Jones v. Clark, 42 Cal. 180; Harlan v. Lambert, 19 Cal. App. 349, 125 Pac. 1079. As a further reason why a reversal could not result from the failure expressly to find on the issue, it is to be noted from the bill of exceptions upon which the case comes to us that the respondent testified that the amount mentioned in the complaint had not been paid; that it was stipulated at the trial, immediately after the giving of that testimony, that demand was made upon appellant, prior to the bringing of the action "for the rent due and unpaid";

that appellant offered no evidence tending to show payment; and that the entire examination of the nonappealing defendant J. S. Thoma, husband of appellant, the only witness offered by the defendants, was conducted upon the theory that the rent had not been paid, the witness being questioned by the counsel for appellant. Under these circumstances there could have been but one finding on the issue, and the rule is that, upon a failure to find, "the judgment will not be reversed, if the finding omitted must have been adverse to the appellant." People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Gerth v. Gerth, 7 Cal. App. 735, 95 Pac. 904. In short, there having been no controversy on this question in the trial court, there can be none here.

[4] Because of the provision in the lease requiring appellant to pay to respondent one-third of the net profits derived from the operation of the hotel, in addition to the payment of the fixed rent charge, appellant contends that a partnership was created, and that respondent must have sued her in equity for an accounting, and that therefore he cannot maintain the present action for the fixed rental. It is sufficient to say, upon this head, that the provision did not make appellant and respondent partners. Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425.

[5-7] It is insisted by appellant that the complaint in the action was defective because it did not allege that notice had been given to appellant that Thiele had defaulted in the payment of rent, and that, accordingly, the general demurrer to the pleading should have been sustained. This claim is based upon the contention that appellant was but a surety for Thiele with respect to the latter's obligation to pay the rent. It is well settled, certainly, that where a lease is assigned the assignor becomes a surety for the assignee under the obligation of the latter to pay the rent to the lessor (Samuels v. Ottinger, 169 Cal. 209, 146 Pac. 638, Ann. Cas. 1916E, 830); but a surety is liable without notice of the default of his principal (Treweek v. Howard, 105 Cal. 435, 39 Pac. 20; Carpenter v. Furrey, 128 Cal. 665, 61 Pac. 369); and the rule has been applied in a case of suretyship like the one now under consideration (Goergen v. Schmidt, 69 Ill. App. 538; Crowley v. Gormley, 59 App. Div. 256, 69 N. Y. Supp. 576). The complaint is not subject to the criticism advanced by appellant.

[8] The defendant J. S. Thoma acted as the agent of appellant in procuring respondent's consent to the assignment of the lease to Thiele; that consent being necessary under the terms of the instrument. Thoma testified that at the time of the execution of the consent, which was in writing, respondent told him that he would notify Thoma before taking any action if Thiele defaulted in the payment of rent, and that, in case of such default, he would give Thoma a chance to go in and run the house himself. This evidence was stricken out on motion, and appellant claims that the ruling was erroneous. The lease contained the usual provisions that the lessee would quit and surrender the property at the end of the term or at the time of any earlier termination of the lease, and that it should be lawful for the lessor to re-enter and remove all persons from the premises in the event that any rent should become due and be unpaid. These convenants, as is apparent from a reading of them, allowed to respondent very definite ways and means by which to protect himself if at any time the rent were not paid. The lease itself, of course, provided for no notice before respondent resorted to his rights under the provisions mentioned, nor did the assignment, nor did the consent to the assignment. Not only so, but the consent contained a specific provision that appellant should not be released from any of the obligations of the lease prior to January 1, 1919. Thiele's default in the payment of the rent occurred between May 1 and October 1, 1918, and respondent re-entered on the last-named day. It is plain, therefore, that the offer of the conversation between Thoma and respondent was but an attempt to vary the terms of the lease and of the consent, and the ruling of the trial court in granting the motion to strike was proper. Code Civ. Proc. § 1856.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

51 Cal. App. 752

In re POLITO'S ESTATE.

POLITO v. McCURDY. (Civ. 3765.)

(District Court of Appeal, First District, Division 1, California. March 17, 1921. Hearing Denied by Supreme Court May 16, 1921.)

1. Executors and administrators ⊂=294—Probate court without power to set off debt due estate against undivided interest of debtor as heir.

The probate court has no power, in distributing an estate, to set off against a debt due the estate by an heir the undivided interest of said heir in the real estate of the estate which is the sole subject of distribution.

2. Courts ⊂=198—Probate court has limited jurisdiction.

While the superior court is a court of general jurisdiction, the powers which it exercises in proceedings in probate are entirely statutory, and in the administration and distribution of estates it exercises a special limited jurisdic-

tion, and in the exercise of such jurisdiction it is not authorized, in the absence of express statutory authority, to determine controversies which do not strictly arise within the course of its probate procedure.

3. Judgment ⊂784—Judgment lien against an heir's share in estate held prior to subsequent judgment secured against him by decedent's estate.

Where the creditor of the heir of an intestate had obtained and duly docketed a judgment against such heir, which had thus become a first lien upon the interest of the heir in the intestate's real estate, such judgment was prior to the lien which the estate acquired upon such interest by its judgment thereafter obtained, for an estate in course of administration has no lien upon the undivided interests of the heirs or devisees in the real property of the estate arising out of the fact that such heir or devisee may be indebted to the estate.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

In the matter of the estate of Louis L. Polito, deceased. From a decree of distribution in favor of Sarah A. McCurdy, Rosa Polito, as administratrix, and also as surviving heir, appeals. Affirmed.

Kitt Gould, of Clovis, and C. K. Bonestell, of Fresno, for appellant.

Keyes & Erskine, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a decree of distribution, and is prosecuted by the appellant, Rosa Polito, in her capacity as administratrix of the estate of Louis L. Polito, deceased, and also as a surviving heir of said deceased.

The facts are these: Louis L. Polito was the owner during his lifetime of certain real estate which upon his death without a will descended to his heirs. One John L. Polito was one of these heirs, and was entitled under the law of succession to a one-tenth interest in said real estate. Shortly after the death of said Louis L. Polito Sarah A. McCurdy commenced an action against said John L. Polito to recover an indebtedness due from him to her in the sum of $2,000, evidenced by a promissory note, and in said action attached the said interest of John L. Polito in the estate of his father, and thereafter recovered a judgment therein for the sum of $4,452.45, which judgment was duly docketed on or about January 24, 1919. On July 14, 1919, Rosa Polito, as administratrix of the estate of Louis L. Polito, deceased, commenced an action against John L. Polito upon an indebtedness due by him to his said father, and on September 13, 1919, recovered a judgment against him in said action for the sum of $1,409.25. Thereafter said Rosa Polito, as such administratrix, petitioned the probate court having jurisdiction of said estate for the distribution thereof. It appeared by said petition that all of the residue of the estate consisted of said real estate, and it also appeared therefrom that the said Rosa Polito had succeeded to the interests of all of the other heirs of the estate with the exception of John L. Polito, and she therefore petitioned the court to distribute to her the whole of said estate. Upon the hearing of said petition said respondent Sarah A. McCurdy appeared to assert her claim to have the portion of the estate to which John L. Polito had succeeded distributed to him subject to the lien of her judgment against him. Upon the hearing of said petition and the opposition thereto it appeared that the appraised valuation of the said interest of John L. Polito in said estate was the sum of $1,213.56. The trial court refused to distribute to said Rosa Polito the interest of said John L. Polito in said estate according to the prayer of her petition, but made its decree distributing the same to John L. Polito, and it is from that portion of said decree that the appellant herein, in her capacity as administratrix of said estate, and also as surviving heir of said decedent, has prosecuted this appeal.

[1, 2] It is the contention of the appellant that since John L. Polito was indebted to the estate in an amount exceeding the value of his distributive share therein, it was the duty of the probate court to set off the said indebtedness to the estate against his share in said estate. In making this contention the appellant chiefly relies upon the Estate of Gamble, 166 Cal. 253, 135 Pac. 970. An examination of that case, however, discloses that as to its facts it differs in a number of material respects from the case at bar. The most important of these consists in the fact that in that case there were no intervening rights of a third party involved. Another essential difference lay in the fact that in that case the court undertook to set off a judgment which the administrator had obtained on behalf of the estate against a legacy in favor of the judgment debtor, and it was thus dealing with a condition which might properly be held to come within the provisions of section 440 of the Code of Civil Procedure relating to the set-off of cross-demands. In the case at bar, however, we are dealing with the question of the right of the probate court in distributing an estate to set off against a debt due the estate by an heir the undivided interest of said heir in the real estate of said estate which is the sole subject of distribution. We are satisfied that whatever may have been held touching this subject in the decisions of other jurisdictions, the probate court in this

state possesses no such power. It would seem to be well settled that, while the superior court is a court of general jurisdiction, the powers which it exercises in proceedings in probate are entirely statutory, and that in the administration and distribution of estates it exercises a special limited jurisdiction, and that in the exercise of such jurisdiction it is not authorized, in the absence of express statutory authority, to determine controversies which do not strictly arise within the course of its probate procedure. Estate of Ryder, 141 Cal. 368, 74 Pac. 993; Estate of Cook, 77 Cal. 232, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, 11 Am. St. Rep. 267; Estate of Smith, 108 Cal. 115, 40 Pac. 1037. The two cases last above cited have by reason of the similarity of their facts a special application to the question presented for decision in the instant case, and in each of them it was decided that the probate court had no power to deduct from the distributive share of an heir of the estate of an undivided interest in personal property a debt which might be due from him to the estate. An even stronger case is presented herein, since the distributive share of John L. Polito consists solely in an undivided interest in real estate.

[3] Aside from these considerations, however, it would seem that the trial court acted correctly in refusing to accede to the petition of appellant herein, since it appears from the record herein that the respondent Sarah A. McCurdy had obtained and duly docketed a judgment against said John L. Polito for the sum of $4,452.45, which had thus become a first lien upon the interest of said John L. Polito in such real estate, and that this lien was prior to the lien which the estate had acquired upon said interest by its judgment thereafter obtained. We are directed to no provision of law and to no decision of the courts of this state which purport to give to an estate in the course of its administration a lien upon the undivided interests of the heirs or devisees in the real property of said estate arising out of the fact that such heir or devisee may be indebted to said estate. It follows that the judgment lien of the respondent herein was entitled to be satisfied out of the interest of said John L. Polito in his father's estate in so far as the value of said interest would suffice to do so, and hence that the probate court in the distribution of said estate was legally bound to distribute the interest of John L. Polito in the real estate thereof to him, subject to the prior claim of the respondent's lien.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

52 Cal. App. 31

ROBERTS v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3692.)

(District Court of Appeal, First District, Division 2, California. March 22, 1921. Hearing Denied by Supreme Court May 19, 1921.)

1. Master and servant ⟸417(7)—Finding of employment within Compensation Act reviewable.

Since the Industrial Accident Commission has jurisdiction to award compensation to employees only, its finding that applicant was an employee is subject to review to determine whether the jurisdictional facts exist, especially under Const. art. 20, § 21, as amended in 1918, which makes all decisions of the Industrial Accident Commission subject to review by the appellate courts.

2. Master and servant ⟸361—One doing specific job without supervision held not an "employee" within Compensation Act.

A porter employed by one saloon who undertook to do for another saloon keeper a specific job, to be paid for by the job, and in doing which he chose his own method and time for working, is not an "employee" of the latter saloon keeper within the Workmen's Compensation Act, § 8a, as amended by St. 1917, p. 836, even though he might not be an independent contractor, since the definition of a "servant" in Civ. Code, § 2009, which was in force when the Workmen's Compensation Amendment was added to the Constitution, requires a servant to be entirely under the control and direction of the master.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employee.]

3. Master and servant ⟸362—Repairing plumbing held casual employment, within Compensation Act.

One who volunteered to make repairs in a saloon which proved to be a job for a plumber is in an employment both casual and not in the course of his employer's business, so as to be excepted from the Workmen's Compensation Act of 1917 by section 8a thereof.

Proceedings before the Industrial Accident Commission by B. F. Banks to recover compensation for injuries opposed by Tessie V. Roberts, employer. From an order awarding compensation to the employee, the employer brings certiorari. Award annulled.

Alvin Gerlack, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

NOURSE, J. Certiorari to review an award of the Industrial Accident Commission in favor of one B. F. Banks and against Mrs. Tessie V. Roberts. The facts of the case as stated by respondents, and resolving all conflicts in favor of the Commission's

findings, are: Banks, a saloon porter, employed in a saloon owned by a third party, frequently dropped into petitioner's saloon for a few moments from time to time to visit and loaf. On one of such occasions, May 25, 1919, it happened that the regular porter in petitioner's saloon had been endeavoring without success to clean out a urinal which had become stopped up. Some discussion ensued, as a result of which Banks intimated that he would be able to clean it out. Banks' testimony on this point is as follows:

"I happened to go in there on this date, and he (Sparman) was on watch. He had relieved his bartender, and he called me and asked me if I would clean out the urinal in the back, and I asked him what was the matter with the porter, and he said—told me Jones wouldn't do it. So I went back and seen what it was and come out and asked him for a hammer to take up a couple of boards that laid over the pipes, and he handed me the hammer, and I seen where it was stopped up at, and I went out and asked him if he had a heavy wire. Q. Did he say how much he would pay you for the job? A. He told me at the bar, when he hired me, he would pay me for it."

Banks worked several hours on the afternoon in question on the job, but did not finish it. In the course of this work, necessarily quite a filthy job, he lacerated his hand; the wound becoming infected and causing the injury for which compensation has been awarded.

Respondents concede that, if Banks were an independent contractor at the time of his injury, the award of the Commission was in excess of its jurisdiction and should be annulled. In support of her contention that Banks was an independent contractor, petitioner points out that he was left to perform the work according to his own methods and plans and that no supervision, direction, or control was exercised over him by the petitioner's agent; that he was not told when to go to work nor when to quit, and that if any payment was to be made to Banks at all it was only for the completed job and not for the time employed. "It has been said that the true test of a contractor is that he renders service in the course of an independent occupation, following his employer's desires in the results but not in the means used." Fidelity & Deposit Co. v. Brush, 176 Cal. 448, 168 Pac. 890; Flickenger v. Industrial Accident Commission, 181 Cal. 425, 184 Pac. 851. Section 8a of the Workmen's Compensation, Insurance and Safety Act, as amended (Stats. 1917, c. 586), defines the term "employee" as used in the act as including "every person in the service of an employer * * * under any * * * contract of hire * * * but excluding any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer." Section 8b of the same act defines an "independent contractor," for the purposes of the act, as including "any person who renders service other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."

The foregoing definition of an independent contractor was expressly held unconstitutional by the Supreme Court in Flickenger v. Industrial Accident Commission, supra. In the same case the court reaffirmed its holding in Pacific Gas & Electric Co. v. Industrial Accident Commission, 180 Cal. 497, 500, 191 Pac. 788, to the effect that "the terms 'employers,' 'employees,' and 'employment' as used in section 21, article 20, of the Constitution, as amended in October, 1911, must be construed in the light of their meaning at the time of the adoption of the amendment, and cannot be extended by legislative definition."

[1] As the jurisdiction of the Commission runs to employees only, the finding of the Commission that the applicant was an employee is subject to review for the purpose of determining whether the jurisdictional facts exist. Donlon Bros. v. Industrial Acc. Com., 173 Cal. 250, 252, 159 Pac. 715; Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Roberts v. Police Court, 195 Pac. 1053. This is especially true under the amendment of 1918 to section 21 of article 20 of the Constitution, which provides:

"All decisions of any such tribunal (Industrial Accident Commission) shall be subject to review by the appellate courts of this state."

[2] A review of the evidence on this phase of the case discloses that the applicant was engaged for one particular job under an agreement that he would be paid for the job as a whole when completed and not for the time occupied; that he was left to perform the work according to his own methods and at his own pleasure; that he was not told what to do or how to do it; that at no time was he under the supervision, direction, or control of petitioner.

Respondents insist that one element of the test of an independent contractor is wanting; that is, that the applicant was not engaged "in the course of an independent occupation." At the same time they argue that the job was a "porter's" job and not a plumber's job, and it is admitted that the applicant's occupation was that of a porter. But an essential element of the test of an employee is also lacking and, as has been shown, unless the applicant was an employee, the respondents were without jurisdiction to make the award. The statutory definition of a servant found in section 2009 of the Civil Code (in force when the workmen's compensation amendment was added to the Constitution) is as follows:

"One who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

Under this definition it is essential that the servant be "entirely under the control and direction of" the master. This element is lacking in the present case. Banks was not asked to come and work under the direction of the manager of the saloon; he was not asked to come and help the manager. He was asked if he would go and do the job himself and that was what he agreed to do.

"The test of 'control,' however, means 'complete control.' For example, the citizen who hires a taxicab to take him to a certain place exercises that amount of control over the driver, but he does not thereby become the man's employer. * * * But in weighing the control exercised we must carefully distinguish between authoritative control and mere suggestion as to detail." Western Ind. Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721.

The record here presents a case where no control was exercised and the right of control was not retained. There is no distinction between this and such cases as Flickenger v. Ind. Acc. Com., supra; Donlon Bros. v. Ind. Acc. Com., 173 Cal. 250, 159 Pac. 715; Fidelity & Deposit Co. v. Brush, supra, and Parsons v. Ind. Acc. Com., 178 Cal. 394, 173 Pac. 585.

[3] Furthermore, the applicant was not an employee within the definition of the act as his employment was "both casual and not in the course of the trade, business, profession or occupation of his employer." Section 8a, Workmen's Compensation, Insurance and Safety Act of 1917, Stats. 1917, p. 835. It was the work of the regular porter to clean the toilet, and in that work he was engaged in the course of his employer's business. But the repair of a broken pipe was a plumber's job not in the course of that business. As the work progressed it developed that the trouble arose from a broken pipe and that the pipe would have to be repaired. If a duly licensed plumber had been called in to make the repair under the same circumstances, it is not disputed that he would have been treated as a contractor and not an employee. The outstanding facts are that the applicant was called on in an emergency to perform a service outside of the course of business of his employer and outside the course of his regular employment as was the case in London, etc., Co. v. Industrial Acc. Com., 173 Cal. 642, 161 Pac. 2.

But it is not necessary for the decision to go upon this ground. Banks was engaged to do a single job and was to be paid on completion only. His employer did not retain the right to control him in the means by which the job was to be done, but was interested only in the result. Under these circumstances, the relation of employer and employee did not exist and the respondents had no jurisdiction to make the award.

The award is annulled.

We concur: LANGDON, P. J.; STURTEVANT, J.

CALIFORNIA REPORTER

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185 Cal. 565

SNIVELY v. RECORD PUB. CO. et al. (L. A. 5787.)

(Supreme Court of California. April 25, 1921. Rehearing Denied May 23, 1921.)

1. Libel and slander ⊜48(2)—Newspaper privileged as to communications regarding public officers.

Under Civ. Code, § 47, subd. 3, declaring privileged a communication without malice, to a person interested therein, by one who is also interested or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for communication innocent, a newspaper stands in "such relation" to the people of its community, with regard to publications therein concerning local public officers, as to afford "a reasonable ground for supposing its motive to be innocent," if the matter published has the other characteristics of a privileged communication; but this rule arises from the fact, not that the publication is made in a newspaper, but that the official conduct of public officers is a matter of public concern of which every citizen may speak in good faith and without malice.

2. Libel and slander ⊜48(2)—Communication concerning a public officer may be privileged, although made to the public only.

A communication concerning a public officer, to be privileged, need not necessarily be made only to those having the power of removal or of appointment, but may be made to the public generally.

3. Libel and slander ⊜48(2)—Privilege as to communication concerning public officer not destroyed because charge is false or charges commission of crime; "libel."

The qualified privilege, under Civ. Code, § 47, subd. 3, protecting communications concerning the acts of a public officer, is not lost merely because the charge complained of is false or because the communication charges the public officer with the commission of a crime, in view of section 45, defining a libel as a "false and unprivileged communication."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Libel.]

4. Libel and slander ⊜5—"Malice" may be inferred from falsity of charge.

The word "malice" in the provisions of the Civil Code upon the subject of libel and slander means actual or express malice, as distinguished from that somewhat fictional form of malice sometimes described as "a wrongful act done intentionally without just cause or excuse," or as "the absence of legal excuse"; and actual malice may be inferred from the publication of a defamatory charge that is false in fact and not within the realm of absolute privilege, defined in section 47, subds. 1, 2, and actual malice may also be inferred where the charge is false and is libelous per se, and the defendant publishes it without having probable cause for believing it to be true and such inference is sufficient to defeat the defense of qualified privilege.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice.]

5. Libel and slander ⊜5—Malice may be inferred from exaggerated manner of statement.

The manner of statement is material upon the question of malice, and if the facts believed by defendant to be true are exaggerated, overdrawn, or colored to plaintiff's detriment, or are not stated fully and fairly with respect to plaintiff, malice may be inferred from such circumstances alone.

6. Libel and slander ⊜101(4)—Defendant, pleading qualified privilege, has burden of proving absence of actual malice, an essential thereof.

As absence of actual malice is an essential part of the defense of qualified privilege under Civ. Code, § 47, subd. 3, it is necessary, for a defendant pleading such privilege, to prove such absence of actual malice to sustain his defense.

7. Libel and slander ⊜16—Cartoon held equivalent to a charge that plaintiff as chief of police had been guilty of accepting bribes or was ready to do so.

In an action against a newspaper for libel by chief of police a cartoon, depicting the chief as holding with his right hand a halo above his head and extending behind him his left hand, in which is apparently being deposited a sum of money tied to the end of a stick, *held* clearly a libel as having the natural effect to expose him to contempt, ridicule, and obloquy at the least, and as readily to be understood as charging that plaintiff had been guilty of accepting bribes or was ready to do so.

8. Libel and slander ⊂⊃110(3)—Plaintiff's bad reputation admissible in evidence.

In action by chief of police against a newspaper for a libelous cartoon, defendants had a right to prove that plaintiff's general reputation for efficiency and competency as chief of police was bad, such trait of his character being put in issue by the pleadings, and the cartoon being susceptible of an interpretation to the effect that he was inefficient and incompetent, and his general bad reputation upon any trait of character in issue being a proper subject of proof by defendants in mitigation of damages.

9. Libel and slander ⊂⊃110(3)—Proof of dereliction of duty of special policemen inadmissible in libel action by chief of police against newspaper.

In action by chief of police against newspaper for libelous cartoon, proof by defendants of offenses and dereliction of duty on the part of certain special policemen would not be relevant or competent, unless it was also shown that plaintiff had some knowledge thereof at the time, or that, after being informed thereof, he failed to take the proper action in regard thereto.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by C. E. Snively against the Record Publishing Company and another. From judgment for plaintiff, defendants appeal. Reversed.

John H. Perry, of New York City, and Leon R. Yankwich, of Los Angeles, for appellants.

E. H. Allen, Vincent Morgan, and Porter, Morgan & Parrot, all of Los Angeles, for respondent.

SHAW, J. The defendants appeal from the judgment. The complaint purports to state a cause of action in damages for a libel published by defendants of and concerning the plaintiff. The alleged libel consisted of a cartoon published in a daily newspaper in Los Angeles, known as the "Los Angeles Record." The Record Publishing Company was the publisher, and Dana Sleeth was the editor of said paper. The complaint averred that the plaintiff was chief of police of Los Angeles at the time of said publication, and that said cartoon was "meant and intended by the said defendants, and each of them, to make the plaintiff appear ridiculous, dishonest, and unfit for public office"; that it was intended by the defendants to mean, and did mean, that the plaintiff, personally and as chief of police was posing and pretending to be honest and upright, whereas he was actually, personally, and as chief of police, dishonest, "and was receiving money secretly and surreptitiously * * * for uplawful purposes and in violation of his oath of office"; and that it was intended to mean and did mean, and was understood by all persons who saw the cartoon and read the language therein to mean, that "the plaintiff was a grafter, to wit, a dishonest public official."

The answer admitted the publication of the cartoon by the defendants, as alleged, and that the plaintiff was then the chief of police aforesaid. It denied that the cartoon was meant or was intended by the defendants to make the plaintiff appear ridiculous or dishonest and unfit for public office, or that it was so understood by those who saw the cartoon and read the language therein. It also denies that defendants intended to or did mean that the plaintiff, as chief of police or personally, was posing or pretending to be honest, whereas he was personally and as chief of police dishonest and unfit to be chief of police, or that he was receiving money secretly or surreptitiously for unlawful purposes and in violation of his oath of office, or that the cartoon was so understood by those who saw and read it.

The answer further alleged as affirmative defenses: First, that the facts represented in said cartoon, so far as they relate to the plaintiff, were and are true in several particulars which it is unnecessary to state in detail, because this defense is not involved in this appeal; and, second, that the facts on which the cartoon was based were matters of public interest, because the plaintiff was then chief of police as aforesaid, that the Los Angeles Record was then a newspaper of general circulation, wherefore it was the right and duty of the defendants, as publishers and editor thereof, to inform the people of facts concerning the official conduct of the plaintiff and to draw inferences from such facts, and that the cartoon concerned the plaintiff solely in his official capacity and was published without malice.

At the time the case came on for trial the complaint contained allegations to the effect that the defendants acted with express malice toward the plaintiff in making the said publication concerning him, and claimed a large sum of money as punitive damages. At the opening of the trial the plaintiff by leave of the court struck out of the complaint the allegations relating to malice and the prayer for punitive damages. The trial was thereafter conducted upon the theory that no express malice was alleged, and that no punitive damages were prayed for.

The main contention of the defendants is that, since the charge of malice was thus wholly withdrawn from the case, and since the cartoon complained of related solely to the plaintiff in his capacity as chief of police, the publication was privileged. A libel is defined in the Civil Code as:

"A false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civ. Code, § 45.

Section 47 of the Civil Code defines five classes of publications which are declared to be privileged. The present case, if it is privileged, falls within subdivision 3 of that section. This declares that—

A privileged publication is one made "in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." Section 48 declares that in privileged communications coming within this class, "malice is not inferred from the communication or publication."

An important question arising from this definition of privilege as applied to the present case is whether or not the defendants, as publishers of the Los Angeles Record, a newspaper of general circulation in Los Angeles, in making the publication concerning the chief of police of that city, occupied the position of "one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive of the communication innocent"; the persons "interested" in this case being the citizens of Los Angeles. We will discuss the law on the subject of privileged communications before taking up the question of the meaning and effect of the cartoon in question. It is apparent from these sections of the Code that if the cartoon complained of constituted a privileged communication by the defendants to the citizens of Los Angeles and was published without malice it was not libelous.

[1] It is apparently conceded by both parties that a newspaper stands in such relation to the people of the community in which it is published and circulated that, with regard to publications therein concerning local public officers, it comes within the scope of that part of subdivision 3, requiring "a reasonable ground for supposing the motive of the communication innocent," if the matter published has the other characteristics of a privileged communication. This is the correct rule, but it does not arise from the fact that the publication is made in a newspaper. It is based on the fact that the official conduct of public officers, especially in a government by the people, is a matter of public concern of which every citizen may speak in good faith and without malice. The privilege of the newspaper is in no wise different from that of any citizen of the community. Palmer v. Concord, 48 N. H. 216, 97 Am. Dec. 605. This is not the universal rule, and in some jurisdictions it is not accepted, but we think the prevailing and better opinion is in accordance with what we have just said. Walsh v. Pulitzer P. Co., 250 Mo. 153, 157 S. W. 326, Ann. Cas. 1914C, 985; Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390; Scripps v. Foster, 41 Mich. 745, 3 N. W. 216; Palmer v. Concord, supra; Mott v. Dawson, 46 Iowa, 537; Express P. Co. v. Copeland, 64 Tex. 358; Newell on Slander and Libel (3d Ed.) § 633; Odgers on Slander and Libel, p. 193; Folkard on Slander and Libel, pp. 149, 171; 25 Cyc. 400, 403; 18 Am. & Eng. Ency. of Law, 1041; Schomberg v. Walker, 132 Cal. 229, 64 Pac. 290.

Since the conduct of public officers in the administration of their offices is a matter in which every citizen of the community which they serve is interested, the publication in question, if otherwise privileged, must be considered as one made to persons interested, and on an occasion which would ordinarily afford reasonable grounds for supposing that it was made from innocent motives. The publication, therefore, appears to come within this part of the definition of privilege as given in subdivision 3 aforesaid.

[2] It appears that the chief of police is not an elective officer, but is appointed by the Mayor of Los Angeles, and is not subject to recall, but may be removed by the mayor. There are some decisions which hold that a communication concerning a public officer which is not made to those having the power of removal or of appointment, but is made to the public generally, is not privileged. We are of the opinion, however, that this rule should not be followed. It is the result of ancient decisions made before the effect of popular government became fully appreciated. Every citizen has the right to apply to the mayor in such a case for the removal of an unfit or corrupt officer, and we are of the opinion that communications made in good faith and without malice to the public generally respecting the conduct of such officer, come within the spirit and purpose of the statute regarding privileged communications. They tend to promote knowledge concerning such officers, and give citizens a basis for their petitions to the mayor.

[3] The plaintiff contends that the privilege does not protect one in making a false charge against a public officer, however innocent the motive, and especially that it does not protect one who charges a public officer with the commission of crime.

There are many cases in this state and elsewhere which support this claim. The plaintiff relies on the decisions of this court in Dauphiny v. Buhne, 153 Cal. 759, 96 Pac. 880, 126 Am. St. Rep. 136, and Jarman v. Rea, 137 Cal. 350, 70 Pac. 216.

Jarman v. Rea, supra, was decided in 1902. The court below had instructed the jury that—

"A candidate for office is as much entitled to protection from defamation as any other citizen. Whoever charges him falsely with the commission of a crime, * * * must make good the injury thereby occasioned. He may not avoid this just responsibility by the claim that he acted in good faith without malice."

The opinion in the case states that "where a crime is imputed malice is presumed"; that the presumption is not rebutted by showing that the words were uttered in the belief that they were true, and that "nothing short of alleging and proving their truth will rebut the inference of malice." In support of these statements the court cited and quoted from Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757, Seeley v. Blair, Wright (Ohio) 358, 686, Root v. King, 7 Cow. (N. Y.) 613, King v. Root, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102, Smith v. Burrus, 106 Mo. 94, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329, Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212, and Rearick v. Wilcox, 81 Ill. 77. Each of these cases supports the opinion. The instruction was held to be a correct interpretation of subdivision 3 of section 47 of the Civil Code.

In Dauphiny v. Buhne, supra, the plaintiff was a member of the council of Eureka and a candidate for re-election. The publication complained of in effect charged the plaintiff with soliciting a bribe as a member of such council. The answer alleged that the publication was made without malice and for the promotion of the public interest and welfare. The evidence on the subject was, in effect, that the publication was made without malice, in the belief that it was true and for the information of the public. The trial court instructed the jury substantially in the language of subdivision 3 aforesaid, that if the publication was made as the above evidence indicated it was privileged. This was held to be error, and the opinion states that when a false charge of criminal misconduct is made against an officer, or a candidate for office, the publisher thereof cannot "escape liability on the ground that the charge was made with good intentions and for justifiable ends without malice, and under even an honest belief that the charge is true, and that the occasion of his candidacy called for its publication"; that "there is no privilege of publication under the Code, or general law, which will exempt one from responsibility for falsehood," and that "one can justify the publication of a libel against a candidate for office upon privilege only by proof that the accusation is true."

We are unable to reconcile these decisions with the aforesaid provisions of the Code on the subject. In denying a rehearing from the District Court of Appeal in Adams v. Cameron, 27 Cal. App. 641, 150 Pac. 1005, 151 Pac. 286, we refused approval of the doctrine stated in the above-mentioned cases, which that court had followed. We take this opportunity of stating our reasons for holding those decisions erroneous.

Since a libel is "a false and unprivileged communication" (section 45), it follows that the publication must be both false and unprivileged in order that it shall constitute an actionable libel. The allegation and proof that it is true in the sense intended constitutes one defense. Allegations and proof that it was privileged upon any of the grounds set forth in section 47 also constitute a defense. The defense of privilege under subdivision 3 of section 47 does not depend at all on the truth of the defamatory charge. With respect to that form of qualified privilege the Code does not require that the publication shall be true in order to bring it within the protection of the privilege. The language of the Code clearly implies that the publication may be privileged, although it is untrue. To hold that it is necessary to allege and prove the truth of the charge in order to establish the defense that it was privileged under this subdivision would destroy the distinction between the defense of truth and defense of privilege, and would render the defense of privilege entirely useless, since the proof that it was true would be a complete defense without proof of any other facts, and without proving the absence of actual malice.

Furthermore, the proposition that one is not liable for damage if, without malice, he states something to another which under the circumstances he is lawfully authorized to tell him, necessarily implies that the statement made may not be accurate; that is to say, that it may be untrue, but that under such circumstances the plaintiff cannot recover damages. This is the established law in many cases of privilege, and no question is ever made about it. For example, if one is about to employ a servant and inquires of a former employer about his character, the former employer is excused for any information he may give in answer to such inquiry, providing he makes the statement in good faith, believing it to be true, and without malice, although the statements may in fact be untrue. This is true in almost any relation where one person is under a duty to give information to another, and does so in good faith and without malice. The failure to give accurate statements does not of itself render him liable for damages in an action for libel or slander. Almost all the cases holding that the statement must be true are cases involving public actions in newspapers regarding public officers or candidates for public office. There is no just ground for any distinction between that class of cases and those above mentioned. The Code places them all under the same rule.

While there are many decisions in other

states which support the rule laid down in Dauphiny v. Buhne and Jarman v. Rea, there are others holding the contrary. In Coleman v. MacLennan, 78 Kan. 729, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390, the court said:

"We think a person may in good faith publish whatever he may honestly believe to be true and essential to the protection of his own interests, or the interests of the person or persons to whom he makes the publication, without committing any public offense, although what he publishes may in fact not be true, and may be injurious to the character of others."

In Palmer v. Concord, supra, the court says that one who makes a publication in a newspaper upon a privileged occasion "is not guilty of libel if the facts alleged were true, or if he had probable cause to believe, and did believe, that they were true." In Mott v. Dawson, supra, the words were spoken on a privileged occasion, and the court said that if they were spoken without malice, believing them to be true, and having reasonable cause so to believe, the defendant was not liable. This implies that they may have been false. In Express P. Co. v. Copeland, 64 Tex. 358, the court said respecting privileged publications, that they "must be confined to the truth, or what in good faith and upon probable cause is believed to be true" and that if the statements were false the defendant could only defeat the action by showing that they were made in good faith in the belief of their truth, and upon just and reasonable grounds for that belief. There are many other cases of similar import, and we need not multiply citations on the point. These decisions cannot be reconciled with the theory that it is always necessary to prove the truth of a publication in order to bring it within the defense that it was privileged. We are satisfied that Dauphiny v. Buhne and Jarman v. Rea went too far in declaring that a privileged communication must be true in order to make it privileged, and that they should be overruled so far as they so declare.

With regard to this form of qualified privilege, no logical distinction can be made between a false charge of crime and a false charge of any other fact of a defamatory character. The occasion and the relations between the one making the charge and those to whom it is made being such that the communication would be privileged, the right of the publisher to speak or write is complete and unqualified, under the Code, except that he must speak or write "without malice." When under these conditions he honestly believes that the person of whom he speaks or writes is guilty of a crime of a nature that makes the fact material to the interests of those whom he addresses, it is as much his right and duty to declare to them that fact as it would be to tell them any other fact pertinent to the occasion and material to their interests. If the publisher of a newspaper honestly believes that a public officer has committed crime of a nature which would indicate that he is unfit for the office he holds, we think he is not liable for damages under the Code in a civil action for libel when, without malice, and so believing, he publishes a statement to that effect to the community served by the officer.

[4] The word "malice" in the provisions of the Civil Code upon the subject of libel and slander means actual or express malice, as distinguished from that somewhat fictional form of malice sometimes described as "a wrongful act done intentionally without just cause or excuse," or as "the absence of legal excuse." This was decided upon a very elaborate discussion of the subject in Davis v. Hearst, 160 Cal. 155–168, 116 Pac. 530. The court there held that—

"A full recovery in compensatory damages may be had under our civil law of libel without the pleading of malice, without the proof of malice, and without the existence of malice."

The court was careful to say that it was here speaking of express malice or actual malice, and not of the fictional malice referred to, which, in some jurisdictions, but not in this state, is held to be a necessary ingredient of libel. With regard to actual or express malice, it was decided that it was material only where the plaintiff alleged it in the complaint as the foundation of a claim for punitive damages, or where the defendant in his answer alleged the absence of such malice as one of the necessary conditions of the defense that it was a privileged communication under one or more of the three varieties of qualified privilege described in subdivisions 3, 4, or 5 of section 47 of the Civil Code. Actual malice was there defined as:

"A state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person," and * * * "the motive and willingness to vex, harass, annoy, or injure."

It was said that—

Such actual malice could be established either by direct proof of the state of mind of the person, or by indirect evidence so satisfying to the jury that they may from it infer and find the existence of this malice in fact; that the evidence "may be direct * * * going to declarations, acts, and conduct of the defendant, showing personal ill will toward the plaintiff, but it will more usually be indirect or inferred, * * * and to this end of proving malice inferentially all legitimate evidence is admissible bearing upon the general course of conduct of the defendant toward the plaintiff, the internal evidence furnished by the character of the libel, and any other specific facts and circumstances not in direct proof of the malice, but

from which the existence may be logically inferred, herein including the circumstance, if it be found to exist, of wanton recklessness and heedlessness of plaintiff's rights."

It is further said that actual malice may be inferred from the publication of a defamatory charge that is false in fact and not within the realm of absolute privilege defined in subdivisions 1 and 2 of section 47. Actual malice may be inferred by the court or jury where the charge is false and is libelous per se and the defendant publishes it without having probable cause for believing it to be true, and such inference is sufficient to defeat the defense of qualified privilege. Smedley v. Soule, 125 Mich. 192, 84 N. W. 63; Quinn v. Scott, 22 Minn. 456; Carpenter v. Bailey, 53 N. H. 590.

[5] On the subject of actual malice it is important to note further that, while one may, on a privileged occasion and without malice, publish to the interested persons what may be false, if he honestly believes it to be true, he is not by this rule given a license to overdraw, exaggerate, or to color the facts in his communication. The manner of statement is material upon the question of malice, and if the facts believed to be true are exaggerated, overdrawn, or colored to the detriment of plaintiff, or are not stated fully and fairly with respect to the plaintiff, the court or jury may properly consider these circumstances as evidence tending to prove actual malice, and they may be sufficient for that purpose without other evidence on the subject.

[6] Upon the trial there appeared to be some confusion concerning the issues involved, and in view of the necessity for a new trial it is proper to state our understanding on the subject. The plaintiff, as we have said, struck out of his complaint the allegations that the publication was made with actual malice, and the prayer for punitive damages. So far as the plaintiff's case was concerned, this eliminated the issue of malice, and he could recover without introducing any evidence on that subject. But by averring in their answer that the publication was on a privileged occasion and was made without malice, the defendants directly put in issue the question of actual malice. As absence of actual malice was an essential part of that defense, it was necessary for the defendants to prove such absence in order to sustain this defense. The withdrawal by the plaintiff of his claim for punitive damages and the striking out of the averments of actual malice from the complaint did not establish the fact that defendants published the cartoon without actual malice, nor excuse them from the necessity of proving absence of such malice, if they desired to establish that defense. Neither party appears to have understood this; the plaintiff's attorney announced that plaintiff "waived all malice", and the court said to the jury at the beginning of the trial that "malice has nothing to do with the case." The defendants introduced no evidence to show the absence of actual malice on their part in publishing the cartoon. The effect of the proceedings and remarks during the trial was equivalent to an admission that the publication was made without malice. If it had not been for this admission and the instructions of the court about to be stated, the jury would have been at liberty to have inferred actual malice from the cartoon itself.

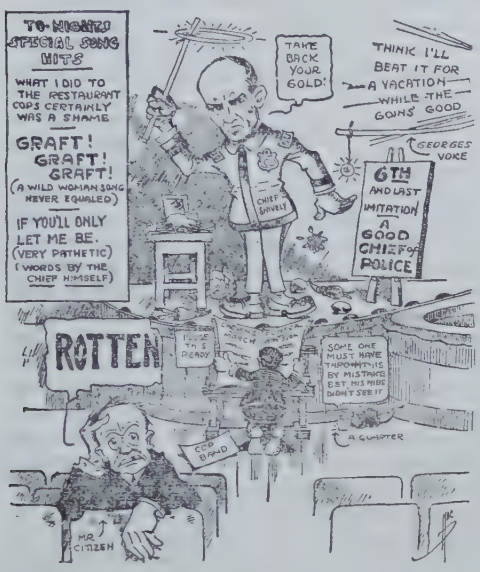
[7] The court instructed the jury to the effect that it was for it to determine the meaning and effect of the cartoon, and that if it was reasonably susceptible of conveying to the ordinary person the meaning that the plaintiff was officially dishonest, or that he was guilty of accepting a bribe, or was ready to accept a bribe, then the publication was not privileged, and the plaintiff was entitled to recover compensatory damages. The answer did not attempt to state as a defense that the cartoon was true if it was susceptible of the meaning just stated, and no evidence was given to that effect. The court in giving these instructions took cognizance of the admission of the plaintiff that the publication was without malice, but assumed, on the authority of Dauphiny v. Buhne, supra, and Jarman v. Rea, supra, that there could be no privilege unless the charge made by the cartoon in the sense above stated was true, and that it was incumbent upon the defendants to prove such truth. Our conclusion in regard to this point demonstrates that the court erred in this instruction, and for this reason it is necessary to reverse the judgment.

The court further instructed the jury in effect that it could not consider the publication as privileged, and that it had nothing to do with that defense. This was evidently also based on the authority of the two cases last cited, and it was erroneous for the reasons above given.

The defendants earnestly insist that the cartoon is not susceptible of the meaning contended for by the plaintiff, and suggested by the court in the instructions above referred to, and claim that it did not refer to the plaintiff personally or officially except to suggest that he was incompetent and inefficient, and that so far as it suggested dishonesty or crime, it referred exclusively to a number of special policemen appointed by the plaintiff and detailed to attend upon certain places in the city during the nighttime, and that it was so understood by those who saw and read it. Upon this theory, the answer set up in justification that these special policemen were guilty of dishonesty and bribery, but it did not aver that the plaintiff participated there-

in or had any guilty knowledge thereof. Since we must order a new trial, it is proper to consider these claims and other objections to rulings made upon the trial.

The cartoon was as follows:



On its face this picture is clearly a libel upon the plaintiff as chief of police. Its natural effect would be to expose him to contempt, ridicule, and obloquy at the least. It is also obvious that it might readily be understood by any person who saw it as the equivalent of a charge that plaintiff had been guilty of accepting bribes or was ready to do so. We do not perceive how it could be otherwise understood by any person who had no knowledge of the alleged offenses of the special policemen mentioned in the answer, and we think that even a person who had some knowledge thereof would understand the cartoon to suggest that the plaintiff was a participant in or had a guilty knowledge of those offenses. It is unnecessary to dilate upon this point. A look at the cartoon is sufficient.

[8] The defendants had a right to prove that the plaintiff's general reputation for efficiency and competency as chief of police was bad. That trait of his character was put in issue by the pleadings, and the cartoon was susceptible of an interpretation to the effect that he was inefficient and incompetent. His general bad reputation upon any trait of character in issue was a proper subject of proof by the defendants in mitigation of damages. Newell on Slander and Libel, 3d Ed., p. 1068; Hearne v. DeYoung, 132 Cal. 362, 64 Pac. 576. We are not certain from the transcript whether this kind of evidence was excluded absolutely by the court below, or whether it was excluded because of the fact that it was not understood that it was offered in mitigation of damages.

[9] Proof by the defendants of offenses and dereliction of duty on the part of the special policeman aforesaid would not be relevant or competent unless it was also shown that the plaintiff had some knowledge thereof at the time, or that, after being informed thereof, he failed to take the proper action in regard thereto. The court did not err in rejecting such evidence where it was admitted by counsel that they had no intention of following it up by proof connecting the plaintiff therewith.

As it may be necessary prior to a new trial for both plaintiff and defendants to amend their pleadings, it is unnecessary to consider here the objections made to the refusal of the court to allow the defendants to file a fourth amended answer.

A number of other rulings are objected to and presented in the briefs, but we do not find them of sufficient importance to justify a discussion thereof.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

185 Cal. 621

SAN FRANCISCO BAR ASS'N v. SULLIVAN. (Cr. 2347.)

(Supreme Court of California. May 5, 1921.)

1. Attorney and client ⊂=52—Accused called upon to meet only specific charges in proceeding for disbarment.

In a proceeding in the Supreme Court to disbar an attorney under Code Civ. Proc. § 287, subd. 5, the accused is called upon to meet only the specific charges made against him by the accusation, and the court is confined to the specific charges.

2. Attorney and client ⊂=49—Proceeding to disbar not criminal prosecution.

A disbarment proceeding is not a prosecution for crime.

3. Attorney and client ⊂=53(2)—Guilt must be clearly established in disbarment proceeding.

In disbarment proceedings, while it may not be necessary as in strictly criminal prosecutions that guilt be established beyond all reasonable doubt, a finding of guilt should be made only upon such proof as clearly and satisfactorily establishes guilt in the minds of the judges, and in such a proceeding all intendments should be in favor of innocence, and where two or more equally reasonable inferences may be drawn from a fact shown, that inference leading to a conclusion of innocence should be accepted rather than one leading to a conclusion of guilt, especially where the charge is accepting a bribe, a charge constitut-

ing a felony involving the grossest of moral turpitude and subjecting offender to imprisonment in state prison and disqualifying him from holding any office in the state, under Pen. Code, § 98, and Code Civ. Proc. § 287, subd. 5.

4. Attorney and client ⊜53(2)—Evidence insufficient to show acceptance of bribe by a police judge in disbarment proceeding.

In a proceeding to disbar a police judge as an attorney and counselor for conduct involving moral turpitude consisting of accepting bribes, under Code Civ. Proc. § 287, subd. 5, evidence *held* insufficient to satisfy the court of the truth of the charges against accused.

Sloane and Lawlor, JJ., dissenting.

In Bank.

In the matter of the accusation of the San Francisco Bar Association for disbarment of John J. Sullivan, an attorney and counselor. Proceeding dismissed.

Max J. Kuhl, M. C. Sloss, John O'Gara, and Jos. J. Webb, all of San Francisco, for plaintiff.

Walter H. Linforth, Bert Schlesinger, and Lewis F. Byington, all of San Francisco, for defendant.

ANGELLOTTI, C. J. This is a proceeding instituted in this court for the disbarment of John J. Sullivan, an attorney and counselor, for conduct involving moral turpitude. Defendant was at all the times mentioned in the accusation one of the police judges of the city and county of San Francisco, and all the charges against him are for acts and conduct on his part with relation to matters coming before him as such police judge; our law providing that an attorney and counselor may be removed "for the commission of any act involving moral turpitude, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney or counselor at law, or otherwise." Subdivision 5, § 287, Code Civ. Proc. Three separate, specific charges against the accused are made by the accusation. Each charge involves the most serious accusation that can be made against a judicial officer, viz. that of agreeing to receive and receiving money upon the corrupt understanding and agreement that his official conduct shall be thereby influenced. All of the charges were denied by the accused by verified answer filed herein. This court retained jurisdiction of the matter instead of transferring it to a District Court of Appeal, because of the seriousness of the charges and the official station of the accused. By order of the court, the evidence in support of and against the charges was taken by the Chief Justice, and the transcript of the evidence so taken has received the careful consideration of each member of the court.

[1-3] No serious question of law is presented. It is conceded, of course, that by this accusation the accused was called upon to meet only the specific charges made against him therein, and that we are confined to those specific charges, viz. agreeing to receive and receiving money upon the corrupt understanding alleged, in the matters and proceedings specified in the accusation. No other misconduct is alleged in the accusation or included in the charges filed. On the other hand, it is clear that, if it is satisfactorily shown that with regard to any of the proceedings specified in the accusation the accused either agreed to receive or received any money upon any such corrupt understanding as is alleged, the accusation should be held to be sustained and the accused disbarred. Some question is raised as to the degree of proof essential to warrant a conviction; i. e., whether the rule applicable in criminal prosecutions that guilt must be shown beyond all reasonable doubt obtains in such a proceeding as this. So far as appears, this precise question has never been determined by this court. A disbarment proceeding is not a prosecution for crime. In some states, however, it has been held that the charges must be proved beyond a reasonable doubt to warrant disbarment. In discussing a question of the sufficiency of an accusation this court has said:

"This accusation is in the nature of a criminal charge, and all intendments are in favor of the accused. The accusation is not sufficient if, all its statements being true, the accused could be innocent." Matter of Haymond, 121 Cal. 385, 388, 53 Pac. 899, 900.

And again:

"A judgment against the respondent will deprive him of personal and property rights. Unless we are clearly satisfied of respondent's guilt, we ought not to remove or suspend him from the practice of his profession. As we are not so satisfied, we decline to strike his name from the roll." Disbarment of Houghton, 67 Cal. 511, 517, 8 Pac. 52, 57.

This, of course, means that something more than the mere preponderance of proof that will suffice in the ordinary civil cause is essential. While we may concede that it may not be necessary, as in strictly criminal prosecutions, that guilt be established beyond all reasonable doubt, we are satisfied that a finding of guilt should be made only upon such proof as clearly and satisfactorily establishes guilt in the minds of the judges. It seems, furthermore, clear that in such a proceeding all intendments should be in favor of innocence, and that, where two or more equally reasonable inferences may be drawn from a fact shown, that inference leading to a conclusion of innocence should be accepted rather than one leading to a conclusion of guilt. In re Application of Alame-

da County Bar Association, 35 Cal. App. 534, 536, 170 Pac. 432. Especially does this seem true where the charge is of acts constituting a felony involving the grossest of moral turpitude, and a conviction of which in a strictly criminal prosecution not only subjects the offender to imprisonment in the state prison, but also forever disqualifies him from holding any office in this state. Section 98, Pen. Code.

The specific charges contained in the accusation are as follows:

First. That in two felony matters pending before him as a committing magistrate, each against one Bernardino Catterini, charged with assault with a deadly weapon with intent to commit murder, the accused, on or about January 12, 1918, did agree to receive and did receive $150 in money, "as a bribe, from one Peter P. McDonough, upon the corrupt understanding and agreement" between him and said McDonough that he, as such police judge, should thereby be corruptly and unlawfully influenced in his decision of said two cases, and that he was thereby corruptly and unlawfully influenced and dismissed said cases corruptly and unlawfully. This matter will hereinafter be referred to as the Catterini matter.

Second. That on or about September 23, 1918, while one Tony Spinelli was in custody on a charge of assault with intent to commit murder, the accused agreed to receive and did receive $50 in money from one C. Vincent Riccardi upon the corrupt understanding and agreement between himself and Riccardi that his action and decision in the matter of the approval of a certain bail bond for $5,000 signed by Angelo Cosenza and Malina Cosenza then presented should thereby be corruptly influenced, and that he should in return for said money approve said bond and order the release of Spinelli from custody, and that he was thereby corruptly influenced to do so, and did approve said bond and make said order for release. This matter will be hereafter referred to as the Spinelli matter.

Third. That in a misdemeanor prosecution against one Pastiango, who was charged with violating the provisions of an ordinance prohibiting lewd and lascivious acts, the accused, on or about November 28, 1919, agreed to receive and did receive $40 money as a bribe from said Riccardi, upon the corrupt and unlawful agreement between them that in return for said money he would discharge said Pastiango from custody upon his own recognizance immediately after finding him guilty and sentencing him to 90 days' imprisonment in the county jail, all of which he did. This matter will be hereinafter referred to as the Pastiango matter.

At the outset it should be stated that as to all the charges the only direct evidence of guilt of the accused is that of one C. Vincent Riccardi, who was at all the times referred to in this proceeding a duly admitted attorney and counselor at law. Probably no witness has ever appeared before a judicial tribunal who was shown to be less worthy of credit in the absence of substantial corroboration than this witness. According to his own testimony, he was for many months a voluntary and active participant, for his own private and personal financial gain, in a system of disposing of matters in the police courts of San Francisco by the bribery of judges thereof, and he was the instigator and prime mover in the particular corruption charged against the accused in this proceeding. That his reputation for truth, honesty, and integrity in the community in which he lived is bad is established by many reputable witnesses, and not denied. Moreover, a motive for the giving by him of sensational evidence relating to conditions in the police courts is most clearly apparent. Early in the year 1920 he was convicted of felony embezzlement in the superior court of San Francisco, and on such conviction adjudged to suffer imprisonment in the state prison. His activities in the matter of disclosures relative to police court conditions immediately followed such conviction. His imprisonment on such conviction was postponed by an appeal, and he has been at large on bail. At the time he testified before this court the judgment had not become final. It had been affirmed by the District Court of Appeal, but the matter was still pending on application for hearing in this court. In all his activities in the matter of disclosures he has known that in the event of the affirmance of the judgment against him his only chance of escape from imprisonment was the granting of executive clemency. His own testimony on this matter showed very clearly that he fully realized that by giving the character of sensational evidence relative to corruption in the police courts that he was giving before the grand jury, the bar association committee, and in this proceeding he might create the feeling that he was rendering so great and impressive a public service as to make a pardon in his own matter a proper recognition and reward. That he had such a hope he freely admitted, as well as that, by reason of his disclosures, he had already received some assurances of friendly interest. Of course, these were given him in view of a belief on the part of those giving them that he was telling only the truth. But it is obvious that he fully realized that no movement for executive clemency in his own behalf could be inspired by a story on his part that was devoid of sensational exposure of official corruption. Hence we find here the strongest kind of a motive for false accusation against the police judges. We think it is self-evident that no statement of

this witness can be accepted as true simply because he testifies to its truth. It may or may not be true, but, uncorroborated, it cannot produce conviction in an unprejudiced mind.

With these observations we proceed to discuss the evidence relative to the various charges, taking up first the Pastiango matter.

Pastiango was first charged with a felony in having violated section 288 of the Penal Code. The matter was pending before accused as a committing magistrate, and Riccardi was acting as his attorney. The matter was heard on November 13, 1919, Mr. Maundrell, assistant district attorney, appearing for the people, and Riccardi for the defendant. But one witness was presented by the prosecution, the girl upon whose body the alleged acts were charged to have been committed. According to her testimony, she was 3 months and 2 days short of being 14 years of age at the time of the commission of the alleged crime. Her testimony being concluded, further hearing was continued until November 17, 1919. On that day when the matter came on for further hearing, Mr. Maundrell said:

"From the testimony of the complaining witness in this case the prosecution fails as far as section 288 of the Penal Code is concerned. And at this time I will recommend that the defendant be arrested under Ordinance 1059," an ordinance prohibiting any lewd, indecent, or obscene act or conduct, and making a violation of its terms a misdemeanor.

The accused then announced that the felony charge would be dismissed, and continued the matter for dismissal to the next day, presumably to give time for the institution of the misdemeanor prosecution. On the next day the dismissal was made by the accused. A prosecution under the ordinance was instituted, and it was in relation to the disposition of this prosecution that the bribe was alleged to have been agreed to be given and accepted. The only direct evidence as to this is that of Riccardi. He is rather vague and indefinite as to the time when the agreement was made, except that he said several times it was before "the dismissal," by which he must mean the dismissal of the felony charge, for this was the only "dismissal" in that matter. In fact, Riccardi testified on direct examination here that the agreement between him and the accused included the dismissal of the felony charge, but subsequent testimony on cross-examination would indicate that his alleged talk with the accused about the matter was during the pendency of the misdemeanor prosecution. This dismissal, we have seen, was recommended by the prosecuting officer for failure of evidence to establish the crime alleged under section 288, Penal Code. Substantially the alleged agreement was that in return for $40 to be paid to the accused judge Pastiango was to be given what was called "a suspended sentence," meaning that, although he was to be found guilty and sentenced, execution of that sentence was to be suspended. The misdemeanor case was subsequently submitted to the accused judge upon evidence conceded to be the same as that given upon the felony charge, a transcript of which is in evidence here. The accused found the defendant guilty, sentenced him to 90 days' imprisonment in the county jail, and suspended execution of sentence. Riccardi says that while the case was pending he agreed to give the accused $40 in this matter in payment for such action on his part, and that on the day the matter was disposed of he gave him the money. The accused denies absolutely any arrangement whatever with Riccardi in the matter, and denies that he was paid any money by Riccardi.

The only pretense of corroboration of Riccardi's evidence which is here claimed is the action of the accused in the Pastiango case in view of the evidence given therein, and his statements on cross-examination here as to his reasons for suspending execution of the judgment. Of course, it is not claimed that mistakes in acts and decisions of a judge that may reasonably be attributed simply to bad judgment or even gross carelessness in the discharge of official duty constitute evidence of bribery of the judge. And yet, at best, we have no more here in regard to the disposition of the Pastiango matters. The dismissal of the felony charge was asked by the prosecuting attorney, as to whom there is no insinuation of misconduct. There was room for an honest difference of opinion as to whether the special offense defined by section 288, Penal Code, was sufficiently shown by the only evidence produced, presumably the only evidence obtainable, to warrant holding the defendant for trial thereon in the superior court, and the situation was such that not even a suspicion of corrupt influence arises from the mere act of the accused in acceding to the request of the prosecuting attorney.

As to the suspension of execution of the judgment in the misdemeanor matter, the law of this state authorizes such action, and we know that it is a course very frequently, perhaps too frequently, followed. Whether or not in any particular case the circumstances are such as to warrant such a disposition is peculiarly one for the trial judge. Personally we should feel that, if Pastiango was guilty of soliciting this girl by word or act to engage in lewd, indecent, or obscene conduct with him, the case was not one for suspension of execution of the judgment. But we cannot say from the evidence before us that the accused did not in good faith consider it a proper case for such action. Some of his reasons for his action in this case given in justification when being pressed by able counsel on cross-examination in this

court certainly do not appeal to us as being good reasons. It is, however, only fair to the accused to say that among his reasons given for suspending execution of the judgment was that in view of the testimony of the girl, and the manner of her testifying and the circumstances of the case generally, he was not satisfied of the guilt of the defendant, and further that neither the prosecuting officer nor the arresting officer objected to the course followed. We cannot find in either his conduct in the case or in his testimony any corroboration of Riccardi's evidence with relation to a bribe. As we look at the matter, in so far as agreeing to accept or accepting a bribe is concerned, it is simply Riccardi's word against that of the accused, with the result that we are not satisfied of the guilt of accused of the offense charged.

As to the Spinelli matter: Spinelli had been arrested on a charge of assualt with intent to commit murder. The matter had been assigned to Police Judge Brady's department, and application was made by Riccardi to the accused at his residence during the evening of September 23, 1918, to approve a $5,000 bond offered for the release of Spinelli. Riccardi testified that during the day he had arranged with accused to meet him at his home that evening, both to fix the bail at $5,000 and to approve the bond offered, and that he was to pay him $50 for so doing. The accused testified that he had heard nothing about the case until Riccardi with others called at his house that evening and requested approval of the bond. He further testified that according to his recollection Judge Brady had fixed the bail at $5,000. There is no evidence other than Riccardi's as to the fixing of the bail by accused, or as to any previous arrangement with accused for the approval of the bond. It is a common occurrence for police judges to approve bail bonds out of office hours at their homes. Riccardi, who had the bond prepared at his office, even to the signatures of the sureties, went with the sureties to the home of the accused and proffered the bond to the accused with a request for its approval. It was approved by accused, who affixed his signature either then or the next day to the jurat on the affidavit of each surety, and also to the certificate of acknowledgment and approval, signed an order for release, which he gave to Riccardi, and retained the bond. Riccardi testified that in pursuance of his agreement he then gave the accused $50, and the accused testified that there was no arrangement for any payment and that no money was paid. As to this it is simply Riccardi's word against that of the accused. The only alleged corroboration of Riccardi's testimony is in the circumstances attendant on the approval of the bond. Riccardi testified that the accused did not examine or swear the sureties, and one of the sureties, Angelo Cosenza, whose knowledge of the English language was so defective that he was compelled to testify through an interpreter, testified that the accused said nothing to him and talked only to Riccardi. The accused testified that he must have sworn the sureties, as this was his universal custom. We are not prepared to hold that he did not purport to do this in the informal way that unfortunately is adopted very often by careless officials, so informal in fact in some cases as to fail to bring to the knowledge of the witness the fact that an oath is being administered. It is admitted by the accused, however, that he did not examine the sureties as to their sufficiency, confining his questioning to Riccardi and relying wholly upon Riccardi's assurances as to their sufficiency and qualification. He apparently believed that he was fully justified in so doing. In thus doing he was guilty, of course, of gross neglect of duty. Nor could he have carefully examined the bond, for a reading of the affidavits of the sureties, who were husband and wife, disclosed that the property described in the affidavit of each as "his property" that "stands of record in his name," and stated to be of the value of $9,000, was the same identical property, a lot in San Jose. Cosenza testified here that this property was worth only $2,000, and an examination by the accused of the sureties would doubtless have disclosed that fact. But this is not a proceeding against accused based upon a charge of neglect of official duty. The question is whether, in view of Riccardi's testimony, it sufficiently warrants an inference of the alleged bribery. We are perfectly satisfied that it does not. It may much more reasonably be attributed to a careless method of transacting official business, in acting solely upon the assurance of another in lieu of the personal investigation that a proper conception of official duty and responsibility requires. To our minds it affords no evidence whatever of the specific charge of bribery, with the result that as to the bribery charge we have nothing but Riccardi's word, and are not satisfied of the guilt of the accused thereof.

As to the Catterini matter: The charge here is that accused agreed to receive and did receive $150 from one Peter P. McDonough, upon the corrupt agreement between them (McDonough and accused) that his conduct in such matter should be influenced thereby. Riccardi was the attorney for Catterini. His dealings in the matter of the alleged corrupt arrangement were with McDonough alone, his testimony being to the effect that, there being $1,500 obtainable from Catterini, he arranged with McDonough that the latter should have the bail fixed at $1,000 cash, and the case subsequently dismissed, and that the $1,500 should be divided, $500 to McDonough, $500 to the accused, and $500 for himself. McDonough testified that there

was no arrangement relative to the case between himself and Riccardi, except that in the course of his business as a bail bond broker he at the request of Riccardi, and for the usual commission of 10 per cent., furnished the bail money. He further testified that he never spoke to the accused about the case and never paid him any money on account thereof. The accused testified that McDonough never spoke to or communicated with him about the case and never paid him any money on account thereof. According to his own testimony, Riccardi's only talk with the accused about the matter was some time after the dismissal, when he asked him how much McDonough gave him in the Catterini matter, and the accused, on being told by Riccardi that he was to receive $500, said that McDonough gave him only $150. The accused denied that any such conversation occurred.

Catterini was arrested the evening of January 1, 1918, voluntarily surrendering himself into the custody of an officer on learning that he was being looked for on two charges of assault with intent to commit murder, alleged to have been committed between 12 and 1 a. m. of the same day.

On January 2, 1918, bail was fixed by accused on the two charges at a total of $2,000, or $1,000 cash, and, the cash being deposited, Catterini was released from custody at 11:55 a. m. According to Riccardi's uncorroborated word, he had asked the accused to fix the bail, and accused had declined to do so at the moment, in view, as he stated, of the seriousness of the charge, and Riccardi had then gone to McDonough and solicited his assistance, with the result that the bail was fixed. The order fixing bail was filled in, except for the amount, in the handwriting of the clerk of the court, a Mr. Hagan, who testified that he had never made out an order fixing bail unless the court was in session. The amount and signature of the judge are in red ink, and the accused testified that he knew the signing was done in court for the reason that all signatures while on the bench were made in red ink, and all while off the bench in black ink. He further testified that he fixed the bail at Riccardi's request. There is absolutely nothing to show any communication, direct or indirect, from McDonough to accused prior to the making of such order, except in so far as one may speculate in view of the intimate relations existing between accused and McDonough and the amount of bail fixed. To hold that there was such communication would be to indulge in the purest of guesswork. Certainly we may not in a judicial proceeding fairly infer therefrom any arrangement between them for a bribe. It is as reasonable to infer in view of the circumstances we have stated that the bail was fixed in court solely at Riccardi's request, as testified to by the accused, as it is to infer that this action was had because of some possible communication from McDonough.

Riccardi's testimony as to the amount of money paid by Catterini is flatly contradicted by that of Catterini, who impressed the court as honestly endeavoring to tell the truth. He said that he paid $225 in cash and Liberty bonds, and $800 on a note that he signed on January 12, 1918, being $1,025 in all. He also contradicted Riccardi as to ever having been taken to McDonough's place of business, testifying that he never saw McDonough until long after the dismissal of the charges against him. There is some corroboration of Riccardi's testimony as to having some sort of arrangement with McDonough to be found in the fact that the $800 note signed by Catterini was payable to Mrs. Riccardi (the mother of Riccardi) and McDonough jointly, although McDonough testified that his connection with the matter was solely for the purpose of accommodating Riccardi in obtaining cash for his fee, and that he received $80 for his indorsement of the note and the giving of his name as security. This was in addition to the $100 which he received for furnishing the $1,000 cash bail on which Catterini was released. But, whatever the arrangement between Riccardi and McDonough, no conclusion adverse to the accused can be based thereon in the absence of evidence connecting him with the matter.

Catterini having been released on bail, the hearing on the charges was continued from time to time, testimony being taken on several of the days on which the matter came on for hearing, until finally, in April, 1918, the charges were dismissed by the accused. At these various hearings the people were represented by an assistant district attorney, Mr. Maundrell. The case was fully heard, and nothing out of the ordinary course of procedure appears in the transcript of the proceedings. Some point is made of the fact that the accused, with the attorneys, went to the hospital to take the evidence of the woman who, it was alleged, was shot by Catterini. To our minds there is absolutely nothing, except the testimony of Riccardi, to indicate that this was done at the instance of McDonough, or otherwise than in regular course. When the taking of testimony was fully concluded, the matter was submitted to the accused for decision. The transcript of the proceedings is before us, and it shows that at that time the following occurred:

"Mr. Riccardi: We have not any further evidence, your honor.

"Mr. Maundrell (assistant district attorney): The case of the people is in in this matter.

"The Court: How do you feel about it yourself, Mr. District Attorney?

"Mr. Maundrell: There is a question in my mind that there might be a probable cause for a holding. I will submit the matter to the court.

"The Court: There is a question in my mind, and it is reinforced by the fact that the de-

fendant surrendered himself. That isn't ordinarily the act of a guilty man, nor is it indicative of a consciousness of guilt. The identification by the complaining witness, or the injured person, is entirely unsatisfactory, and the identification of a necktie and pin and a pair of shoes. It seems that a person who was present committing an act of that character would have rendered some other mark of identification which could have been made more complete and satisfactory.

"Mr. Maundrell: I understand there is a $10,000 damage suit upon file against the man three weeks ago.

"Mr. Riccardi: He has property. He will pay if he loses. That is what they wanted in the first place.

"The Court: Dismissed."

It appears from the foregoing that the assistant district attorney was doubtful as to the advisability of holding the defendant for trial in the superior court, and certainly did not urge or request a holding. It appears from his evidence given in this proceeding that he, as prosecuting officer, talked with the accused in his chambers that morning before the case was dismissed as to what should be done with it, and a fair reading of his evidence here indicates that it was his recollection that he then expressed to the accused his doubts as to the propriety of a holding for trial. The question in the cases was as to the identity of the man who in fact made the assaults; the defendant denying that he was that man. There was positive identification by the woman assaulted and her little daughter, the other person assaulted, but this was somewhat weakened by matters educed on cross-examination, and there were also one or two other circumstances pointing to defendant as the guilty party. On the other hand, there was an apparent absence of motive on the part of defendant, good evidence as to his reputation for honesty, integrity, industry, peace, and quiet, his absolute denial of the charge, and some evidence in support of his claim that he was elsewhere when the assault was committed. It also appeared that a civil action for damages on account of this assault had been instituted against him and was then pending. From the cold record of the evidence given on the preliminary examination it would seem to us that a committing magistrate might well have concluded that there was probable cause for holding defendant for trial before a jury. But the record of proceedings before accused is not such as to satisfy us that the accused did not in good faith think otherwise. It seems that the assistant district attorney who conducted the case, and who consulted during the course of the proceeding with a private attorney interested in the prosecution who attended the proceedings, thought otherwise, and the police court transcript in the case is not such as to warrant the inference of improper influence upon the accused in the matter, and much less the conclusion that his action was due to an agreement for a bribe.

But one other alleged item of corroboration remains to be noticed. The evidence does disclose an unfortunate and deplorable intimacy between accused and McDonough, one certainly calculated to bring the accused and his court into disrepute. The two had been friends for many years; the friendship dating from a time long prior to the accession of the accused to the police bench. McDonough has been for many years engaged in the business of furnishing cash bail for persons charged with public offenses, especially in the police courts, and his volume of business in the police courts was very large. By reason of the character of his business he was necessarily much interested in the fixing of bail for defendants, and also likely to be interested on occasions in the final disposition of their cases. The friendship of earlier years continued after accused became police judge, something as to which, of course, no one can justly complain, but it was accompanied by an intimacy which, in view of the nature of the business of McDonough and its association with the matters with which the accused was called upon as a judicial officer to deal, was almost bound to create suspicion of improper influence. Indeed, the intimacy was of such a character that, according to the evidence of both McDonough and accused, McDonough had occasionally presumed to speak to accused about some "misdemeanor" case pending before him, never a "felony" case, they said, but occasionally some small misdemeanor case, involving some friend, such, for instance, as an alleged violation of the law regulating traffic on public highways. In so far as the matter of gross impropriety is concerned, we must confess we can see no distinction between such conversations with relation to misdemeanor cases and conversations with relation to felony cases, and we doubt if the line between the two classes would be sacredly observed by a judge and another person whose relations were such that they discussed any matter at all pending before the judge. The confessed showing in regard to this is such that we may feel that in the Catterini matter, or, indeed, in any other matter coming before the accused that might be under inquiry, McDonough may have spoken to the accused with a view to influencing his action. There is nothing in the record, however, upon which to found such an inference with reference specifically to the Catterini matter except the possible interest of McDonough therein, in view of the testimony of Riccardi and the testimony concerning the note given to Mrs. Riccardi and McDonough. In any event, with nothing tangible in the conduct of accused with relation to the case to indicate the presence or effect of improper influence, we are not warranted in inferring anything in the nature of an agreement on

his part to accept a bribe or the acceptance by him of a bribe in that matter, or even that he was in any way improperly influenced therein. In so far as he is concerned, the only evidence to connect him with any misconduct in that matter is the absolutely uncorroborated evidence of Riccardi as to an admission by him that he received $150. That uncorroborated evidence absolutely fails to produce even the slightest measure of conviction in our minds. The specific charge against accused with relation to the Catterini matter must be held to be not proved.

[4] None of the specific charges against accused having been sustained by evidence sufficient to satisfy us of its truth, it follows that the order to show cause must be discharged, and the proceeding dismissed, and it is so ordered.

We concur: SHAW, J.; LENNON, J.; WILBUR, J.

OLNEY, J. I concur in the judgment and the majority opinion, but, in order to prevent so far as possible any misunderstanding, I would epitomize what, as I understand it, is the final attitude toward the cause of the majority of the court and what is certainly my own attitude.

The question involved is, of course, purely one of fact, and is to be determined by each of us in accordance with the final impression made upon his mind by the evidence. The impression made upon my mind is one of very strong suspicion that the defendant was guilty in the Catterini case, at least of the act of corruption with which he was charged. But mere suspicion, even a strong one, is not enough to warrant a positive finding of guilt, and I find that, in spite of the strength of the circumstance to which Justice LAWLOR adverts, the dismissal by the defendant of the charge against Catterini in the face of the direct evidence against him presented to the defendant, I have not that certainty of conviction which would justify me in affirmatively finding the defendant guilty of corruption. Though this is my final conclusion, I feel free to voice my suspicion of the defendant in view of the wholly inexcusable manner in which he performed his judicial duties in general and conducted himself in particular in his relations with McDonough, who from the very nature of his business must have constantly appeared before the defendant, directly, and indirectly, as an applicant in matters of bail where it was so easy for the defendant to dispense, not impartial justice, but judicial favors with or without a monetary consideration.

SLOANE, J. I dissent. If satisfactory proof of the specific offense of accepting a bribe is necessary to the disbarment of the accused under the charges in this proceeding, I would be compelled to concur in the majority opinion. The only direct evidence of such bribe-taking rests on the testimony of Riccardi, and his unsupported word can carry little or no weight, and, as to the actual passing of any money between the parties here there is no corroborating evidence.

But the gist of this accusation for disbarment is not the crime of bribery, but the commission of an act of moral turpitude in the manner of disposition of certain criminal cases pending in the court over which the accused presided, and if the acts complained of are shown to have been influenced by some other corrupt motive than that of bribery, the variance in the proof in that respect ought not to defeat a judgment.

The substance of the charges here, taking the Catterini case as an example, is that in certain felony matters pending before him as a committing magistrate the respondent was corruptly and unlawfully influenced by a bribe in his decision and disposition of said cases.

Now, bribery is not the crux of the matter, but rather the gravamen of the offense is the moral turpitude of disposing of these cases under the influence of some corrupt motive. Bribery is merely an incident of the charge, which is fully met by the proof, if it is satisfactorily established, of some motive for the wrongful act not in itself unlawful. The accused might, for instance, have been charged with favoring the defendants as a simple act of personal friendship to them or their attorneys or sureties. Friendship is a very commendable trait in itself, but as a motive for disposing of criminal prosecutions by a magistrate it would involve an act of moral turpitude. The motive charged here happens to be bribery, a criminal act in itself, but that is not the controlling element of the accusation.

The purpose of the proceeding here is not to convict the respondent of bribery, or of any other specific criminal act, but of wrongfully administering his official duties in the particular matters charged, under some corrupt influence involving moral turpitude.

I have no question under the evidence that the respondent under some or all of the charges filed disposed of the matters before him in conscious disregard of his duties as a magistrate. The array of incriminating circumstances is too strong and convincing to be disposed of on the mere ground of coincidence. They strongly tend to corroborate Riccardi's testimony in support of some sort of a prearranged program, and, when thus supported, Riccardi's testimony, although that of a self-confessed criminal, may not be wholly disregarded.

Whether this program for the discharge of the various defendants was influenced by bribery, or politics, or favoritism, or friendship, is entirely immaterial. With any motive other than a purpose to faithfully discharge official duty it involved moral turpitude.

We do not even need to resort here to the analogy of the criminal procedure which incorporates the lesser offense within an information charging the greater. If the defendant were on trial for murder alleged to have been committed for pay, could it be held a fatal variance if the proof showed the act was committed for revenge? At any rate, there can be no room for such technicality in a proceeding of this nature.

It may be conceded at once that the rules of criminal procedure apply here to the extent that the respondent cannot be charged with one offense, and be convicted of another, but when we consider that the vital element of the accusation is the corrupt and wrongful disposition of certain cases pending in his court, and not the particular means by which the official action of the accused was influenced, it becomes apparent that the salutary rule referred to is not violated by accepting the proof as showing some other wrongful influence than that of bribery. The test of materiality of variance in an information or indictment is whether the pleading so fully and correctly informs the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense. People v. Freeman, 29 Cal. App. 543, 156 Pac. 994; Harrison v. U. S., 200 Fed. 662, 119 C. C. A. 78.

The respondent here was fully notified by the accusation of the entire subject-matter of investigation involving his relations with Riccardi and McDonough in connection with these criminal prosecutions.

It may be urged that, if the evidence does not establish bribery, it does not disclose specific wrongful inducement. I do not think that such is the fact. The circumstances are convincing to my mind that there was some prearranged and agreed plan to dispose of these cases in a certain manner, which agreement was acted upon by the respondent. Such a state of facts establishes moral turpitude without giving the moving cause a specific name.

There is nothing in the Code provisions or the decisions in this state relating to disbarment to invest this proceeding with such a degree of technicality that should prevent a judgment against respondent if the evidence is such as to clearly prove that the acts complained of were influenced by any corrupt and dishonest motive, whether amounting to bribery or not.

I think the majority opinion tends too much to minimize the effect of the evidence against the accused. Under each of the three separate counts of the accusation the action taken by the respondent was such as to shock the sense of judicial integrity. His own explanation of his conduct is far from satisfactory, and in the Pastiango case almost incriminating, and the fact that the program was substantially carried out in the manner that Riccardi had announced tends strongly to corroborate the testimony of the latter that it was all in accordance with a prearranged agreement, whether influenced by a bribe or some other ulterior inducement.

LAWLOR, J. I dissent. I am convinced from the evidence, tested by the rules of law declared in the main opinion, that the direct testimony of Riccardi as to the three acts of bribery are sufficiently supported by the other evidence to warrant the disbarment of the accused.

Speaking from the impressions I received from the record, I cannot, upon any theory consistent with his innocence, account for the refusal of the accused to hold Catterini for trial upon the evidence presented. In connection with all the other circumstances, considering the grave condition of Mrs. Nanni, and the evidence that bail was to have been denied in the beginning, the fixing of the bail at $500 cash on each of the two charges is not without significance. The gist of the crime of assault with intent to commit murder is the specific intent to take life, since the only element of murder which is lacking is the failure to execute the deadly intention. The perpetrator of such an offense is as much possessed of a malignant and abandoned heart as if he had not shown bad marksmanship, and, keeping in view the hour of the assault, that the woman and child were left to die, and the other surrounding circumstances, it does not appear that those essentials of murder were lacking in this instance.

Two questions are presented on a preliminary examination: Has a crime been committed, and is there sufficient cause to believe the defendant guilty thereof? Section 872, Pen. Code. "Sufficient cause" has been held to have the same meaning as "probable cause" as used in section 1487 of the Penal Code. Ex Parte Heacock, 8 Cal. App. 420, 97 Pac. 77. It was declared in Yaner v. People, 34 Mich. 286, 289:

> "The examining magistrate is not to be required to nicely weigh evidence as a petit jury would, nor to discharge the prisoner where there is a conflict of evidence, or in case of a mere reasonable doubt of his guilt."

Upon the facts in this case the corpus delicti proved itself, so that the only question to be determined from the evidence was whether there was sufficient cause for believing Catterini was the assailant. In determining this question, the committing magistrate is not to finally determine the weight of the evidence, nor to resolve conflicts therein, but only to decide whether there is sufficient cause to hold the defendant for trial. In judging the state of mind of the accused in this matter it is inconceivable to me that he, an experienced practitioner and judge of the

police court successively for nearly 20 years, did not know and understand it was his plain duty to hold the defendant so that a jury, under the sanctions of a trial on the merits, where all the evidence is presented, could determine whether he was the guilty party. Of course, a mere mistake of judgment, or gross carelessness, yielding to influence, sympathy, or the like, on the part of the magistrate, would not constitute bribery as charged herein, but in the presence of evidence such as was adduced in this case the weightiest consideration should be given to the failure of the accused to hold Catterini so that he could be tried in the superior court.

A brief reference to some of the salient features of the evidence will, I think, demonstrate this. Catterini had lived in the Nanni household, eating at the same table with the family for several months. While the room where the shooting occurred was dark, in the struggle both the woman and the child were given an opportunity to determine the identity of the assailant. Light came through a crack in the window shade. The woman tore from the throat of the assailant a necktie which was identified as belonging to Catterini. One of his shoes was afterwards found in the room. Catterini's defense, in addition to proof of good character, was an alibi. The crimes were committed in a house in the Mission district. The alibi witness was the keeper of a dance hall on the Barbary Coast, where Catterini testified he was at the hour of the shooting and during the rest of the night. When first interrogated he said he was in a room a block away when the bells announced the new year. He admitted that a revolver with three empty barrels and showing recent bloodstains, which was found in his trunk by an officer, belonged to him. He first admitted he was out in the Mission about 7:30 or 8 o'clock, but denied he was at the Nanni house on that day or night. Detective Officer Thomas Fuhrman testified Catterini told him he was in the Nanni home for a few minutes about 8 o'clock. Mrs Nanni testified that about a month before the shooting Catterini had threatened to take her life, and while admitting the incident, his version of what took place is that she requested him to kill her. When questioned about the tie and pin, Catterini said they were in his trunk, whereupon he was shown these articles by the officer. Then he said he did not know how the officer got the pin, but stated he left the tie at the Nanni household some time before.

The principal reason assigned by the accused for discharging Catterini was that he voluntarily surrendered. The surrender took place some 17 hours after the shooting and about the same length of time before the services of the facile Riccardi were engaged, and the work of blocking justice began. Catterini's action in surrendering may have comported either with his guilt or his innocence; for, if he were guilty, going into hiding or seeking flight would be strong evidence against him, and the question ought to have been left to a jury to decide. The accused also remarked when he discharged Catterini:

"It seems that a person who was present committing an act of that character would have rendered some other mark of identification which could have been made more satisfactory."

Is not the reason given by the accused for going out of his province as a committing magistrate and passing upon the merits of this case strongly indicative of an intention to exonerate the defendant for some reason other than a lack of evidence?

Riccardi testified that the reason the preliminary examination was opened at the hospital was because of two conversations he had with McDonough, the latter saying in the first he would speak to the accused about the case, and the second that he had done so; the point being that, as the case would be heard in the "woman's court," which the accused would preside over during the current month (each judge, it seems, holds the court for a month alternately), he would "lose jurisdiction of that case, and once he loses jurisdiction we are in a nice hole." As to the $800 promissory note: McDonough admits that he received $80 commission out of a transaction he testifies was a mere accommodation to Riccardi, in addition to the $100 commission he obtained from the bail money. To my mind the entire story of McDonough as to how he came to indorse the note is palpably improbable and not entitled to credence. Assuming this testimony to be fabricated, it must be taken as inferential proof that the entire bail transaction was tainted with corruption. Why resort to an invention if the note transaction was as McDonough testified? Why was there need for McDonough furnishing security to the bank? Mrs. Riccardi had about $4,000 on deposit there. According to McDonough, he had known Riccardi the three or four months the latter had been practicing in the San Francisco police courts. The accused also knew Riccardi. Riccardi tells of meeting the accused in saloons, including McDonough's, and in his court chambers, and talking over cases with him. It may be inferred that Riccardi's identity with the "system" about which he has testified was becoming known, and, of course, even an honest judge on that bench would not fail to appreciate that the due administration of justice was imperiled by the nefarious methods of so gifted a crook as Riccardi. It may also be inferred that Catterini was not in ignorance of the system. The evi-

dence impresses me that Catterini was neither frank nor unsophisticated. He had property, and he evidently knew what to do and where to go in order to get results. Riccardi and McDonough were soon seen in action, the judicial machinery appeared to function harmoniously, and everything moved rapidly except the decision itself. Must we shut our minds to the plain import of the evidence simply because one of the guilty participants has chosen for reasons of his own to reveal the shameful conditions shown to hedge the administration of justice in the police courts?

Riccardi has been attacked as a witness in all the modes known to the law. His testimony gives me the impression that he has no scruples which would induce him to tell the truth in a matter of importance to himself if it seemed to his detriment to do so. He probably hoped, because of his willingness to expose the system, that some concession might be made to him by the public authorities. But, notwithstanding that witnesses such as Riccardi are to be distrusted, it is nevertheless the solemn duty of courts of justice in weighing their evidence, and especially where matters affecting the public good are at stake, to endeavor to extract from their testimony as much of the truth as is possible—to sift the false from the true, for we learn as judicial officers that justice is often served from the lips of guilty participants in great public wrongs.

Now, I do not accept the reasoning of the majority opinion as to how Riccardi expected to be benefited by the testimony he gave. He is presented in this proceeding by a committee of the Bar Association of San Francisco, composed of earnest and sincere members of the bar faithfully endeavoring to vindicate the ethics of the profession and purge it of disreputable members, and the bench of venal judges. But it is plain to me that Riccardi realized he could only help himself by satisfying the committee that he had told the truth. According to the evidence, the committee refused to make any promises of help to Riccardi, and certainly, since the Bar Association had taken up the work of cleansing the police courts, the committee would neither advocate nor tolerate any leniency being shown him if it believed he had given false testimony against a judicial officer. Moreover, the effect of sensational disclosures on the public mind is so diffused I do not think as shrewd a man as Riccardi would expect any tangible results from that source. In my opinion, Riccardi testified under circumstances peculiarly calculated to induce him to tell the truth. He was in the toils of the law with a long term of imprisonment ahead of him. There is no evidence of personal hostility on his part toward the accused. And, considering all that there is at stake to the accused and to McDonough in this proceeding, I think there is strong reason for closely scrutinizing their testimony, and especially that of the former, whose denials of the acts of bribery are couched in stereotyped and colorless phrase. I do not understand that my learned Associates who have signed the majority opinion entertain any doubt that the conditions Riccardi described as the "system" did not in fact exist. But apparently because he, an admitted actor in the system, comes before us to tell the miserable story, his testimony must be practically discarded when it comes to the question whether the accused was a factor in the system. If Riccardi's story of the system is true, it follows, of course, that judges in the police courts have been debauched. I apprehend that once it is believed the accused was a part of the system there could be no hesitation in finding sufficient support for Riccardi's testimony that he acted corruptly in this particular case.

In cases of criminal confederation evidence of close relationship between the members of the enterprise is always regarded as of a most persuasive character. That an intimate relationship existed between McDonough and the accused, and that they discussed cases which came before the latter, is admitted by them. I shall not pause to dwell on what is urged upon us in extenuation of their indiscretions. For 15 years McDonough was a professional bail bond broker, conducting the business in his saloon, which was in the neighborhood of the criminal courts. In my view, this constituted a menace to the administration of justice. It must be so regarded by every right-thinking person, whether a judicial officer or a private citizen. As a bail bond broker McDonough did a very large business and was daily brought into contact with judges and other officials who had to act on the bail he furnished. Such contract is very apt to breed contamination, and for that reason, in my judgment, professional bondsmen should not be accepted by courts of justice. McDonough kept track of the volume of his bail brokerage business for income tax purposes, but otherwise preserved no record of bail transactions. In this proceeding he was not able to fortify his testimony by books of account of any sort. It is not difficult to understand why he kept no records. When bail has been declared forfeited the sureties may seek to have the order of forfeiture discharged. Sections 1305–1307, Pen. Code. Is it not inherently probable that in such matters McDonough would use every means within his power to avoid the loss of his money? His bail bond business is as much on trial in this proceeding as is Riccardi's credibility or the integrity of the accused. In view of all the surrounding circumstances it is against every rule of probability that the relationship between the accused and McDonough was of the character they have both described. It must shock the sense of propriety of every

one that a relationship could exist between a judge and a bail bond broker under the circumstances shown, for it would tend to scandalize the administration of justice, create suspicion, forfeit public confidence and respect, invite corruption, and be directly responsible for the very conditions described in the evidence in this proceeding.

I am of the opinion that there is sufficient evidence which is not "purely guesswork" to support the testimony of Riccardi that the accused was bribed in this case through the medium of McDonough, and that the conversation between Riccardi and the accused as to the amount of the bribe did take place. This, in itself, would constitute an admission of guilt. I have not attempted to reconcile with the evidence in the Catterini case the action of the prosecuting officer as to the sufficiency of the evidence to hold Catterini for trial, and I shall therefore leave him to his own explanations.

Under the evidence in the Pastiango case every reason is shown for and no reason against holding the defendant for trial. The accused testified he believed the defendant was guilty of the act, but that it was not done with an "impure motive." But, notwithstanding this, after the felony charge was dismissed, the defendant was prosecuted and convicted under ordinance 1059 upon the identical evidence offered under the felony charge. This ordinance prescribes an offense where any lewd, indecent or obscene act is committed. The meaning of section 288 (the felony statute) is "lewd and lascivious" conduct, when accompanied by a certain specific intent. But, even if we assume the accused dismissed the felony charge for the reasons given, upon what theory can his action in suspending the sentence of 3 months on the misdemeanor charge, thereby permitting the defendant to go unwhipped of justice for tampering with a girl under 14 years of age, be explained or defended? I think this case also furnishes corroborating evidence.

Even assuming in the Spinelli matter that the accused did not fix the bail, do not the surrounding circumstances tend to corroborate the testimony of Riccardi? No satisfactory explanation is given by the accused for taking up the question of bail in this case. This fact, however, standing by itself, might not be significant. But it does not seem likely that Riccardi would go to the home of the accused with the sureties in the absence of some understanding or arrangement. Besides, the accused admitted that he "depended on Riccardi" as to the sufficiency of the undertaking. This admission certainly shows something more serious than "a gross neglect of duty." The transaction occurred in November, 1918, and by this time, of course, the accused knew of Riccardi's character and activities. It was stated Riccardi's gross yearly earnings from his practice in the Hall of Justice were between $40,000 and $60,000, out of which he claimed he only netted $12,000. Moreover, if Riccardi's story was an invention, it is not likely he would have placed the amount of the bribe at the insignificant sum of $50. In my opinion, the evidence in this matter is corroborative of Riccardi's testimony and explains why the accused "depended" upon him in the acceptance of the undertaking.

I have given my appraisal of the evidence. I am unable to believe that in the Catterini and Pastiango cases the accused, an experienced judge, did not reach the conclusion there was sufficient cause to hold the defendants for trial. Human life has been forfeited and the liberty of the individual taken under the forms of law upon less convincing evidence than that presented in these cases—upon a preliminary examination. But a failure by the accused to find there was sufficient cause would not, of course, call for disbarment if his action upon any hypothesis of innocence could be attributed to a mistaken conception of the law or the evidence, or an erroneous or otherwise unwarranted exercise of discretion. In none of these transactions is it claimed or suggested the accused was moved by personal appeal, sympathy, or compassion, for, if he was so influenced, his conduct would not be corrupt within the meaning of the accusation, however inexcusable it may have been. But in my study of the evidence I could not accept the conclusion announced in the prevailing opinion, for I reached a point where neither the self-confessed criminality of Riccardi nor the presumptions of innocence and that his official duty was regularly performed with which the accused stood clothed could avail against the plain import and inherent probabilities of the evidence indicative of guilt.

I am of the opinion that the accused should be disbarred.

185 Cal. 606

WHITE v. SCHADER et al. (L. A. 5561.)

(Supreme Court of California. May 4, 1921. Rehearing Denied June 2, 1921.)

1. Evidence ⟸419(4)—Agreement to assume mortgage may be shown, notwithstanding deed recital that property is granted subject thereto.

An agreement to assume and pay a mortgage not being inconsistent with a deed reciting that the property is granted subject to the mortgage, such an agreement may be shown by parol evidence, as showing the consideration for the deed.

2. Mortgages ⟸281 — Where payment of a mortgage forms part of the consideration, grantee must discharge it.

Where the payment of a mortgage forms part of the consideration for a conveyance, the grantee is bound to pay the same.

3. Judgment ⟸744—Finding that defendants assumed payment of a mortgage held a conclusive adjudication.

Where, in a previous action for rescission of a contract, whereby plaintiff and defendants exchanged incumbered property, plaintiff, the defendant in that action, filed a cross-bill seeking specific performance which set up the adequacy of consideration, a judgment finding that the contract obligated each party to discharge the mortgage on the property received, and that the consideration was adequate, was a conclusive adjudication, binding in an action by plaintiff to compel defendants to pay deficiency resulting on foreclosure sale of the mortgage on the property which had belonged to plaintiff.

4. Mortgages ⟸292(3)—Where foreclosure sale results in deficiency, mortgagor, without first paying deficiency, may sue grantee who assumed payment.

Where foreclosure of a mortgage resulted in a deficiency, the mortgagor, without first paying the deficiency, could bring action against his grantee, who assumed payment of the mortgage, for the mortgagor's right to reimbursement had then accrued.

5. Mortgages ⟸292(1)—That mortgagor was not personally served in foreclosure action does not preclude relief where deficiency resulted so that mortgagor's payment was not voluntary as respects recovery from grantee primarily liable.

Though the mortgagor was not personally served in foreclosure proceedings, service being had by publication, the mortgagee did not, where deficiency resulted on sale, lose his rights against the mortgagor; hence the mortgagor's subsequent payment of the amount of the deficiency was not voluntary, so as to preclude relief against a grantee to assumed payment.

6. Mortgages ⟸280(4)—Agreement to pay attorney's fees included in agreement to assume mortgage.

An agreement by the grantee to assume and pay a mortgage on the property conveyed includes an agreement to pay attorney's fees, which were included in mortgage foreclosure.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by A. Stanley White against Carl F. Schader and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

Oscar C. Mueller and Alfred Wright, both of Los Angeles, for respondent.

WILBUR, J. The parties herein had exchanged two pieces of real estate, each subject to mortgage. The mortgage upon the property of the plaintiff was afterwards foreclosed by the mortgagee, and sold in satisfaction thereof, leaving a deficiency of $2,264.90. The mortgagee thereupon brought suit against the plaintiff for the amount of the deficiency, and the plaintiff in turn brought suit against the defendants, alleging that the defendants in the transaction for the exchange of properties had assumed and agreed to pay the mortgage, and were therefore liable to him for such deficiency. Subsequent to the beginning of the suit, the plaintiff paid the amount of the deficiency, and, by way of supplemental complaint, set up the fact of such payment. Judgment was rendered for plaintiff, and defendants appeal. Defendants' main contention on the appeal is that the written agreement for the exchange of the real properties of plaintiff and defendants, and the deeds which were exchanged in pursuance thereof, provided that each party should take the property transferred to it subject to the mortgage thereon. That, as there was no agreement either in the deeds or in the written contract for exchange by which the defendants agreed to assume the mortgage upon the property transferred to them, oral evidence that such an agreement was entered into is inadmissible, for the reason that the writing between the parties must be considered conclusive as to the agreement between them.

[1] It is well settled by the authorities that an agreement to assume and pay a mortgage is not inconsistent with a deed reciting that the property is granted subject to a mortgage. Consequently, such an agreement may be shown by parol evidence. Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868; Hibernia Savings & Loan Society v. Dickinson, 167 Cal. 616, 140 Pac. 265; Dodds v. Spring, 174 Cal. 412, 163 Pac. 351; Arp v. Ferguson, 175 Cal. 646, 166 Pac. 803; Jones on Mortgages, §§ 748, 750; 27 Cyc. 1344,D; Swarthout v. Shields, 185 Mich. 427, 152 N. W. 202; Ordway v. Downey, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892; see note, page 84, 78 Am. Dec.; McDill v. Gunn, 43 Ind. 315, 319; Drury v. Tremont Improvement Co., 95 Mass. (13 Allen) 168; Moore v. Book-

er, 4 N. D. 543, 62 N. W. 607. As this court stated in Hopkins v. Warner, supra:

"It is not necessary that there should be a formal promise, on the part of the grantee, to pay the mortgage debt, in order to render him liable therefor, if his intention to assume the debt appears from a consideration of the entire instrument. The obligation may be made orally or in a separate instrument; it may be implied from the transaction of the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the agreement."

See, also, Andrews v. Robertson, 177 Cal. 434, 438, 170 Pac. 1129.

The theory on which such oral evidence is permitted, notwithstanding the contents of the deed, is that the purpose of such evidence is to show the consideration for the transfer, and that this may be done by parol evidence. In McDill v. Gunn, supra, the Supreme Court of Indiana thus stated the rule:

"Parol evidence may be given to show the real consideration of a deed, and that the purchaser took the conveyance subject to incumbrances and agreed to discharge them in addition to the consideration stated in the deed. Allen v. Lee, 1 Ind. 58; Rockhill v. Spraggs, 9 Ind. 30; Pitman v. Conner, 27 Ind. 337; Robinius v. Lister, 30 Ind. 142."

Upon the same subject, the Supreme Court of Massachusetts, in Drury v. Tremont Improvement Co., supra, stated:

"The plaintiff contends that the deed is conclusive evidence of the contract between the parties, and that no other evidence is admissible on the subject. But as to the consideration which was paid, the deed is not conclusive. The acknowledgment of payment may be controlled by parol evidence of an additional or a different consideration. Paige v. Sherman, 6 Gray, 511; Miller v. Goodwin, 8 Gray, 542."

Further authorities will be found in the note, 25 L. R. A. (N. S.) 1202. The following cases therein cited may be referred to as particularly applicable to the facts in the case at bar: Herrin v. Abbe, 55 Fla. 769, 46 South. 183, 18 L. R. A. (N. S.) 907; Perkins v. McAuliffe, 105 Wis. 582, 81 N. W. 645; Johnson v. Elmen, 94 Tex. 168, 59 S. W. 253, 52 L. R. A. 162, 86 Am. St. Rep. 845; Morgan v. South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872; Langan v. Iverson, 78 Minn. 299, 80 N. W. 1051.

It is clear from the foregoing authorities that, if the rights of the parties are determined with relation to the deed and the oral testimony concerning the assumption of the mortgage, the parol evidence with reference to the assumption of the mortgage was admissible, and the judgment of the trial court must be sustained.

The foregoing, however, is not entirely decisive of the case, for the reason that the deed in question was based upon a previous written agreement of exchange, which agreement was subsequently enforced by a decree of specific performance wherein the parties hereto litigated their respective rights under said agreement. In determining the rights of the parties in this action, we have to take into consideration the effect of such contract and such decree. It is therefore necessary to state additional facts in order to arrive at a conclusion upon that subject. The parties entered into an agreement for exchange of real estate on the 23d of November, 1911. Under the terms of this agreement, the Schaders agreed to deliver to White a grant deed, on or before the 23d of December, to three lots in Santa Monica, with a certificate of title—

'showing the title of said property to be free and clear of all incumbrances in Nellie M. Schader, except a mortgage for $7,500 payable to Mrs. Mary B. Hook, due approximately two years from date, and also subject to the restrictions of said Carl F. Schader 'Seaside Terrace' tract above referred to, as follows. * * *"

They also agreed to deliver to White a bill of sale of all the furniture contained in the residence erected thereon, and to deliver possession December 22, 1911, on payment of $4,000. White agreed to deliver to the Schaders on or before December 23, 1911, a warranty deed to certain real property in the city of Seattle, Wash., and to deliver a certificate of title showing the title of the premises to be in White, "free and clear of all incumbrances, except a certain mortgage for $7,000 dated April 20, 1910, running for five years, at 7 per cent. interest per annum, in favor of Margaret A. Campbell" and excepting also certain assessments, etc. It was further agreed that the Schaders should pay the interest on the note and mortgage of $7,500 in favor of said Mary B. Hook to date (November 23, 1911), and that White should pay the interest on the $7,500 mortgage in favor of Margaret A. Campbell to date. It was further agreed that White should pay the Schaders $4,500. It should be observed that this contract calls for a grant deed from the Schaders and a warranty deed from White, the effect of which deeds would be that each grantor should discharge the incumbrances upon his own property. It is to be further observed, however, that each grantor was to furnish evidence of title showing the property subject to the particular incumbrances referred to in the agreement.

Subsequent to the delivery of possession of Schaders' property to White, they brought a suit to recover possession and for rescission of the contract of exchange. White, by cross-complaint, sought to specifically enforce the contract, and the Schaders, in their answer to the cross-complaint, sought to reform the agreement of exchange. In the complaint for a specific performance, it was necessary that the cross-complainant allege, as he did, that the consideration was adequate. This allegation was denied, and formed one of the issues

in the case. The finding of the court upon that subject is as follows:

"That said agreement hereinbefore referred to was and is a just and reasonable agreement as between the plaintiff and the defendant, and at the time said agreement was made the said property of the defendant in the city of Seattle, and the sum of $4,500 paid by the defendant to the plaintiff, together with the difference in plaintiff's favor in the mortgages assumed by the plaintiff and the defendant respectively, constituted, and were, a fair, just, and adequate consideration for the said property of the plaintiff in said city of Santa Monica."

It was in pursuance of this finding as to the entire transaction between the parties and the effect of the deed tendered by White to Campbell that the decree was rendered requiring the Schaders to specifically perform the agreement by the delivery to White of their deed to the property in Santa Monica.

[2, 3] This action between the parties was pending at the time of the bringing of the action at bar, the former action having been tried, and judgment rendered, and the case was on appeal. In defendants' answer, they stood upon the pendency of that case as a ground of abatement, but previous to the trial the former action had been terminated by an affirmance of the judgment. Schader v. White, 173 Cal. 441, 160 Pac. 557. The judgment roll in the prior case was introduced in evidence. Inasmuch as the question of the consideration passing between the parties in the transaction was involved in the previous action, and was determined by the findings and judgment in that case, the proposition that the assumption of the mortgage in question was part of the consideration running to respondent is res adjudicata, and it is well settled that, where the payment of a mortgage forms part of the consideration of a conveyance, the grantee is bound to pay the same. The rule is thus stated in Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901:

"It is well established that when a party purchases premises which are incumbered to secure the payment of indebtedness, and assumes the payment of the indebtedness as a part of the purchase money, the premises purchased are in his hands a primary fund for the payment of the debt, and it is his duty to pay it. Lilly v. Palmer, 51 Ill. 331; Russell v. Pistor, 3 Seld. 171. And the rule is the same, although there be no assumption of payment of the indebtedness, if the purchase be made expressly subject to the incumbrance, and the amount of the indebtedness thereby secured is included in and forms a part of the consideration of the conveyance. Lilly v. Palmer, supra; Comstock v. Hitt, 37 Ill. 542; Fowler v. Fay, 62 Ill. 375; Russell v. Pistor, supra; Ferris v. Crawford, 2 Denio, 598."

See, also, Tichenor v. Dodd, 4 N. J. Eq. 454.

In considering the question as to whether the findings and judgment in the prior action between the parties are conclusive upon the question of the assumption of the mortgage in question, it should be stated that the appellants rely upon the statement contained in the findings that "* * * said contract contains the whole agreement of the parties thereto. * * *" This clause is a part of the sentence in the findings disposing of Schader's contention in that case that there could have been a mutual mistake in the drafting of the contract in omitting the following words: "That said A. Stanley White is to pay the taxes on the premises in the city of Seattle for the years 1911–12," and it was in that connection that the court found that these words were not omitted by mistake, and, incidentally, that the contract contained the whole agreement of the parties. This general statement, of course, is modified, in so far as the assumption of the mortgage in question is concerned, by the express finding that the parties agreed to assume the mortgages upon the properties deeded to them respectively.

In view of the fact that the question of the assumption of the mortgage is res adjudicata under the circumstances of this case, it is unnecessary to consider whether the parol evidence introduced with reference to the assumption of the mortgage was properly receivable, or sufficient in legal effect to establish such assumption.

[4] Defendants claim that the action was prematurely filed, for the reason that the plaintiff had not at that time paid the deficiency; that therefore the order permitting the filing of the supplemental complaint was erroneous, and that proof thereunder should not have been received. There is no merit in the contention, for the reason that the right of the plaintiff to reimbursement had accrued when suit was brought. At that time the mortgaged property had been applied to the debts by the mortgage foreclosure sale, and there was an unpaid balance. Stichter v. Cox, 52 Neb. 532, 72 N. W. 848; Callender v. Edmison, 8 S. D. 81, 65 N. W. 425; Adams v. Symon, 6 N. Y. Supp. 652; Merriam v. Lumber Co., 23 Minn. 314; Burbank v. Roots, 4 Colo. App. 197, 35 Pac. 275; Williams v. Fowle, 132 Mass. 385; Sparkman v. Gove, 44 N. J. Law, 252; Kreling v. Kreling, 118 Cal. 413, 50 Pac. 546; Jones on Mortgages, vol. 1, § 769. The case of O'Neal v. W. H. H. Hart, 116 Cal. 69, 47 Pac. 926, is cited as authority for an opposite conclusion. It is merely held in that case that the grantor was not entitled to a judgment against the grantee in the mortgage foreclosure case where the mortgagee had asked no relief against the grantee, and that the vendor and grantor could only be entitled to such judgment upon the payment of the deficiency, if any. This does not purport to determine the rights of the vendor and grantor in a separate action against the grantee and vendee, who has assumed and agreed to pay a mortgage upon the premises transferred.

[5] Appellants contend that the mortgagee

waived her rights against the mortgagor, the plaintiff herein, by failing to secure a deficiency judgment in the mortgage foreclosure case. In that case service was obtained by publication. Jurisdiction was not acquired over the person of the plaintiff, and the effect of the decree was to apply the property to satisfaction of the mortgage. It was in no sense a waiver of the rights of the mortgagee against the mortgagor. The payment by the plaintiff to the mortgagee was therefore not voluntary.

[6] Appellants claim that the judgment is excessive, at least to the extent of the attorney's fees which were included in the mortgage foreclosure. The agreement to pay these attorney's fees was included in the agreement to assume and to pay the mortgage debt. Williams v. Moody, 95 Ga. 8, 22 S. E. 30; Johnson v. Harder, 45 Iowa, 677.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; OLNEY, J.; SHAW, J.; LENNON, J.; LAWLOR, J.

185 Cal. 614

WHITE v. HENDLEY. (Sac. 2981.)

(Supreme Court of California. May 4, 1921.)

1. Deeds ⊜56(2)—Intent to transfer title is essential to conveyance.

To constitute a valid transfer of real property by deed, the delivery of the instrument of conveyance must be attended by an intent to transfer the title and the existence of such intent is to be determined by a consideration of all the evidence bearing on that issue.

2. Deeds ⊜206—Evidence held not to sustain court's finding that parties did not intend conveyance of title.

In a suit to set aside an absolute conveyance of mining property which was accompanied by a contract manifesting an intention that the grantee should have the title subject only to the right of the grantor to support and that the property should be reconveyed to the grantor if he survived the grantee, evidence *held* insufficient to warrant an inference that the conveyance of the title was not intended by the parties, so that the trial court's finding against the conveyance was so clearly against the preponderance of the evidence that it must be reversed.

In Bank.

Appeal from Superior Court, Butte County; Ernest Weyand, Judge.

Action by Joseph Hendley against Joseph W. Hendley to set aside a deed to mining property, in which Richard White, as executor of the last will of Joseph Hendley, was substituted as plaintiff after the death of the original plaintiff. From a judgment for plaintiff, defendant appeals. Reversed.

See, also, 35 Cal. App. 267, 169 Pac. 710.

George F. Jones, of Oroville, for appellant.

W. H. Carlin, of Marysville, for respondent.

LENNON, J. This action, instituted for the purpose of setting aside and canceling a deed to certain mining property in Butte county, Cal., arose from the following facts: The plaintiff's testate, Joseph Hendley, like other adventurous spirits, came to San Francisco as a sailor in the year 1847. He remained in California and later began traveling the trails to the different mining camps in the interior, eventually locating in Morris ravine, a few miles from Oroville, in the county of Butte. Here he spent the rest of his life, living in a cabin by himself, after the custom of so many of the early mining pioneers, and procuring title to the mining land referred to in the pleadings in this action.

In 1910 Joseph W. Hendley, a nephew of the pioneer Joseph Hendley, came to California from Illinois and visited his uncle. Desiring that his mine remain in the Hendley family and also wishing to see the mine developed in his own lifetime, the uncle went with his nephew, on April 26, 1910, to the office of an attorney in Oroville and executed the papers which are the source of the present controversy. These papers consisted of a deed and an agreement. The deed was executed by the uncle and purported to convey to the nephew the uncle's one-half interest in the mining land in question; it appears that in 1896 the uncle had transferred a one-half interest in the land to a Mrs. McIntyre. The agreement, wherein the nephew is referred to as the party of the first part and the uncle as the party of the second part, provides as follows:

"Whereas the said party of the second part has this day granted and conveyed unto the said party of the first part by deed absolute and without condition all the real estate of said party of the second part situated in the county of Butte, state of California, consisting of all the right, title and interest of the party of the second part in and to that certain mining property situate in Morris ravine, in said Butte county, and commonly known as the 'Joe Hendley mine and mining property,' and

"Whereas, it is understood that the said party of the second part shall during his lifetime occupy said premises as a place of residence, and shall obtain therefrom such income as may be necessary to afford him a comfortable livelihood and living in accordance with his desire and condition in life, and that during his lifetime said property shall be advantageously developed in a proper and systematic manner as a mining claim for the benefit of said party of the first part, and also for the benefit of the party of the second part for the purpose hereinabove stated:

"Now therefore it is hereby mutually agreed that the party of the first part will undertake the opening up and developing of said property

as a mining claim at his own expense and free of cost and expense to the party of the second part, and in case, either before or after the full development of said property as a mining claim, in the judgment of the party of the second part it shall be advantageous to sell and dispose of said property for a valuable consideration and at a sum in excess of the amount expended thereon by the party of the first part, then and in that event the party of the first part will consent to such sale and join in executing any conveyance necessary therefor, provided that in case of such sale said party of the first part shall be reimbursed from the proceeds thereof for all moneys expended by him or expenses which he may have incurred in connection with the development of said property and a reasonable rate of interest thereon, it being further understood and agreed that the party of the first part is to have and receive the whole of the proceeds from the sale of said property except such amount thereof as may be necessary to provide for the care and maintenance of said party of the second part during his lifetime.

"It is fully understood and agreed that the intention of the parties herein is to give to the party of the first part the full and entire benefit of all the property of the party of the second part this day conveyed, with the right to proceed with the opening up and development thereof, and to obtain the full benefit to be derived therefrom, save and except that the party of the second part is to be provided for during his lifetime.

"It is further understood and agreed that in case said party of the first part shall not survive the party of the second part, then and in that event the property described in said deed is to be reconveyed to the party of the second part, subject, however, to the reimbursement of the party of the first part for the amounts expended by him in the development of said property as hereinbefore agreed.

"The terms of this agreement are to be binding upon the heirs, successors or assigns of both parties hereto."

The agreement was deposited in a bank in Oroville, with escrow instructions to the effect that, upon the death of either the uncle or nephew, the agreement should be delivered to the survivor.

In 1914 the uncle commenced an action against the nephew to set aside the deed, claiming that the clauses in the agreement relating to the development of the mine by the nephew constituted conditions subsequent, the failure of the performance of which entitled plaintiff to a cancellation of the deed. Judgment was rendered in favor of the plaintiff, but was reversed by the District Court of Appeal, which held the clauses in question to be mere covenants. White v. Hendley, 35 Cal. App. 267, 169 Pac. 710. Plaintiff thereupon amended his complaint and proceeded upon the theory that there was no intention on the part of the uncle at the time of the signing and acknowledgment of the deed, or at any time, to divest himself of title to any of the lands described in the deed or to vest title thereto in the nephew. The plaintiff again prevailed in the trial court, and this is the second appeal by the defendant. Pending the litigation, the uncle died, and his executor was substituted as plaintiff.

Fraud is not charged in this case and no evidence of fraud was presented; no question is raised on this trial as to the effect of a failure to comply with the provisions of the agreement in regard to the development of the mine during the lifetime of the uncle, for that point was determined on the first appeal. Intention was the sole issue of fact on the second trial, and we are of the opinion that appellant is correct in his contention that there is no substantial evidence to sustain the finding of the trial court on that issue.

[1, 2] To constitute a valid transfer of real property by deed, the delivery of the instrument of conveyance must be attended by an intent to transfer title, and the question of the existence of such an intent is determined by a consideration of all the evidence in a given case bearing upon that issue. Williams v. Kidd, 170 Cal. 631, 638, 151 Pac. 1, Ann. Cas. 1916E, 703. Therefore the question to be determined in the instant case is whether the parties intended to effect a transfer of title or whether it was contemplated that no such transfer should take place and that the uncle should continue to be the owner thereof until his death. The written instruments embodying the transaction of the parties, namely, the deed and agreement, are the most potent evidence of intention. The uncle testified that he voluntarily executed the deed to the nephew. This deed, which was in form an absolute conveyance, was not retained in the possession or control of the grantor, but was recorded and then mailed to the grantee with the knowledge and consent of the grantor. The agreement accompanying the deed begins with a recital that all of the interest of the uncle in the property has been conveyed to the nephew by deed "absolute and without condition," and, after setting forth an understanding that the nephew will open and develop the mine at his own expense, provides that the uncle shall, during his lifetime, be entitled to a sufficient amount of the income from the property or proceeds thereof, in the event of a sale, to afford him a comfortable livelihood. It then states that the intention is to give the nephew the full and entire benefit of all the property "conveyed," except only that the uncle is to be provided for during his lifetime, and closes with the provision that, in case the nephew should die before the uncle, then the property should be "reconveyed" to the latter. The provision in the event that the uncle should survive the nephew is relied upon by respondent in support of the argument that it was the intention that title should pass to the nephew only upon the death of the uncle. However, this provision itself and the entire agreement

clearly negative the existence of any intention to postpone the taking effect of the deed. The only permissible construction of the agreement is that the salient objects in the mind of the uncle were the immediate passing of title to the nephew subject only to the life interest of the uncle. The very language of the provision for the return of the property in the event that the nephew predeceased the uncle recognized title as having vested in the nephew, for the agreement was that the property should be "reconveyed," thus acknowledging that a legal transfer would be necessary to vest title in the uncle. The efficacy of such a provision is of no import in the present case and we do not pass upon the validity of the provision, but consider it merely for the purpose of ascertaining intent. Despite respondent's disparagement of the agreement as "a gem in the way of camouflage," it furnishes incontestable proof that the parties contemplated a passing of title at the time of the execution of the deed.

The circumstances, concurrent and subsequent to the execution of the deed, point conclusively to the fact that there was no intent to postpone the vesting of title. The deed was not withheld, but was delivered to the grantee and recorded. Moreover, on August 1, 1911, sixteen months after the signing of the deed which is the subject of this action, Joseph Hendley, the uncle, executed and delivered to his nephew a deed conveying to him .112 of an acre, referred to in the testimony as the outlet to the mine, which was adjacent to the property described in the previous deed and which was inadvertently omitted from that instrument. Seven days later he executed and delivered to his nephew a deed to the water rights, there being some doubt in the minds of the parties as to whether or not the original deed covered the water rights. The execution, delivery, and recording of these supplementary conveyances furnishes additional proof of the intention of the grantor to divest himself of title to all of the property in question.

Further glimpses of this intention are revealed by the correspondence which ensued between the parties after the execution of the deed and agreement. That the uncle understood the general legal effect of a deed is evidenced by the following statement, in reference to another matter, contained in a letter to his nephew, "A deed, my dear nephew, is absolute title." In a letter from the uncle to the nephew, dated December 16, 1913, is the statement: "You are the owner of the property." Numerous references and passages in the correspondence indicate that the parties regarded the title as having passed to the nephew on the execution of the deed.

The evidence relied upon by respondent in support of the judgment of the trial court consists mainly of so-called inferences from the evidence adduced. Thus, it is claimed that the placing of the agreement in escrow, with instructions to deliver it to the survivor, demonstrates that no title had passed, but that, upon the mere return of the agreement, the whole transaction would be wiped out. Such cannot reasonably be deemed the purpose of the escrow. It will be noted that the agreement did not provide for the mere redelivery of the deed or agreement, but recognized the necessity of a reconveyance of the property in the event that the nephew predeceased the uncle. Clearly, the only purpose of the escrow was to provide the uncle with evidence of the agreement of the nephew in the event of the prior death of the latter. Respondent also points out that the nephew in one or two letters reminds the uncle that he had spoken of making a "will" and that the evidence shows that the uncle possessed no real property other than that in controversy. From these facts, it is argued, the inference is permissible that it was understood by the parties that the uncle should transmit the property to the nephew by will. In view of the conduct of the parties these facts are, in and of themselves, insufficient to support the inference contended for. The vague references to the execution of a will cannot be permitted to overturn the previous unequivocal acts of the parties. It is entirely reasonable to assume that the uncle had in mind the disposition of his personal belongings by will.

Counsel for respondent also relies upon the following testimony of the nephew upon cross-examination:

"Q. And he and you (uncle and nephew) talked it over and went to Mr. Jones' office for the purpose of having the papers drawn up so that in case you should die before he would, that he would still own the property? A. Yes, sir."

It is claimed that, by admitting that it was the understanding that the uncle was "still" to be the owner of the property in the event that the nephew died first, the nephew practically admitted that the intent was that title was to pass to the nephew only upon the uncle's death. This particular excerpt from the testimony, taken alone, might support such an inference, but not so when viewed in the light of all of the facts of the case and the other testimony of this witness.

The inferences attempted to be drawn from the evidence in support of the findings upon which the judgment rests are unreasonable, illogical, and strained, and cannot, therefore, avail to overcome the effect of the delivery of the deed, which the circumstances show to have been made with full knowledge of the legal consequences thereof. Therefore the finding of the trial court on the question of intent, and the judgment based thereon, cannot stand, for "the evidence is so clearly preponderating against the finding as made that it can be said that there is no substan-

tial evidence to sustain it." Williams v. Kidd, supra.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

52 Cal. App. 1

PETERSON v. WAGNER et al.
(Civ. 2263, 2264.)

(District Court of Appeal, Third District, California. March 21, 1921. Hearing Denied by Supreme Court May 19, 1921.)

1. Cancellation of instruments ⊜24(1)—Where plaintiff was damaged by defendant's breach in excess of the amount defendant paid, no restoration is necessary.

The general rule that, in all actions either to rescind or cancel a contract, the party seeking relief must restore to the defendant whatever of value he has paid or given under it, is subject to exception where plaintiff, seeking cancellation of contract for the sale of three seasons' hop crops, was damaged by the defendant's breach in excess of the amount defendant had paid.

2. Equity ⊜66—Maxim that he who seeks equity must do equity does not require offer to do equity by restoring consideration where defendant has caused plaintiff loss greater than amount received.

Although plaintiff's suit to cancel the contract for the sale of hops was neither in tort nor for damages for breach, nevertheless the allegation in the complaint of damages caused by defendant's breach may be considered, and the maxim that he who seeks equity must do equity will be held not applicable where it clearly appears that in the transaction plaintiff has suffered a loss equal to, if not in excess of, any loss defendant has suffered from payments under the contract.

3. Evidence ⊜416—Parol evidence is admissible to prove that three writings constituted one contract.

In view of Code Civ. Proc. § 1856, and Civ. Code, §§ 1625, 1698, 1642, 1647, relating to varying the terms of a written contract by parol testimony, it may be shown by parol evidence that three written contracts for three different seasons' crops were one and the same agreement, where such evidence was not in conflict with the writings.

4. Sales ⊜87(3)—Evidence held to show that three writings for sale of three different years' hop crops constituted but a single contract.

In action to cancel a sale of three seasons' hops, parol evidence *held* sufficient to support the trial court's finding that the separate contracts for sale of each year's crops constituted but a single indivisible contract for the sale and purchase of hops for three years.

5. Sales ⊜110(2)—Evidence held to show plaintiff damaged in the sum of $9,000 by breach of contract.

In an action to cancel a sale contract for three years' hop crops, evidence *held* to show that plaintiff seller was damaged in the amount of $9,000 by the defendant's breach of contract for the first year.

6. Sales ⊜92—Evidence held sufficient to show that sale contract was canceled by mutual agreement.

In an action to cancel a contract of sale of crops for three years, evidence including defendant's refusal and failure to make advances as required by the contract *held* sufficient to support the trial court's finding that the contract was mutually canceled.

7. Sales ⊜174—Buyer's failure to make advancements held not excused.

Where defendant buyer, contracting with plaintiff for purchase of crops of hops for three years, agreed to make advances for the purpose of harvesting the crops, knowing of plaintiff's prior contract with another party for a certain amount of the first year's crop, refused to make an advancement as required, defendant cannot successfully urge that such failure did not violate the contract on the ground that the money might be used to harvest crops for the other buyer, where the contract did not limit the use of advances to crops harvested for defendant.

8. Estoppel ⊜110—Must be pleaded.

In an action to cancel agreement for sale of three years' hop crops, an objection by the assignee of the contract for the two last years that the maxim that, when one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must suffer, Civ. Code, § 3543, is inapplicable, where estoppel is not pleaded.

9. Estoppel ⊜58—Assignee claiming estoppel held not pecuniarily prejudiced.

In seller's action to cancel a sale agreement which amounted to a mortgage on the crops sold, where an assignment from buyer recites a consideration of $1, the presumption is that that amount was the actual sum paid by the assignee for the assignment, so that the defendant assignee cannot be said to have been pecuniarily prejudiced by the transaction so as to justify estoppel as against seller.

10. Estoppel ⊜118—Acts of seller held not to have misled buyer's assignees so as to create estoppel.

In seller's action to cancel a contract for sale of three seasons' hop crops, which contract was a mortgage thereon, where buyer assigned the contract to other defendants, record *held* not to show that the assignees had been misled to their prejudice by any act or conduct of the plaintiff, so as to estop plaintiff.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Paul E. Peterson against C. A. Wagner and others. Judgment for plaintiff,

and the defendants C. A. Wagner and A. A. Merkeley and Ben F. Hall appeal. Affirmed.

Driver & Driver, of Sacramento, and G. W. Bedeau, of Marysville, for appellants.

Thomas B. Leeper, of Sacramento, for respondent.

HART, J. This is an appeal by separate defendants (C. A. Wagner and A. A. Merkeley) and defendant B. F. Hall from a judgment terminating, invalidating, and voiding three written instruments for the purchase of hops for the years 1918, 1919, and 1920, and also for injunctive relief, enjoining and restraining defendants, their agents, attorneys, and assignees from doing any act which would prevent plaintiff from having peaceful possession and enjoyment of the property mentioned in said instruments.

There are two appeals growing out of the same transaction, and presented here upon two separate and distinct records. The appeal in the case we are now considering (No. 2263) is by the defendants Wagner and Merkeley, from the judgment in favor of the plaintiff, and is supported by a transcript of the testimony and proceedings taken at the trial, as authorized by section 953a of the Code of Civil Procedure. The other appeal (No. 2264) is by defendant Ben F. Hall, from the judgment rendered and entered as against him in favor of plaintiff, and is brought to this court upon a bill of exceptions.

The parties have stipulated that, inasmuch as the legal points involved in both cases are identical, the two appeals may, for the purposes of convenience, be heard together, and that the briefs filed by the respective parties in both cases may be considered in disposing of both appeals.

The agreement between the parties called for the delivery by plaintiff to Wagner of 40,000 pounds of hops for each of the years 1918, 1919, and 1920. The three written instruments evidencing said agreements are identical in form, with the exception that the price agreed to be paid for the hops for the years 1918 and 1919 was 16 cents per pound, while for the 1920 crop of hops 15 cents per pound was the stipulated price. Omitting the preliminary or explanatory provisions of the instruments, we here present the following as the salient terms of the agreement:

"In consideration of the covenants of said seller herein contained, the said buyer agrees to pay to said seller for said hops that are up to the requirements of this contract the sum of 16 cents per pound net upon delivery thereof.

"Should there be any dispute between the parties hereto respecting the quality or condition of any hops tendered hereunder, or as to any fact involved in the performance of this contract, such fact in dispute shall be determined by two competent arbitrators, one of whom shall be selected by each party hereto, and if such arbitrators are unable to agree, they shall select an umpire, and the decision of any two so chosen, as to such fact, shall be conclusive and final. Such arbitrators shall be men experienced in the cultivation, growing, and curing of hops.

"And to assist said seller to cultivate, harvest, and prepare said hops for delivery, as aforesaid, said buyer further agrees to advance to said seller during the year of this agreement, if said seller shall so request, the following sums of money, to wit: $800 on or about the 1st day of March, 1918, $800 on or about the 1st day of May, 1918, for cultivating purposes, and $1,600 on or about the 15th day of August, 1918, for harvesting, curing, and baling purposes.

"All of said moneys so advanced shall, at the time of the delivery of said hops, constitute and be deemed as part payment upon the purchase price thereof. And said sums of money, so advanced as aforesaid, and all other sums that may be advanced, shall bear interest from the date when the same are made, and up to the time of delivery of said hops upon which such advances are made, at the rate of 7 per cent. per annum. Provided, that in the event that said hops are not delivered in accordance with the provisions of this contract, then such advances shall be repayable by said seller to said buyer at the time when such delivery should have been made, and the repayment of such sums and all other obligations of said seller under this contract shall be evidenced by his promissory note or notes, and are secured by a mortgage lien in favor of said buyer upon all of said hops; and this instrument shall and does constitute such mortgage upon said hops in favor of said buyer for the purpose aforesaid, and shall stand as such mortgage and as a contract for the sale of such portion of said hops as are necessary to reimburse said buyer for all sums of money so due to said buyer under this contract. If, however, during the year of this contract, the growing hops herein referred to are not in such condition at the proper season to produce the quantity and quality of hops above specified and agreed upon, then said buyer may give notice in writing to said seller that said buyer will not make any advances or further advances to said seller and in such event said buyer shall be discharged from any obligation to make any advance of any money and if any advances have been made, the same shall be repayable when the above facts are ascertained.

"That said seller shall keep said hops insured at all times for an amount not less than the advances made to him under this contract, insurance policy to be delivered to the buyer, and loss made payable thereunder to the buyer as his interest may appear. If the seller fails to keep said hops insured as above provided, the buyer may insure same, at the expense of the seller, for which purpose the seller hereby constitutes the buyer his authorized agent.

"This agreement shall bind the heirs, devisees, executors, administrators, and assigns of all parties hereto."

The complaint alleges that, although the agreement entered into between the plaintiff and the defendant was evidenced by three separate instruments, said instruments—

"relate to the same matter, are between the same parties, are parts entered into at the same time, and constitute, in fact, one contract; that said instruments are and were not distinct and severable; that the consideration expressed in each of said instruments is and was not distinct and severable; that the consideration entering into each of said instruments was the agreement to buy and sell said hops for said three years as set forth in said three instruments; that the entire consideration for each of said separate instruments is the entire consideration contained in said three separate instruments; that, in pursuance of said contract, plaintiff did plant, cultivate, and raise a crop of hops on the land described in said contract for the year 1918; that said crop so planted and raised on said land, during the year 1918, was in excess of the 40,000 pounds of hops agreed to be furnished under said contract; that said crop of hops was of the kind and quality stipulated in said agreement; that defendant Wagner, in pursuance of said contract, on or about the 1st day of March, 1918, advanced and paid to plaintiff the sum of $800, and on the 1st day of May, 1918, the sum of $800 for cultivating purposes; that said agreement provides that defendant C. A. Wagner, should advance to plaintiff the sum of $1,600 on or about the 15th day of August, 1918, for harvesting, curing, and baling purposes; that said defendant C. A. Wagner advanced to plaintiff, under said contract, the sum of $500 on August 17, 1918, and the sum of $600 on August 31, 1918, for harvesting, curing and baling purposes; that on or about the 31st day of August, 1918, and thereafter until the 15th day of November, 1918, the market price of hops mentioned in said contract was 8 cents per pound; that during all of said time defendant C. A. Wagner refused to advance to plaintiff the sum of $500, or any other sum, or any sum at all, for harvesting, curing, and baling purposes; that on the 31st day of August, 1918, and thereafter until the 15th day of November, 1918, defendant C. A. Wagner continually repudiated said agreement, and refused to carry out or perform any of the terms of conditions thereof; that, on account of the prevailing low market price of said hops, from August 31, 1918, to November 15, 1918, plaintiff was unable to procure money enough to harvest all his crops from any source, and did not have money or other means of harvesting, curing, and baling said crop of hops; that all of said crop of hops was not harvested, and that 450 bales of the same were totally destroyed; that on account of defendant C. A. Wagner's refusal to advance said sum of $500 to plaintiff, plaintiff was unable to harvest all his crop for the year 1918; that during said time plaintiff repeatedly demanded of defendant C. A. Wagner that he advance to him the sum of $500 to allow plaintiff to harvest said crops, but defendant, C. A. Wagner, repeatedly refused to advance said sum of $500, or any other sum at all, for said purpose, and repeatedly repudiated said contract, and repeatedly told plaintiff that plaintiff was released from said contract, and that said contract was at an end; that on account of the refusal of defendant C. A. Wagner to so carry out the terms of said contract, all of said crop of hops was not harvested, and 450 bales of the same were totally lost and destroyed; that said contract was terminated by defendant C. A. Wagner's repudiating the same and the acceptance of said repudiation by plaintiff; that after the signing of the armistice between the allies and their enemies, on or about the 15th day of November, 1918, the market price of hops began to rise, until, on or about the 18th day of December, 1918, the market price of hops mentioned in said agreement was 25 cents per pound; that on or about the 18th day of December, 1918, said defendant C. A. Wagner began to assert and claim that said contract was still in full force and effect; that on the 18th day of December, 1918, said C. A. Wagner had said instrument, relating to the crop of hops for the year 1919, recorded in the county recorder's office of Sacramento county, and that on or about the 24th day of January, 1919, he assigned said instrument, relating to the crop of hops for the year 1919, to defendant Ben F. Hall; that defendant Ben F. Hall has notified plaintiff of said assignment of said contract, and now contends that the same is in full force and effect, and that plaintiff is obligated to deliver the hops mentioned in said instrument to him; that each of said defendants now claim that said instrument, relating to the crop of hops for the years 1919 and 1920, is in full force and effect. It is further alleged that said instruments, relating to the crops of hops for the years 1919 and 1920, now constitute a cloud and an incumbrance upon plaintiff's crops for said years, and that the same, unless canceled and annulled by a decree of the court, will hinder and annoy plaintiff in the peaceable possession and enjoyment of said crops of hops for said years, and that they do now hinder, delay, and prevent plaintiff from contracting for the sale of said hops for said years, or of selling or disposing of the same. The prayer is for a judgment declaring said agreement terminated and canceled, and that said instruments, relating to said crops of hops for 1919 and 1920, be declared null and void, and that defendants, and each of them, their agents, attorneys, successors, and assigns, be restrained and enjoined from attempting to enforce either of said instruments or assert the validity of the same, or to transfer the same."

It further appears from the pleadings that prior to the time of the execution of the three instruments just referred to the plaintiff had contracted to sell to Wm. Uhlmann & Co. 300 bales of hops, or about 60,000 pounds of the crop of 1918 to be grown on the said premises, which contract was made prior to the contract for 40,000 pounds of the 1918 crop before the court in this action, and constituted a prior obligation; that on the 20th day of February, 1918, the date of the execution of the three contracts, the defendant Wagner sold and assigned, by an instrument in writing, the contract for the sale and purchase of the crop for the year 1918 to Harry Fraser; that on the 20th day of January, 1919, said Wagner sold and assigned by an instrument in writing the contract for the sale and purchase of the crop of the year 1919 to defendant B.

F. Hall; that on January 16, 1919, said Wagner sold and assigned by an instrument in writing the contract for the sale and purchase of the crop of the year 1920 to the defendant A. A. Merkeley. It appears that Mr. Fraser, the purchaser of the 1918 crop, did not desire to have his name known in the transaction, and, accordingly, the advances of of money to assist the plaintiff in cultivating and harvesting his crop as called for by the contract for the 1918 crop were made by defendant Wagner with funds furnished for that purpose by Fraser.

The separate demurrers of the defendants Wagner, Hall, and Merkeley were overruled by the court, whereupon the said defendants filed answers denying generally the material allegations of the complaint, and asking that said contracts for the years 1919 and 1920, respectively, be adjudged "good, valid, existing, independent, and separate contracts," etc., and that the same should constitute valid liens upon the lands involved for said 1919 and 1920 crops, and for costs.

Upon a trial of the issues involved, the court made its findings of fact and conclusions of law, the latter being as follows:

(1) "That the contracts set out in plaintiff's complaint, and marked as Exhibits A, B, and C, were one entire contract; that the same were terminated by the breach and refusal of defendant Wagner to perform the same, and plaintiff's election to treat said breach as a termination of said contract; that the same were terminated by plaintiff and defendant Wagner mutually agreeing that the same should be and were terminated; that the same are now terminated, and invalid, and of no force and effect, and have no existence; (2) that the assertion by defendants of the validity of said contract and the claim of defendant to have an interest in the crop of hops mentioned in said contract for the year 1919 and 1920 prevents plaintiff from contracting to sell, or to sell, said hops for said years, and prevents plaintiff from peaceably enjoying and holding said property."

Judgment was ordered accordingly.

The appellants contend: (1) That the complaint does not state facts sufficient to constitute a cause of action, in that therein the plaintiff does not state that he is ready to and does restore and offer to restore to defendants the advances made to him by the defendant Wagner according to the terms of the contract; (2) that the court erred in holding that the several written instruments constituted a single contract or involved a single transaction. In this connection, it is further contended that the court erred in admitting evidence of a parol contemporaneous agreement of the parties as to the scope and effect of the three written instruments—that is, that parol testimony was incompetent to prove that the intention of the parties, unexpressed in the writings, was that the said writings were interdependent, and were to evidence the terms of a single contract relating to a single transaction, the effect of said testimony being to change or modify the terms of a written agreement; (3) that the failure of Fraser and Wagner to make the further advance of $500, mentioned in the complaint, did not constitute or involve a breach of the contract; (4) that defendant Hall was a purchaser for value without notice; (5) that there was no mutual cancellation of the contract as found by the court; (6) that findings 18 and 19 are not supported by the evidence. These findings are as follows:

18. "That defendant Wagner refused to perform said contract by his failure to advance $500 to plaintiff; that said $500 would have enabled plaintiff to have harvested the remainder of his crop; that plaintiff was unable to secure said $500, or any other sum, from any other source, and by reason thereof was unable to harvest the remainder of his crop, and 450 bales of the same (about 90,000 pounds) was totally lost and destroyed to plaintiff; that, by reason of defendant Wagner's breach of said contract, plaintiff suffered damages, and was and is damaged in the sum of $9,000."

19. "That prior to and at the time of the termination of said contract, plaintiff had performed all the terms and conditions thereof to be done and performed on his part, and was then and there ready, able, and willing to perform said contract on his part."

The contract involved in this controversy is not only one for the sale of the hops produced by plaintiff in the years 1918, 1919, and 1920, but also, by its express terms, constitutes a mortgage of said crops to secure the payment by plaintiff to Wagner of the sums advanced by the latter to the former according to the terms of the agreement.

The complaint alleges that Wagner promised and agreed to make certain advances to plaintiff for the purpose of enabling the latter to harvest the crops; that he (Wagner), after making certain advances which were short by $500 of the maximum amount which he agreed to advance, refused to advance said mentioned sum to plaintiff, and so repudiated the agreement; that, by reason of such refusal, the plaintiff was prevented from harvesting all the hops growing on his premises in the year 1918, and that he thereby lost 450 bales. It is alleged that Wagner repeatedly refused to advance said sum of $500 and repeatedly told plaintiff that he (plaintiff) was released from said contract, and that said contract was at an end, etc. From these allegations it is clear that the complaint proceeded upon the theory that there was a mutual renunciation of the agreement to sell and buy the hops, and therefore the principal object of this action was to obtain a decree removing the mortgage lien from the crops for the years covered by the agreement. It was necessary, of course, as a prerequisite to such relief, to have the contract declared void, and for that reason canceled and annulled, and

this, as alleged, upon the ground that Wagner had repudiated or abandoned the contract, entailing upon the plaintiff the loss mentioned.

[1, 2] It is undoubtedly the general rule that, in all actions either to rescind or cancel a contract, the party seeking the relief must restore to the defendant whatever of value he has paid or given under it, or, in other words, the defendant must be by plaintiff restored to statu quo. Sullivan v. California Realty Co., 142 Cal. 201, 204, 75 Pac. 767. This rule follows from the equitable principle that he who seeks equity must do equity, and that upon that principle no one will be permitted to hold that which he has secured from another under a contract whose force he is seeking to destroy while it is still executory, unless he can show by his pleading and his proof that there are equitable circumstances in the case which would justify him in retaining whatever of value he has received under the contract from the other party or, in rendering it not requisite, that he should restore the other party to statu quo. In this case, however, the complaint shows that the defendant Wagner refused to live up to the terms of the contract, and this amounted to an abandonment thereof. The plaintiff seems to have acquiesced in Wagner's breach of the agreement, for he has not sued for damages for the breach, or attempted to enforce the terms of the agreement. He has proceeded upon the theory, well justified, that there was a mutual abandonment, which amounted to a rescission—indeed, the only way that a rescission may be effected by the act of the parties themselves, since the mere abandonment of the contract by one of the parties and refusal to proceed therewith cannot constitute a rescission, although such act is a ground for an action for rescission. Standing on the abandonment of the contract by Wagner and his own acquiescence therein, the plaintiff merely seeks by his complaint to secure a cancellation of the agreement, to the end that the embarrassment incident to the lien upon his crops for the years embraced in the contract and the mortgage may be removed.

But there are exceptions to the general rule that the party against whom the remedy of rescission is invoked must be restored to statu quo before the relief sought will be granted. Some of these exceptions are given in Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797, and among them is the case where, without fault of plaintiff, there have been peculiar complications which make it impossible, or not imperative, for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties. See Richards v. Farmers', etc., Bank, 7 Cal. App. 387, 393, 394, 94 Pac. 393.

While it is true, as stated, that the plaintiff does not sue in tort or for damages for the breach of the contract, we may, nevertheless, consider the allegation in the complaint that he did suffer damage by reason of the violation of the contract by Wagner for the purpose of determining the equities of the case. The maxim that he who seeks equity must do equity does not apply where, as here, it is made clearly to appear in the complaint that, in the transaction as to which relief is sought, the plaintiff, by reason of the abandonment of the contract by the defendant, has suffered a loss equal to, if not in excess of, any loss which the defendant has suffered, or would suffer, from the transaction if restoration to the latter of what he has parted with has not been made. The allegation that the act of Wagner in renouncing the contract had cost plaintiff 450 bales of hops, on account of his inability to harvest them by reason of Wagner's refusal to advance the $500, as agreed, while not direct as to the extent of his loss when measured in money, clearly enough shows, when considered in connection with the contract (which is made a part of the complaint), that the loss so suffered by him is far in excess of the sums advanced to him by Wagner. Under these circumstances, it was not necessary for the plaintiff to restore or offer to restore to the defendants the sums advanced him by Wagner to entitle him to the relief he, by his action, asks for, whether the remedy he invokes be either that of rescission or that of cancellation.

In this connection, we may with propriety further observe that the evidence does not call for the application of the equitable principle above mentioned. As above stated, the manifest object of plaintiff's action was to get rid of the mortgage lien upon his crops for the years covered by the mortgage. The court found, upon what we believe to be sufficient evidence, that the plaintiff, by reason of the failure of Wagner to complete the advancements he agreed to make to plaintiff and further, because of the failure of plaintiff to secure from any other source the sum of $500, the latter suffered the loss of 450 bales, or 90,000 pounds of hops, and that the damage so suffered by plaintiff amounted in money to the sum of $9,000. It is manifest, therefore, that, while it is true that plaintiff's action is, in effect, one to quiet title to the mortgaged crops, the equitable principle referred to, which is undoubtedly applicable in all cases to quiet title where the circumstances thereof make it appropriate (see Booth v. Hoskins, 75 Cal. 271, 276, 17 Pac. 225) is not, upon the evidence, applicable here.

[3] The next point to which attention will be given is that the court erred in allowing parol testimony for the purpose of explaining that the three instruments involved herein were understood and intended by Peterson and Wagner to constitute a single contract respecting a single transaction. The contention

of the defendants is, as has been shown, that the three several instruments were not interdependent or indivisible, but involved three distinct independent contracts, the one having no relation to or connection with the other. This, it is contended, appears from the face of the writings themselves, and hence, so it is argued, the effect of the allowance of parol testimony for the purpose above stated was to vary or modify the terms of said instruments by parol. The importance of this point is, as is obvious, that, even if the agreement as to the crop for 1918 was breached by Wagner, such breach could not effect or nullify the agreement as to the crops for the years 1919 and 1920.

The rule that the terms of a written contract cannot be changed or varied by parol testimony or evidence extrinsic to the writing itself is elementary. It has been expressly adopted into our system of laws, and is embraced in a number of sections of our codes, one of which is section 1856 of the Code of Civil Procedure. Expressly is it therein provided that "when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms," and therefore neither the parties to such agreement nor their representatives or successors in interest can introduce evidence of the terms of the agreement other than the contents of the writing, except:

"(1) Where a mistake or imperfection of the writing is put in issue by the pleadings; (2) where the validity of the agreement is the fact in dispute."

But said section contains this qualification:

"But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud."

The Civil Code (section 1625) also lays down a familiar rule relative to written agreements as follows:

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Section 1698 of the last-named Code further provides:

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

It is the provisions of the foregoing sections which appellants insist were offended by the allowance of the parol testimony referred to. This theory is founded on a misconception of the effect of the testimony upon the writings in question. The testimony, the legal propriety of which is here challenged, cannot justly be held to have had the effect of varying or changing in any particular or in any sense the terms of the written instruments. The essential or vital terms of the latter were that the plaintiff would sell a certain specified number of pounds of the hops produced by him in each of the years mentioned in said instruments at a specified price to be paid by the buyer, and that Wagner would advance to plaintiff certain sums of money to be used in cultivating and harvesting the crops for the years covered by the agreement. It is obvious that the testimony objected to had no bearing whatever upon the terms of the agreement. The simple question was whether the three instruments were intended by the parties to constitute one, or a single contract. Upon their face they appeared to represent three distinct or several contracts, but the plaintiff, in his complaint, in effect alleged that they were intended and understood by and between him and Wagner, before and at the time of their execution, to represent one single transaction, and one single contract, and that it was that specific understanding and agreement that moved him to enter into the contract with Wagner upon the terms therein expressed; that, in brief, it formed part of the consideration inducing him to enter into the contract.

Section 1642 of the Civil Code declares:

"Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

Section 1647 of the same Code provides:

"A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

Jones on Evidence (vol. 3, by Horwitz, § 439) declares this to be the rule:

"The general rule is not violated by allowing parol evidence to be given of the contents of a distinct valid contemporaneous agreement between parties which was not reduced to writing, when the same is not in conflict with the provisions of the written instrument."

Again, the same author (pages 178, 179, § 439, of the same volume) states the rule in this fashion:

"The law is that agreements or representations made prior to the written contract under which the party was induced to sign the contract may be shown; in other words, where the parol contemporaneous agreement was the inducing and moving cause of the written contract, or where the parol agreement forms part of the consideration for a written contract, and where the written contract was executed upon the faith of the parol contract or representations, such evidence is admissible."

The books contain many cases in which the principles above stated have been applied. Indeed, in the case of Torrey v. Shea,

29 Cal. App. 316, 155 Pac. 820, in which the opinion was prepared by Mr. Justice Lennon, then a member of the Court of Appeal of the First district, but now of the Supreme Court, we have a concrete application of the rule recognizing the legal propriety of, as well as the necessity for, the allowance of parol testimony as in aid of the ascertainment of the real intention of the parties to a written contract, where the same is itself characterized by more or less obscurity in that particular, or where it is otherwise made to appear that the real intent of the instrument cannot be made known except by proof of a contemporaneous parol agreement. Like the case here, the action in that case involved a contract for the sale and purchase of hops produced by the plaintiff for three successive years. The contract, as here, was made into three different instruments, each covering a different one of the three years included in the agreement. The parties to the action in that case occupied, as litigants, positions reverse to those of the parties in the case at bar, the seller having breached the agreement by refusing to deliver the hops to the buyer thereof as agreed. The latter, as plaintiff, maintained, as does the plaintiff here, that the three instruments constituted a single contract, or but one transaction, and that such was the intention as was made manifest in their oral negotiations accompanying and directly resulting in the execution of the contract. The trial court in that case ruled—

"That the defendants were entitled to show by parol evidence that the three instruments were intended and executed by the parties thereto to cover but one transaction, and that the controlling consideration for the execution of the particular writing in suit, contracting for the delivery of hops during the year 1911, was the contemporaneous execution of two other instruments calling for similar deliveries in the years 1909 and 1910."

The appellate court, upholding the ruling of the trial court, with clearness expounds the rule sanctioning, under such circumstances as were existent in that case, and as are present in the instant case, parol proof of contemporaneous oral agreement disclosing the intention of the parties as to whether two or more writings, apparently independent of each other, were to constitute a single transaction. Indeed, so much is said in the opinion that applies with singular cogency to the question in hand, that the temptation to reproduce herein an extensive excerpt therefrom is difficult to resist; yet to do so would extend this opinion to a much greater length than is desirable, and we shall, therefore, content ourselves by a mere reference to the case. It should be stated, however, that the Supreme Court denied a hearing of the case, and later, in the case of Merkeley v. Fisk, 179 Cal. 748, 178 Pac. 945, cited Torrey v. Shea upon the very proposition discussed in the latter case, and it is sufficient to make the following excerpt from the later case named:

"Obviously, the most certain criterion of the completeness of an individual writing will be found within the writing itself. It is therefore the general rule that two or more separately executed instruments may be considered and construed as one contract only when, upon their face, they deal with the same subject-matter, and are by reference to one another so connected that they may be fairly said to be interdependent. Of course, this rule is not so rigid as to be absolutely unyielding in the face of a suggestion contained in the writing itself that it is not complete, or of circumstances which call for the application of a well-defined exception to the rule that 'a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.' Civ. Code, § 1647. This is so, we apprehend, because, while ordinarily the subject-matter and identity of the parties to several instruments will be disclosed by a reference to the instruments themselves, nevertheless, 'the question of whether or not several instruments between the same parties were * * * intended * * * to cover a single transaction ofttimes cannot be ascertained from an inspection of the instruments themselves, and, consequently, if the intention of the parties be either not expressed or doubtfully expressed, resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments' "—citing Torrey v. Shea, supra.

See the very recent case of Stern v. Sunset Road Oil Co. et al., 190 Pac. 651, holding that the intention of the parties is the determining factor in the ascertainment of whether a contract evidenced by several or separate writings is or is not divisible. See, also, upon the same proposition, Richter v. Union Land & Stock Co., 129 Cal. 367, 62 Pac. 39; Sterling v. Gregory, 149 Cal. 117, 120, 85 Pac. 305; Los Angeles Gas & Elec. Co. v. Amal. Oil Co., 156 Cal. 776, 779, 106 Pac. 55.

While the precise question before us was not, as we judge from the opinion therein, before the court in Sterling v. Gregory, supra, nevertheless, the court (Mr. Justice Sloss writing the opinion) used this significant language:

"It must be remembered that the question whether a contract is entire or whether its various stipulations are to be regarded as severable is a question of construction. The court seeks to determine the intent of the parties from a consideration of all the circumstances surrounding the making of the contract."

In that case, Judge Sloss approves the following from Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736, characterizing it as a sound statement of the rule:

"A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent. * * * On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. * * * It is sometimes difficult to determine whether the contract is entire or severable in such cases, and there is great diversity of decisions on the subject, but on the whole, the weight of opinion, and the more reasonable rule would seem to be that where there is a purchase of different articles at different prices at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties. This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts and the circumstances of each particular case."

How all the "circumstances surrounding the making of the contract," or the acts of the parties "and the circumstances of each particular case," other than the mere act of executing the contract, and the "circumstances" as exhibited by the writing itself, may be shown otherwise than by evidence extrinsic to the writing itself, it would, indeed, be difficult to point out.

Counsel for appellants contend, however, that the case of Torrey v. Shea is different, and therefore to be differentiated, from the present case, in that the complaint of the plaintiffs in the former specifically pleaded a collateral contemporaneous agreement to the effect that the several instruments there involved should constitute but a single and indivisible contract covering a single transaction, etc., whereas, so it is likewise asserted, the complaint in the instant case pleads no such agreement. Counsel for appellant Hall proceed in their brief: "The court, under the issue raised in the Torrey-Shea Case, quite properly, in our opinion, admitted the testimony of the defendants to establish the parol agreement alleged. * * * The evidence in Torrey v. Shea was directed to an issue raised upon allegations made in the amended answer of defendants, in accordance with which allegations the court properly found, and which findings were sustained by the evidence," while in the case at bar, having alleged no contemporaneous agreement, the plaintiff "sought rather, so it appears from the complaint, to rely upon a construction of the contracts." With this concession, so far as appellant Hall is concerned, the point sought to be maintained is surrendered, if it may justly be said that the complaint does tender an issue upon the question of the making of such an agreement, and we think, as before suggested, that it sufficiently does so, in view of the silence of the instruments themselves upon that proposition, in the allegations—

"That said separate instruments for each year are and were not distinct and severable; that the consideration expressed in each of said separate instruments is and was not distinct and severable; that the consideration entering into each of said separate instruments was the agreement to buy and sell said hops for said three years as set forth in said instruments." Paragraph 3, supra.

We have carefully examined the cases cited by counsel for the respective appellants as supporting their position that it was error to permit proof of the parol collateral agreement in question, and we find none of them in point. Nothing can be gained by reviewing those cases herein. It will be sufficient to say that in all the cases of those cited in which an attempt was made by evidence de hors the writings themselves to add to them some term or terms not expressed or provided therein, or to vary or change the terms of the instruments themselves, it was with eminent propriety held that to permit testimony having that effect would involve a violation of the rule interdicting the modification of the terms of a written agreement by parol. But, as pointed out in the outset of this discussion, that is not this case. The evidence offered and received here was not for the purpose of varying the terms of the instruments, nor could it have that effect. The vital terms of the agreement, as stated above, were the agreement to sell the crops produced by plaintiff for the years and at the prices therein mentioned, and the agreement of Wagner to make certain specified advancements to plaintiff to enable him to cultivate and harvest the crops. As to these terms, the instruments themselves, upon their face, were couched in such terms as to import a complete legal obligation, and not characterized by any uncertainty as to the object and extent of the engagement. Of course, as to those vital terms, it is to be presumed that the whole engagement of the plaintiff and Wagner, and the extent and manner of their undertaking, are embodied in the writings. Seitz v. Brewer's R. M. Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; 1 Greenleaf on Ev. § 275; Jones on Evidence, § 439.

The evidence objected to here, however, as before pointed out, was intended merely as in aid of the solution of the question, not whether the terms of the agreement as expressed in the writings themselves were or were not what the parties agreed that they should be, but whether (the instruments being silent as to that matter) it was or was not the intention of the parties that the subject-matter of the three separate writings should involve or relate to and cover but a

single transaction, and the instruments themselves were to constitute a single contract, and, also to show whether the fact of making a three-year indivisible contract was or was not the controlling reason (not the consideration he was to receive for the hops under the agreement to sell and deliver the same to Wagner) which induced him to enter into the agreement to sell the hops for the consideration expressed in the written instruments; in other words, whether, but for the agreement that the contract should be a single one, and indivisible for the three years' crops, he would have entered into the contract at all for the sale of the hops on the terms expressed in the three instruments.

[4] It is deemed appropriate to consider in this connection whether the testimony allowed under the ruling last above considered is sufficient to support the finding that the parol contemporaneous agreement referred to was entered into or had between plaintiff and Wagner. The appellants contend that it was not.

The plaintiff testified that, in the first conversation with Wagner, which was held over the telephone, the latter proposed to him (plaintiff) a contract for one year's crop, to which plaintiff demurred, saying that he would not enter into such a contract unless it embraced the crops for three years. This conversation occurred two or three days prior to the day on which the three instruments were executed. Subsequently, Wagner again called plaintiff on the phone and said: "I have something else for you; we have an offer that might interest you." The plaintiff asked for the nature of the new offer, and Wagner replied: "I have two more years' offer. We have 15 and 16 cents." The following morning plaintiff and Wagner, by prearrangement, met at a business house in the city of Sacramento. Plaintiff then stated to Wagner that he wanted 16 cents per pound for his hops for three years, but Wagner was willing to offer 15 cents per pound. Plaintiff thereupon offered to enter into a contract for three years upon the basis of 16 cents per pound for the first and second years and 15 cents for the third year, to which proposition Wagner assented. Wagner thereupon proceeded to prepare the agreement upon the stereotyped printed forms generally used by hop buyers for such contracts, and, observing that he was making out a separate contract for each year covered by their agreement, the plaintiff said to the former: "Mr. Wagner, this is a three-year deal," to which Wagner explained that the form of contract he had was not large enough to insert "all the dates, different prices, for the different years. While," continued Wagner, "this is a three-year deal, we will put them on different forms for convenience sake." With this understanding—that is, that it was to be a "three-year deal"—the plaintiff consented, for the sake of convenience, to have the agreement evidenced by the three instruments.

This testimony very clearly and plainly tends to show that the parties entered into the written engagement with the distinct understanding, and under an agreement, that the transaction should and was to be regarded as one, and the three instruments as evidence of a single, indivisible contract. The trial court, therefore, having accepted said testimony as revealing the truth of the transaction in that particular, was warranted in making the finding that the transaction involved but a single, indivisible contract for the sale and purchase of the hops for three years.

[5] It is not necessary to present herein the testimony upon which the court predicated findings 18 and 19. It is enough to state that an examination of said testimony has convinced us that from it the court was authorized, in the exercise of its discretion as to the weight or evidentiary value of the testimony, to conclude as a matter of fact that the failure or refusal of Wagner to advance the $500 involved a refusal by him to perform the contract; that said sum, if advanced as agreed, would have enabled the plaintiff to harvest the remainder of the crop; that plaintiff, although making an effort to do so, was unable to secure from any other source the loan of $500, to be used in harvesting the remainder of the crop; and that, as a result thereof, 450 bales of hops were destroyed and lost by reason of having been required to remain on the vines, and unharvested; that the detriment thereby sustained by plaintiff amounted in damages to the sum of $9,000; that, before and at the time that Wagner refused to further advance $500, the plaintiff had performed all the terms and conditions of the contract to be done and performed by him, and was ready, able, and willing to perform said contract on his part. Of course, the latter finding must be considered with the other findings, and, as so construed, must be held to mean that plaintiff was ready to perform his part of the contract upon a performance by Wagner of the terms of the covenant of the agreement as to advances.

[6] The finding that there was a mutual cancellation of the contract by the parties derives support from the testimony of the plaintiff that after demanding from Wagner the $500 referred to on several different occasions, on each of which Wagner stated to plaintiff that he (Wagner) could not raise that sum, the two met, when plaintiff thus addressed Wagner: "Mr. Wagner, if you do not give me that $500, that breaks the contract," to which Wagner replied: "I know it does. I cannot raise the money. I can-

not help it—hops are very cheap, anyhow." Later (in the month of September) plaintiff met Wagner, when this conversation took place between them:

Wagner: "Hello, Paul; I hear you are going to bring suit against me."

Plaintiff: "Well, I ought to. I lost three or four hundred bales on your account, breaking this contract."

Wagner: "Do so, by all means. I want you to bring suit against me. I know you lost quite a number of bales."

The plaintiff continued:

"It was some time in September (1918). I do not know exactly when. I met him [Wagner] at Faust and McGinnis saloon. * * * I asked Mr. Wagner about the other two contracts. He says: 'They are a dead issue. They canceled themselves.'" (It may here be suggested that Wagner's statement to plaintiff that he wanted the latter to bring suit against him [Wagner] may be accounted for by the fact that, prior to the above-mentioned conversation, Wagner had formally assigned the contract to Fraser, who, as seen, was the real vendee in the contract of sale, Wagner having acted for Fraser in the making of the contract, and the latter having actually furnished the money for the advances provided for.)

As heretofore stated, the plaintiff made no move looking to an enforcement of the contract, and did not, and has not, asked for damages for its breach. His present action marked the first step he took respecting the broken engagement, and this move was made only after it was made known to him that Wagner, after there was a rise in the price of hops, assigned the different instruments constituting evidence of the agreement and thus indicated that he intended to maintain that the agreement still existed, and imposed a valid and binding obligation upon the plaintiff. From the testimony and the other considerations thus adverted to, we do not doubt but that the court was well within the evidence in finding that the contract was mutually canceled by the parties.

[7] The point that the refusal by Wagner to advance the said $500 did not constitute a breach of the agreement is founded upon the following situation: The plaintiff, as has already been shown, had, prior to the making of the contract with Wagner, entered into a similar contract with a hop-buying firm known as Uhlmann & Co., whereby he was to sell and deliver to said firm approximately 60,000 pounds of the 1918 crop. This contract was, of course, prior in right to the Wagner contract, and the latter was entered into by Wagner with full knowledge of that fact. It is contended that the evidence shows that the moneys already advanced to plaintiff under the Wagner contract were used, and that the $500 which defendant Wagner refused to advance would also be used in harvesting the hops which were sold and to be delivered to Uhlmann & Co., and that plaintiff was not entitled under the Wagner contract to the further advance of $500 to be used for that purpose. It is hence argued that the refusal by Wagner to advance said sum of $500 did not involve a violation of the Wagner contract.

There is no merit in the point or the argument. As stated, Wagner, when he entered into the contract with plaintiff, knew of the existence of the Uhlmann contract, and was presumably familiar with its terms. He did not, therefore, enter into the engagement with plaintiff under any misapprehension or in ignorance of the situation as it was created by the Uhlmann contract. Moreover, there is no express provision in his contract with plaintiff requiring the moneys he agreed to advance to the latter to be exclusively used in harvesting the portion of the hops that were to be delivered to him, and there is nothing in the terms of the agreement justifying the implication that such was the understanding. The agreement merely provides in general language that the defendant should advance to plaintiff a specified maximum sum of money for the purpose of enabling the latter to cultivate and harvest the hops to be produced by him, and in view of the fact that Wagner, when he made the agreement with plaintiff, had knowledge of the existence of the Uhlmann agreement, and its priority over his agreement, would seem to warrant the implication that the agreement to make the advances was made with the intention that the moneys so advanced should and would be used in harvesting plaintiff's entire crop for 1918.

[8, 9] It is lastly contended that the defendants Hall and Merkeley purchased and paid a valuable consideration for the contract in question without knowledge of the parol collateral agreement referred to, and it is insisted that as to them the rule or maxim, "When one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer" (Civ. Code, § 3543), is to be applied. The contention, manifestly, involves the claim of an estoppel in pais as against the plaintiff.

There are several distinct answers to the proposition. The first is that estoppel is not pleaded by either Hall or Merkeley, and "it is, therefore, not properly in the case." Napa Val. Pkg. Co. v. S. F., etc., Funds, 16 Cal. App. 461, 466, 118 Pac. 469, 470; Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982. Again, as to defendant Hall, it is to be observed that the assignment to him recites that the consideration therefor was the sum of $1, and the presumption is that that amount was the actual sum paid by him for the assignment. 13 Cyc. 613; Devlin on Deeds, § 817; Kinsell v. Thomas, 18 Cal. App. 683, 692, 124 Pac.

220. Indeed, it was admitted and stipulated by Hall that $1 only was the amount which was paid by him to Wagner for the assignment. Obviously, Hall cannot be said to have been "pecuniarily prejudiced" by the transaction, even if it were true that he was lured into purchasing Wagner's rights under the contract through the negligence or conduct of the plaintiff.

[10] The assignment to Merkeley, however, does not, save in general terms, state the consideration therefor, it merely reciting, "for a good and sufficient consideration;" and no doubt the presumption would be, in such case, that the consideration was a valuable one. But, assuming that the estoppel has been by pleading properly introduced into the case, the whole question is whether said defendants were induced to enter into the transaction through any act or words or conduct or negligence of the plaintiff. The findings and the evidence upon which they were predicated disclose, as has been shown, that the defendant Wagner broke the contract, repudiated it, and refused to proceed with it, and that the plaintiff did nothing towards compelling its enforcement until Wagner later made the assignments in question.

What else could the plaintiff have done but to sue for damages for the breach of the contract, if he had elected to stand upon it? He merely treated Wagner's renunciation of the contract as a termination of it, and allowed the matter thus to stand until Wagner undertook to revive it. There is no testimony of any acts or words of his indicating that he regarded or intended to treat it as a binding obligation after Wagner refused to proceed with it. If the agreement had been recorded, or was of record at the time of its breach and repudiation by Wagner, and plaintiff had failed to take steps before the execution of the assignments in question to have it canceled or annulled because of the termination thereof, then a different question might be presented. But at the time of the breach of the agreement none of the instruments evidencing its terms had been, or was, of record, and, presumably, in view of that fact, and his acquiescence in the termination of the contract by Wagner, the plaintiff intended to allow the transaction to stand that way, and to treat the entire contract, as Wagner expressed it, as "a dead issue."

We cannot see how it can be successfully maintained upon this record how Hall and Merkeley could have been misled to their prejudice, or at all, by any act or conduct of plaintiff. On the other hand, it seems to be clear that they themselves were negligent when entering into the transaction. The fact that the contract and mortgage (that is, the instrument covering the 1919 crop) which was executed on the 20th day of February, 1918, was not recorded until December 18, 1918, and the only one of the three several writings that was recorded, was sufficient to put Hall and Merkeley upon inquiry as to the status of the engagement between Wagner and plaintiff. They did not receive their respective assignments until January, 1919, and being, as the record shows, hop raisers and buyers, it would seem that so important a circumstance as a failure to record a contract, which also operated as a mortgage, for so long a period would at once have suggested to their minds the necessity for a full inquiry into the transaction between plaintiff and Wagner before purchasing and paying for Wagner's rights therein; and had they done so, they certainly would have learned of the true situation as to said transaction, and thus have saved themselves whatever of damage or detriment they may now be required to suffer. But, at any rate, even if it were true that a lack of diligence cannot be imputed to Hall and Merkeley, it is plain that, if they have been imposed upon to their pecuniary detriment in the transaction, it was due to no conduct or negligence of the plaintiff, but rather to the failure of their assignor to reveal to them, before executing to them the assignments, the true state of affairs between the latter and plaintiff, as it is to be gathered from the evidence and the findings.

There are some other points involving certain rulings of the court upon evidence which, after a careful consideration thereof, we have concluded are not of sufficient importance to require special notice thereof herein.

The judgment in Civ. 2264, Peterson v. Wagner & Merkeley et al., is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

52 Cal. App. 795

PETERSON v. WAGNER et al. (Civ. 2263.)

(District Court of Appeal, Third District, California. March 21, 1921.)

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Paul E. Peterson against C. A. Wagner and others, to terminate, invalidate, and avoid certain written instruments, and for an injunction. Judgment for plaintiff, and the defendants appeal. Affirmed.

W. Finlaw Geary, of Santa Rosa, for appellants.

Thomas B. Leeper, of Sacramento, for respondent.

HART, J. On the stipulation of the parties to this appeal, and those to the appeal in Peterson v. Wagner & Merkeley, Civ. 2264, 198 Pac. 25, the two appeals were considered together, so far as the points urged for a reversal are concerned. We have this day filed an opinion

in Civ. 2264, affirming the judgment. In said opinion, in accordance with the stipulation mentioned, we have considered and disposed of all the points raised on both appeals which we conceived required special consideration adversely to the appellants in both appeals. Accordingly, upon the authority of Peterson v. Wagner & Merkeley et al. (Civ. 2264) 198 Pac. 25, the judgment in Civ. 2263, Peterson v. Wagner & Hall et al., is affirmed.

We concur: Prewett, Presiding Justice pro tem.; BURNETT, J.

52 Cal. App. 48

KLAFFKI v. KAUFFMAN et al. (Civ. 3098.)

(District Court of Appeal, Second District, Division 2, California. March 24, 1921.)

1. Master and servant ⟸83 — Allegation of place of contract essential to recovery of penalty for nonpayment of wages.

A servant's right to penalty under St. 1911, p. 1268, § 3, as amended by Acts 1915, p. 299, for nonpayment of wages sued for, is purely statutory, and he must allege and prove that the services were contracted for or were performed in or at least were payable in this state, or, if they were not, that they were contracted for or were performed in a state having a similar statute.

2. Master and servant ⟸83 — Penalty for withholding wages depends upon law of place of contract.

St. 1911, p. 1268, § 3, amended by St. 1915, p. 299, affords the employee two remedies, each of which is for the vindication of a distinct, substantive right, namely the common-law remedy for breach of the employer's contract to pay the agreed wage when due, the statutory remedy for vindication of a statutory wrong, to wit, the penalty allowed for the withholding of wages, and, though the penalty appertains to the remedy, the right thereto depends upon the laws of the state of employment and discharge.

3. Evidence ⟸80(1)—Presumption that statutory law of another state is the same as our own does not extend to the matter of penalty.

While in the absence of proof to the contrary the law of another state will be presumed to be the same as our own, and this presumption extends to statutory as well as common law, yet there is the exception that the presumption of similarity of statutory enactment will not be indulged where the law of the forum imposes a penalty such as that for withholding wages due.

4. Appeal and error ⟸1172(5)—Where judgment is in lump sum, it may be reversed in toto, though it was in part correct.

Upon an appeal in a case where servant has recovered for both unpaid wages and penalty thereon and the recovery of wages is not contested, but the case must be reversed because the pleadings will not support the recovery of penalty by showing the case within the statute of this state or a similar statute of some other state or country, though the retrial be thus limited, the judgment may be reversed in toto because it is for one lump sum.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Roy H. Klaffki against Angela G. Kauffman and others for wages. Judgment for plaintiff, and the defendants appeal. Reversed and remanded, with directions.

C. O. Whittemore, J. R. Whittemore, Paul W. Schenck, and Richard Kittrelle, all of Los Angeles, for appellants.

William J. Palmer, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action brought by plaintiff upon his own claim and certain claims assigned to him by his fellow laborers to recover wages due for work performed for defendants. Judgment passed for plaintiff, and defendants appeal. The evidence is not before us; the appeal being on the judgment roll alone.

[1] The action was to recover not only the wages of the men, but also the penalty provided by the act entitled "An act providing for the payment of wages," approved May 1, 1911 (Stats. 1911, p. 1268), as amended by the act approved April 28, 1915 (Stats. 1915, p. 299), section 3 whereof reads:

"In the event that any employer shall fail to pay, without abatement or deduction, within five days after the same shall become due under the provisions of section one of this act, any wages of any employee who is discharged or who resigns or quits, as in said section one provided, then as penalty for such non-payment the wages of such servant or employee shall continue from the due date thereof at the same rate until paid; * * * provided, that in no case shall such wages continue for more than thirty days."

In addition to the amounts found due as wages, the court found that there is due each of the several claimants a sum as the penalty provided by the act for the nonpayment of wages. The aggregate of the sums found due as wages is $372, and the aggregate found due as penalties is $532, making a total of $904, for which total amount judgment was entered against defendants. There is no controversy as to the $372 due the several claimants as wages. The only question raised by appellants is as to respondent's right, under the pleadings and the findings, to the $532 found to be due as penalties under the statute.

The complaint does not allege nor does the court find that the men were hired in California, or that they quit or were discharged therein, or that they performed their work or were to receive their wages in this state. Indeed, the pleadings and findings are wholly

silent as to the place where the services were contracted for or where they were performed or were payable, or where the men quit their work. For aught that appears on the face of the judgment roll, which is all we have before us, the contract for services may have been made and the work all performed and made payable in some foreign state or country. Appellants therefore make the point that so much of the judgment as is made up of the amount found due as penalties finds no support in either the complaint or the findings. Their claim is that the right to the penalties is purely statutory, and that therefore the plaintiff must allege and prove that the services were contracted for, or were performed in, or at least were payable in, this state, or, if they were not, that they were contracted for or were payable in or were performed within some state or country that has adopted a statute similar to that of this state—a statute giving a penalty to wage-earners for nonpayment of their wages when due. The record before us constrains us to hold with appellants in this contention.

The only replies that respondent vouchsafes to appellants' contention are: (1) The penalty allowed by our statute for nonpayment of wages pertains, not to the substantive right of the wage-earner, but to the remedy afforded him in an action to recover his unpaid wages; therefore, so it is argued, the law of the forum controls, regardless of where the contract may have been made, or where the wages were earned, or where made payable; (2) in any event there is a prima facie presumption that the law of the place where the wages were contracted for, or where they were earned or made payable, is the same as the law of this state. In our opinion neither of these points is tenable.

True it is that, though the substantive rights of parties are governed by the lex loci, it is the lex fori or law of the forum that governs as to the appropriate remedy to be afforded a suitor for the enforcement or protection of his right or for the redress or prevention of a wrong done or threatened him. It is often difficult to discern whether a particular inquiry relates to the remedy or to a substantive right. But, difficult as the question may be, the wrong inflicted or the right invaded, on which the action is based, must never be confused with the redress which the law affords. It is said in Dorr Cattle Co. v. Des Moines Nat. Bank, 127 Iowa, 153, 98 N. W. 918, 4 Ann. Cas. 519, that where the plaintiff sues for the redress of a wrong, "the act complained of is always to be diagnosed in the light of the law of the place where committed, *and its character determined according to that law*; but the particular kind of and the extent of the remedy to be applied necessarily depends on the notions of justice entertained by the forum by which it is to be administered." (Italics ours.)

In the instant case there not only is a breach of contract—a breach of defendants' agreement to pay the wages when due—but over and beyond this mere breach of contract there is something that, by the statute of this state, is made an actionable wrong—a wrong visited by the prescribed statutory penalty. That wrong is the continuance of the employer's breach of his contract to pay the wages when due. In actions of this character the plaintiff sues to recover, not only the wages due him under his contract with his employer, but also the penalty that the statute allows him because his employer, in addition to breaching his contract, has done him a further wrong—a wrong denounced by the statute, namely, the withholding of the wages for a greater period than five days after they become due. This wrong, in the language of the above excerpt from the opinion of the Iowa court, is "to be diagnosed in the light of the law of the place where committed, and its character determined according to that law." That is, the character of the act of withholding payment of the wages for more than five days is to be determined by the law of the place where the act is committed, or, at any rate, according to the law of the place where the contract of employment was made; and therefore whether the act complained of—the act of withholding the wages for more than the five days—is in and of itself, and aside from the mere breach of the employer's agreement to pay for the work, an actionable wrong, to be redressed by the recovery of a penalty, depends upon the law of the place where the work was contracted for or where it was made payable, or possibly, upon the law of the place where the work was performed, or where the employee quit or was discharged. We are not to be considered as determining which one of these things it is that brings a case within the provisions of our statute and impresses the act of withholding the wage with the character of an actionable wrong for which the penalty prescribed by our statute may be recovered. What we do say is that under our statute some one at least of these things must have occurred in this state in order to stamp the character of an actionable wrong upon the mere act of continuing the nonpayment of the wage for more than five days after it becomes due and payable; and this actionable wrong is the basis of a right of action that is additional to the wage-earner's right of action to recover the wages due under his contract. So that the right to the penalty is based upon an additional substantive right created by statute.

[2] The penalty provided by the statute does, it is true, appertain to the remedy. But this is no more than to say that the statute affords the employee two remedies, each of which is for the vindication of a separate and distinct substantive right; that is, there

is first the common-law remedy for breach of the employer's contract to pay the agreed wage when due, viz. the recovery of the wages due under the contract of employment; and there is also the statutory remedy for the vindication of the statutory wrong, viz. the penalty allowed the employee for withholding his wages for more than the five days. But each of these remedies appertains to its own separate and independent substantive right.

The situation is not like that where the statute empowers the court to impose treble damages when a tenant commits waste or in cases of forcible entry or unlawful detainer. In those cases the statute gives treble damages for the one wrongful act—the one and only wrongful act complained on in the complaint, namely, the tenant's waste, or his unlawful detainer, or the forcible entry, as the case may be. In that class of cases there is but one substantive right that has been invaded, and the treble damages allowed for the invasion of that right obviously pertain to the remedy only. But in cases arising under the act of 1911 there are two substantive rights. There is the employee's common-law right to the wages earned by him under his contract of employment; and there is also the employee's statutory right to the unearned wages which the statute awards him as a penalty for his employer's conduct in continuing to withhold his earned wages after they are due. So also there are two separate and independent wrongs. There is the wrongful violation of the employee's right to receive, when due, the wages earned by him; and there is also the statutory wrong, visited by the imposition of a penalty, which consists in the continued withholding of the wages after the expiration of the five days. To quote again from the Iowa case:

"The nature and extent of the wrong, everything relating to its essence, is one thing; the consequences which naturally flow from it quite another. The right of recovery depends on the former; the remedy to be applied, and its extent, upon the latter."

The case of Louisiana & N. W. Ry. Co. v. Phelps, 70 Ark. 17, 65 S. W. 709, is directly in point. There the plaintiff brought an action in one of the Arkansas courts to recover wages due him and likewise the penalty allowed by the Arkansas statute for nonpayment of wages. He had been employed in Louisiana and was discharged in that state. The Supreme Court of Arkansas held that plaintiff's right of action for any penalty for withholding payment of his wages accrued to him by virtue of his contract of employment and his discharge from defendant's service, and that therefore his right thereto, if any he had, depended upon the laws of Louisiana, where those acts occurred, and not upon the law of Arkansas, where the action was brought.

[3] Equally untenable is respondent's claim that, regardless of where the services may have been contracted for or where the claimants may have been discharged, it will be presumed, until the contrary is shown, that the law of that place, wherever it may be, is the same as that of this state. Without doubt, it is the established rule in this state that, in the absence of proof to the contrary, the law of another state will be presumed to be the same as our own; and this presumption extends to statutory as well as the common law. Cavallaro v. Texas, etc., Ry. Co., 110 Cal. 348, 357, 42 Pac. 918, 52 Am. St. Rep. 94. But to this rule there is a generally recognized exception, which is that such presumption of similarity of statutory enactment will not be indulged where, as here, the law of the forum imposes a penalty. Louisiana & N. W. Ry. Co. v. Phelps, supra; Grider v. Driver, 46 Ark. 50; Bird v. Olmstead (Tenn. Ch. App.) 53 S. W. 978; Chamberlayne on Evidence, vol. 2, § 1213; 22 Corp. Jur. 153. See, also, Myers v. Chicago, etc., R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579.

[4] Since there is no attack upon those findings which show that plaintiff is entitled to a judgment for the amount of the wages actually earned by the claimants, the sum of $372, there is no necessity for a retrial of any of the issues upon which those findings are based. Indeed, there seems to be no necessity for a retrial of any of the issues upon which the case already has been tried. The court has made findings upon those issues, and there is no pretense that any finding is not sustained by the evidence. The only issue upon which there seems to be any occasion for a trial, on the going down of the remittitur, is the issue that may be tendered by such amendment to the complaint as plaintiff may make in order that it shall appear that the case is within the California statute or within a similar statute of some other state or country. Though the retrial should be thus limited, and though plaintiff unquestionably is entitled, under the uncontested findings, to a judgment for $372, we think it better to reverse the judgment in toto, since it is for one lump sum.

The judgment is reversed, and the cause remanded, with directions to the lower court to permit plaintiff, if he be so advised, to amend his complaint by alleging any fact or facts showing that his right to recover penalties for nonpayment of the wages is derivable from the statute of this state or is afforded him by some similar statutory provision in the enactments of some other state or country, and the court is directed to try the issue or issues thus tendered by such amendment, if any there be.

We concur: WORKS, J.; CRAIG, J.

52 Cal. App. 133

HAYNES v. DOXIE. (Civ. 3447.)

(District Court of Appeal, Second District, Division 1, California. March 29, 1921.)

Highways ⊂=179—Plaintiff running into unlighted truck stopped in the middle of highway on dark night held not contributorily negligent.

Where defendant, on a dark and rainy night, stopped his motor truck in the middle of the road for the purpose of placing lights thereon, and plaintiff, operating an automobile ran into the unlighted rear end of the truck, sustaining damages, *held*, that plaintiff was not shown to have been operating his automobile at a speed which amounted to contributory negligence as a matter of law by the fact that, on account of the darkness and rain, and the slippery condition of the road, he did not see the truck until he was within 25 or 30 feet from it, when it was too late to stop; it not appearing that plaintiff was running at a rate of over 30 miles per hour.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Robert E. Haynes against G. W. Doxie. From judgment for plaintiff, defendant appeals. Affirmed.

Thos. C. Ridgway, of Los Angeles, for appellant.

C. W. Hall, of Los Angeles, for respondent.

CONREY, P. J. In this action the plaintiff recovered judgment against the defendant in a sum allowed as damages for injuries to plaintiff's automobile, which injuries were caused by negligence of the defendant resulting from a collision between plaintiff's automobile and a truck operated by the defendant. The defendant appeals from the judgment.

On the evening of February 20, 1920, after sundown, and at about the hour of 6 o'clock, darkness having set in, and at a time when there was a steady downpour of rain, the defendant, while operating a motor truck headed in a westerly direction on Wilshire boulevard, in the county of Los Angeles, stopped his truck at or near the middle of the road for the purpose of placing lights on the truck. This left the truck standing in the street without lights, and the defendant did not have a lighted lantern, or a light of any description, upon the rear end of the truck at the time when it was struck by plaintiff's automobile, as hereinafter stated.

In addition to the foregoing facts, the court found that at said time the plaintiff was driving an automobile in a westerly direction, on the northerly side of, and near the center of, the road; that at said time the plaintiff was driving at the rate of 18 miles per hour, and was unable to, and did not, see said motor truck until he was 25 or 30 feet from the rear end of the truck; that the plaintiff, while driving as aforesaid, ran into and collided with the rear end of the truck; that the direct and proximate cause of the collision, and of the damage suffered by plaintiff's automobile, was the negligence and carelessness of the defendant in stopping his truck in such a position that its left, or south, wheels were in the middle of said Wilshire boulevard, and also the fact that, as plaintiff's automobile approached the rear of said truck, defendant was standing to the left or southerly side of said truck, and shouted at plaintiff, which caused plaintiff to attempt to pass to the right of said truck, and that but for defendant's act in shouting at plaintiff, he might have turned to the left, and avoided a collision with the truck; that the direct and proximate cause of the collision between plaintiff's automobile and the truck was the negligence and carelessness of the defendant in not stopping his truck near the edge of the boulevard, as required by the Vehicle Act of the state of California (St. 1919, p. 191), and because of the unusual darkness and rain, and also because of the fact that defendant, by shouting, caused plaintiff to attempt to pass said truck on the right, thereby striking the rear of the truck; that the collision occurred without fault on the part of plaintiff; that it is not true that plaintiff did not exercise ordinary care or caution or prudence to avoid the collision, and it is not true that the damages sustained by plaintiff were either directly or proximately contributed to or caused by the fault or carelessness or negligence of the plaintiff; and it is not true that plaintiff operated his automobile negligently or carelessly, or at a reckless or excessive rate of speed, or at the rate of 35 or 40 miles per hour, or that, by any fault or negligence of the plaintiff, he caused his automobile to collide with the truck; that Wilshire boulevard is a county boulevard outside of the city of Los Angeles; that the boulevard extends about one-half mile in an easterly and about a half mile in a westerly direction from the place of the accident without intersecting any highway or railroad crossing, and is level for that distance in both directions from the place of the accident, all of which facts were within the knowledge of both parties prior to and at the time of the accident.

The contentions of appellant as stated by his counsel, are as follows: (1) That the plaintiff was guilty of contributory negligence both upon the evidence and the findings of fact; (2) that plaintiff's negligence was contributory negligence as a matter of law; (3) that the court erred in finding that a shout of warning was negligence on the part of the defendant; (4) that the findings are inconsistent, and do not support the conclusions of law.

The points above stated impliedly concede negligence on the part of the defendant.

From the facts proved and found, it seems clear that the accident was caused by negligence of the defendant, and that there is no defense to the action unless the plaintiff was guilty of negligence which directly and proximately contributed to and caused the collision and damage.

In support of the claim that plaintiff was guilty of negligence, dependence is placed upon the testimony of plaintiff wherein he stated that it was dark and rainy; that his wind shield was wet, and was fairly hard to see through; that it was slightly down grade there, and the road was slippery, and the car more or less inclined to skid; that plaintiff did not see the truck until he was within 25 or 30 feet from it. On these facts we are asked to declare it to be the rule that it is negligence for the driver of an automobile to drive on the highway on a dark night at such a rate of speed that he cannot avoid objects after they come within the area lighted by his lights. The principal decisions relied upon are cited in Ham v. County of Los Angeles, 189 Pac. 462, a recent decision rendered by division 2 of this court. The court there said:

"We are not prepared to say that negligence may not be predicated as a matter of law, irrespective of any positive law as to speed limits, where an automobile is being driven in the night on any part of the highway, and where the driver is dependent upon the lights of his machine for knowledge of the condition of the road and the traffic upon it, and runs into an obstruction, if he drives at a rate of speed which will not permit him to stop or slow up within the radius illuminated by his lights, and the accident is proximately caused thereby."

The fact that respondent was not able to see, and did not see, the unlighted truck until he was within 25 or 30 feet of the same does not fully establish the facts necessary to give appellant the benefit of the rule above stated. Notwithstanding the facts stated, it may also be true that if the truck had been lighted, as required by law, plaintiff would have been able to see it, and would have seen it, while at a distance great enough to enable him to stop his automobile, and avoid the collision. The condition of the road, as to its openness and the distance to any point of intersection or any railroad crossing, was known to both parties, and the plaintiff was entitled to proceed at a rate reasonable under those conditions, and not exceeding 30 miles per hour. Our conclusion is that the plaintiff was not guilty of negligence in operating his automobile at the speed at which he was traveling at the time of the accident. It is not claimed that he was guilty of any other negligence. This being so, the third point above stated becomes immaterial.

We have given consideration to the contention that the findings are inconsistent, and do not support the conclusions of law. These claimed inconsistencies relate to findings defining the positions of the truck and the automobile on the street, and several statements in the findings defining acts of negligence of which the defendant was guilty. The decision herein is not dependent upon the question of whether or not the truck was left standing on the left side of the roadway. Assuming that it was at the right of the middle of the road, it remains true that the truck was wrongfully allowed to stand unlighted in the path of road travel and under conditions likely to cause injury to persons lawfully traveling on the highway. It was the duty of defendant to operate his truck—

"in a careful manner, with due regard for the safety and convenience of pedestrians and of all other vehicles or traffic upon such highway." Vehicle Act, § 20(a); Stats. 1919, p. 215.

The finding which refers to the act of defendant in shouting at the plaintiff, and the effect thereof under the circumstances stated, was material only for the purpose of determining whether plaintiff's negligence, if he was negligent, was the proximate cause of the collision. Since it has been determined herein that negligence of the plaintiff is not established, the incidental question of proximate cause becomes unimportant.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

52 Cal. App. 62

PEOPLE v. GOSCINSKY. (Cr. 946.)

(District Court of Appeal, First District, Division 1, California. March 25, 1921.)

1. Indictment and information ⊂⊃81(3)—Mistake in defendant's middle initial, immaterial.

That an information makes a mistake in or omits defendant's middle initial or name is immaterial; the law recognizing only one Christian name.

2. Criminal law ⊂⊃1167(4)—Failure to change name, on defendant's true name appearing during trial, harmless.

Even if, on it appearing, during the trial of one whose name was given in the information as "A. G.," and who when arraigned stated that that was his true name, that the "A." stood for "Alfred," the subsequent proceeding ought to have been conducted in that name, in compliance with Pen. Code, §§ 953, 959, failure so to do was a mere error of procedure, and in a matter of form, not tending to prejudice substantial rights.

3. Criminal law ⊂⊃1032(5), 1167(1)—Defendant cannot complain of failure of information to state county of offense where no demurrer and omission harmless.

Defendant may not complain that the information was defective because not stating the county where the offense was committed, he

not having specially demurred as he might on that account, and the evidence showing such county, and he not having been hampered in his defense or suffered any injury through the omission.

4. Physicians and surgeons ⟸6(10)—Defendant has burden of proving possession of license to practice.

A physician prosecuted for practicing without a license has the burden of proving that he had one, a matter peculiarly within his own knowledge.

5. Physicians and surgeons ⟸6(11)—Defendant's possession of a license held under the evidence a jury question.

Whether a physician, prosecuted for practicing without a license or certificate, had one, *held*, under the conflicting evidence, a question for the jury.

6. Criminal law ⟸1159(3)—Jury's determination of fact on conflicting evidence binding on appeal.

The jury's determination, on conflicting evidence, of a question of fact, is binding on the appellate court.

7. Criminal law ⟸1184—Appellate court will modify judgment imposing excessive alternative imprisonment.

Judgment for practicing medicine without a license imposing in case of nonpayment of fine alternative imprisonment for a period in excess of the maximum time by which the offense is punishable under Medical Practice Act, in contravention of Pen. Code, § 1205, is not on that account void, but merely erroneous, so that the appellate court will, under authority of section 1260, modify it.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

A. G. Goscinsky was convicted of practicing medicine without a license, and appeals. Affirmed.

F. P. Feliz, of Salinas, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. This is an appeal from the judgment and from an order denying a motion for a new trial in a criminal prosecution wherein the defendant and appellant was charged with the offense of practicing a system and mode of treating the sick and afflicted without having at the time of so doing a valid, unrevoked certificate from the board of medical examiners of the state of California.

The information charged the defendant by the name of A. G. Goscinsky, and upon arraignment the defendant stated his name to be A. C. Goscinsky, and thereafter the proceedings were conducted in that name; but during the trial, when called and examined as a witness the defendant gave his name as Alfred C. Goscinsky. However, the proceedings continued in the name given by the defendant upon his arraignment.

[1, 2] The law recognizes only one Christian name; and it has been often held that a mistake in or omission of a middle initial or name is immaterial; but there is a conflict in the authorities as to the sufficiency of the use of initials in lieu of the given name. 29 Cyc. 265, 269. Assuming that from the time when it appeared that the letter "A." in the defendant's name as given by him stood for "Alfred" the subsequent proceedings ought to have been conducted in that name, and the initial "A." discarded, in compliance with sections 953 and 959 of the Penal Code, the neglect to do so was at most a mere error of procedure, and in a matter of form, which did not tend to prejudice the substantial rights of the defendant. He had himself stated on his arraignment that his true name was A. C. Goscinsky, and the fact that the name thus given was used throughout the remainder of the proceedings in no way interfered with his defense to the charge, and it will hardly be contended by the most zealous champion of the defendant's rights that the omission or defect complained of in this case resulted in a miscarriage of justice.

[3] The point that the information was defective in not stating the county in which the offense was committed may also be dismissed with the comment that the evidence showed where it was committed—i. e., where the defendant resided and practiced medicine—and certain it is that the defendant suffered no injury and was not hampered in his defense on account of this omission. It may also be remarked that he could have specially demurred to the information upon this ground, and neglected to do so.

[4] The court instructed the jury in part as follows:

"You are instructed that it is not necessary for the people to prove that the defendant did not have a license. Whether the defendant has or has not, or has had, a license is a matter peculiarly within his own knowledge. The burden is therefore upon him to prove that he has or has had a license if he seeks to make the possession of a license a defense."

A similar instruction was given and sustained in the cases of People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402, and People v. T. Wah Hing, 190 Pac. 662. The instruction correctly announced the law on the subject, and the court therefore committed no error in so directing the jury.

[5, 6] The evidence supports the verdict. The prosecution introduced evidence tending to show that the defendant was engaged in the county of Monterey in the practice of medicine and surgery, and then rested, whereupon the defendant took the stand and testified that a license was issued to him in the

year 1894 by the board of medical examiners of the state of California entitling him to practice medicine, and that such license was destroyed during the fire in San Francisco in the year 1906. He also testified that in the year 1898 he practiced in the office of Dr. Herbert W. Schultz, and that during that time his certificate hung on the wall in Dr. Schultz's surgical room above the X-ray apparatus. Dr. Schultz, however, took the witness stand in rebuttal, and testified that, while the defendant had been associated with him in his office as stated, he had never seen a certificate or what purported to be a certificate or license of any kind entitling defendant as a physician and surgeon to practice in this state. All questions of fact are for the jury, as also the question of the credibility of witnesses. It is quite apparent that the jury discredited the defendant's testimony that he had been granted a license to practice medicine and surgery in the state of California, and its determination of this fact is binding upon an appellate court.

[7] The Medical Practice Act provides as a penalty for the violation of any of its provisions a fine of not less than $100 nor more than $600, or imprisonment for a term of not less than 60 days nor more than 180 days, or by both such fine and imprisonment. Stats. 1917, p. 115, § 24. The judgment in this case provides that the defendant shall pay a fine of $500, and in default of payment that he be imprisoned in the county jail one day for each $2 of the fine. It is contended that the judgment is void for the alleged reason that it requires that the defendant be imprisoned, in default of payment of the whole of the fine imposed, for a duration of 250 days, contrary to the provisions of section 1205 of the Penal Code, which limits the duration of such alternative imprisonment to the maximum time by which the offense is punishable —in this case 180 days. But the judgment is not for this reason void, but erroneous and should for that reason be modified by this court. Pen. Code, § 1260. It is therefore ordered that the judgment be modified by adding to it the following words, to wit:

"Provided, however, that the term of imprisonment under this judgment shall not exceed the duration of 180 days."

As so modified, the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

52 Cal. App. 171

Ex parte SANDERS. (Cr. 991.)

(District Court of Appeal, First District, Division 1, California. April 4, 1921.)

1. Habeas corpus ⟸85(1)—Court cannot assume warden of state prison will not discharge prisoner on proper date.

On habeas corpus by a prisoner in the state prison against the warden, the court cannot assume, as contended by petitioner, that the warden will not act in accordance with law, and discharge petitioner on the date when he is entitled to a discharge.

2. Habeas corpus ⟸17—Prisoner not illegally detained until term expired.

Where the term for which petitioner for habeas corpus against the warden of the state prison was sentenced has not actually expired, petitioner is not illegally detained, and will not be so detained until his term has expired.

Application by Russell Sanders for writ of habeas corpus, directed to the warden of San Quentin Prison, to secure petitioner's release from custody. Writ denied.

See, also, 190 Pac. 647.

Russell Sanders, in pro. per.

PER CURIAM. It appears that the applicant was delivered to the custody of the warden of the state prison at San Quentin on the 6th day of April, 1913, to serve a term of eight years, which period he contends will expire on the 6th day of April next. The sole ground for the application is that the petitioner has "been given to know and understand" that the warden at the state prison will not discharge him from custody and restore him to his liberty until a date some time later than the day upon which he contends he is lawfully entitled to be discharged.

[1, 2] There are two reasons why we cannot entertain this petition at this time: First, we are not in a position to assume that the warden of the state prison will not act in accordance with law, and discharge the petitioner, if it be, as alleged in his petition, that he is entitled to a discharge, on the 6th day of April, 1921. The second is that the term for which the petitioner was sentenced has not actually expired, and, until it has, the petitioner is not illegally detained. Ex parte Ross, 82 Cal. 109, 22 Pac. 1086.

Application for the writ is denied.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

52 Cal. App. 93

WINTERS et al. v. LINDSAY. (Civ. 3480.)

(District Court of Appeal, Second District, Division 1, California. March 26, 1921. Rehearing Denied April 23, 1921. Hearing Denied by Supreme Court May 23, 1921.)

1. Corporations ⊜99(3)—Company had right to exchange shares for property other than money, and could sell on less than par basis, leaving stockholders liable to creditors.

Under Const. art. 12, § 11, a bond and mortgage company had the right to exchange its shares for property other than money, and had the right, except as conditions imposed by the commissioner of corporations affected the matter, to sell or exchange such stock on a less than par basis of valuation, except that creditors would have the right to require stockholders to respond in an amount equaling the difference between the price paid and the par value of the shares.

2. Corporations ⊜99(2)—Failure to observe terms of condition of sale of stock fixed by commissioner of corporations does not void stock.

Though the Legislature possessed power to delegate to the commissioner of corporations authority to fix the value of the property which should be exchanged for stock in a company, a failure to observe fully the terms of such a condition would not render the stock void, but might subject the officers of the corporation to the penalties of the law as otherwise fixed in the act.

3. Corporations ⊜121(1)—If stock not void, action to recover against seller on account of its lack of value a collateral attack on issue.

If corporate stock as issued was not void, an action to recover damages sustained by reason of the fact that the stock sold to plaintiffs by defendant was of no value constitutes a collateral attack on the issue, and is ineffectual.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by John C. Winters and another against Lycurgus Lindsay. From judgment for defendant, plaintiffs appeal. Affirmed.

Oliver O. Clark, Claud B. Andrews, and Carnahan & Clark, all of Los Angeles, for appellants.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for respondent.

JAMES, J. Plaintiffs by this action sought to recover from the defendant damages alleged to have been sustained by reason of the asserted fact that certain corporate stock sold to the plaintiffs by the defendant was of no value. They were denied any relief by the judgment, and this appeal has resulted. The record consists of the judgment roll only.

The corporate stock secured by the plaintiffs from the defendant consisted of 19,944 shares of American Bond & Mortgage Company, a California corporation. The stock was given by the defendant as part consideration for real property of the plaintiffs located in the state of Nevada. The trial court found that this stock was worth the sum of $1.25 per share, which was the value which the plaintiffs alleged defendant represented it to have at the time the exchange of properties was made. There is no contention that the stock as to its value did not fulfill all of the representations made by the defendant, but as a basis for recovery plaintiffs have urged the claim that the stock had been illegally issued to defendant —that it was void stock in consequence, and hence they received no value whatsoever. At the time the stock was issued the American Bond & Mortgage Company possessed in its treasury more than the number of shares that were represented in the certificate which defendant transferred to the plaintiffs; hence the question of an overissue is not involved. The determination of the case rests upon a solution of the question as to whether corporate stock, if not sold for the amount required and stated in the permit or certificate issued by the state corporation commissioner, is void for all purposes, and in whosever hands it may be. The plaintiffs here stand in the place of an innocent holder for value. To make clearer the contention of plaintiffs, further facts as expressed in the findings of the court are necessary to be stated: Defendant obtained the shares of stock in the American Bond & Mortgage Company by exchanging therefor a large number of shares in a corporation called "The State Investment Company." Before this exchange was made the first-named corporation obtained from the commissioner of corporations a permit authorizing the sale of a large number of its shares, the permit containing, among other statements, the following:

"To sell and issue not exceeding 1,000,000 shares in exchange for property, the fair and reasonable net market value of which, after deducting therefrom all expenses incurred by such applicant in acquiring the same, shall, at the time of such exchange, equal or exceed 110 per cent. of the par value of the shares issued therefor. Said shares shall be sold or issued only for a consideration hereinabove recited."

The court found that—

These shares in the State Investment Company at the time they were exchanged for the American Bond & Mortgage Company's stock "had no market value whatsoever, and the value thereof, if any, was exceedingly speculative and doubtful, and did not in any event exceed 50 cents per share; and at all times herein mentioned the value thereof as shown by the books and records of said State Investment Company, a corporation, did not exceed 50 cents per share."

The expressions used in this finding are ambiguous, but it does appear therefrom that the stock exchanged by the defendant for the stock of the Bond and Mortgage Company had at least a substantial value. To be sure, if it was worth 50 cents per share, the total amount thereof exchanged by the defendant would equal but one-half the total value of the shares received by the defendant in return therefor. In order to sustain appellants' contention, it is necessary that it be held that shares of corporate stock, although authorized by a duly issued permit to be sold, are void unless there is received from the purchaser thereof, in exact measure, property of a specified value, where such a condition is stated in the permit of the corporation commissioner. The transaction herein referred to occurred in the year 1915. The law creating a commissioner of corporations and defining his duties as then in effect is found in the Statutes of 1913 at page 715. In that law it is provided—

> That a permit to sell securities may be issued where compliance is made with certain forms; that the permit shall show that the "company is authorized to sell said securities within this state on such conditions, if any, as the Commissioner of Corporations may in said certificate prescribe. * * * The Commissioner of Corporations may impose such conditions as he may deem necessary to the issue of said securities, and may, from time to time, for cause, rescind, alter or amend the certificate." Section 5.

The act contains penal clauses under which a failure to comply with its terms is made punishable by a fine, and, in some cases, imprisonment. The act does not contain, like the successor to it (Stats. of 1917, p. 673), any clause declaring void, securities issued without complying with the requirements as to the obtaining of permits, or for a violation of the conditions thereof. It may be pertinent to here state that in the findings of the court it is also determined that the board of directors of the American Bond & Mortgage Company, by resolution adopted six months after the issuance of the stock herein referred to, attempted to repudiate the transaction with the defendant on the ground that the exchange had been effected in violation of the terms of the permit. We think it wholly immaterial as to what the board of directors did at the time last stated in the direction of an attempt to nullify the sale of the stock. It is not determined by the court that through any collusive agreement between the defendant and the Bond & Mortgage Company the stock was fraudulently issued; in fact, nothing appears which authorizes the assumption that the officers of the Bond & Mortgage Company acted in other than the utmost good faith in making the exchange with the defendant. It does appear, to be sure, in the findings that the defendant knew all about the stock which he was delivering to the Bond & Mortgage Company and had knowledge of its market value; he had knowledge, too, it is shown, of the terms of the permit issued by the commissioner of corporations. On the other hand, it is not shown that he misrepresented the value of his stock to the Bond & Mortgage Company in any way. The failure of a corporation to observe regulations governing the sale of its stock, such as those provided for in the act to which we have referred, in our opinion amounts only to an irregularity, and will not taint the transaction as being ultra vires. Mr. Thompson in his work on Corporations, vol. 3 (2d Ed.) par. 2772, states that where a corporation is authorized to perform an act for a specific purpose and performs the act for another purpose, the case does not become one of ultra vires, and that such a plea is not available to either party concerned. The text is illustrated by citation to a case where a state bank under its charter had power to accept stock in a national bank as security, but no power to purchase such stock as an investment. The bank purchased national bank shares and, the national bank becoming insolvent, assessment against the purchasing bank made by the controller was resisted on the ground that the purchase was ultra vires. It was there held that the purchase of the stock was "merely the exercise, for an unauthorized purpose, of a power existing for other and legitimate purposes," and that the defense was not available, citing Citizens' State Bank v. Hawkins, 71 Fed. 369, 18 C. C. A. 78. This author further states:

> "A plain distinction is to be made between cases where a contract is ultra vires because clearly outside of the power granted a corporation and the cases where a contract, while within the general scope of granted powers, is ultra vires because of some particular circumstance which may or may not be known to the other contracting party. In the former case an action on the contract will not lie; while in the latter, according to many of the decisions, an action may be maintained."

There was not an inherent lack of power in the Bond & Mortgage Company to issue and dispose of its corporate shares. It possessed the stock as a part of its treasury assets prior to the transfer of the same to defendants.

[1] Under the constitution (article 12, § 11) it had the right to exchange its shares for property other than money, and it had the right (except as the conditions imposed by the commissioner affected the matter) to sell or exchange such stock on a less than par basis of valuation. The only result which would follow in the latter case would be that the rights of creditors to require the

stockholders to respond in an amount equaling the difference between the price paid and the par value of the shares would be unaffected. Herron Co. v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265; Hasson v. Koeberle, 180 Cal. 359, 181 Pac. 387. The statute in force gave to the corporation commissioner power to impose conditions on the sale of stock.

[2] Allowing the very broad concession that the Legislature possessed the power to delegate to the commissioner of corporations authority to fix the value of the property which should be exchanged for stock, we believe that a failure to observe fully the terms of such a condition would not render the stock void. It might subject the officers of the corporation to the penalties of the law as otherwise fixed in the act. Yetter et al. v. Delaware Valley R. Co. et al., 206 Pa. 485, 56 Atl. 57.

[3] Once admitting that the stock as issued was not void, then this action constitutes a collateral attack upon the issue, which is not allowed to be effectual. Hasson v. Koeberle, supra; Fletcher Cyclopedia on Corporations, vol. 5, §§ 3485–3486.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 138

MADER v. CHRISTIE. (Civ. 3386.)

(District Court of Appeal, First District, Division 1, California. March 30, 1921.)

1. Judgment ⟸101(1)—Pleadings sufficient to support default, if apprising defendant of nature of demand.

A default judgment will not be set aside as being void on its face, in that the complaint fails to state sufficient facts to constitute a cause of action, unless the complaint wholly fails to apprise defendant of the general nature of plaintiff's demand.

2. Appeal and error ⟸1024(4)—Finding on conflicting evidence not disturbed.

The trial court's finding, on motion to vacate default judgment, as to when an amended complaint was served, will not be disturbed on appeal, where based on substantially conflicting evidence.

3. Judgment ⟸153(1)—Motion to vacate default after 11 months held too late.

Where defendant, although aware of entry of his default within 2 days thereafter, waited nearly 11 months before moving to have the same vacated and set aside, at which time judgment thereon had also been entered for 2 months, his motion was properly denied, as not seasonably made.

4. Judgment ⟸153(1)—Motion to vacate default must be seasonably made.

When a judgment is not void upon its face, nor fraudulent, the court has no power to set it aside on motion, unless the motion is made within a reasonable time, the limit of which is 6 months; but in such a case resort should be had to an independent action.

5. Judgment ⟸153(1)—Time for motion to vacate measured from entry of default.

The entry of the default fixes the beginning of the period within which motion to set aside the default and judgment should be made.

6. Appeal and error ⟸172(1)—Grounds of motion to vacate, not urged below, not considered on appeal.

An objection to a default judgment, which was not one of the grounds of the motion to vacate the judgment, may not be considered on appeal from an order denying the motion.

7. Army and navy ⟸34—Moratorium affidavit properly filed after default and prior to judgment thereon.

Plaintiff's moratorium affidavit was filed in time, although not filed before entry of default against defendant, where it was filed before entry of judgment thereon, under the express terms of the statute (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3078¼a–3078¼ss).

8. Appeal and error ⟸1073(2)—Time of filing moratorium affidavit not error, where defendant not prejudiced.

Defendant could not complain that plaintiff's moratorium affidavit was filed too late, because not filed prior to entry of default against defendant, where it did not appear that defendant was in the military service, or that he was in any way prejudiced or at all affected by the fact that the affidavit was not filed earlier.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Anton Mader against John H. Christie. From an order denying defendant's motion to set aside default, defendant appeals. Affirmed.

W. H. Schulte and Frank B. Austin, both of San Francisco, for appellant.

Thomas P. Wickes and Harry E. Michael, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from an order denying defendant's motion to set aside his default and the judgment entered thereon. In the month of June, 1911, the plaintiff, through the alleged negligence of the defendant, suffered an injury necessitating the amputation of his left leg. About one year later he commenced an action against the defendant to recover damages therefor. At the trial of that action it appeared that plaintiff, two days after the injury, entered into a contract with the defendant whereby he released the defendant from all liability

on account of said injury in consideration of the sum of $60, to be paid at the rate of $5 a week, which agreement the court held to be binding, and accordingly directed the jury to return a verdict in favor of the defendant, which was done. An appeal was taken from the resulting judgment, pending which the defendant effected a compromise of the action with the plaintiff, without the knowledge of the plaintiff's attorneys, by the terms of which the defendant agreed to pay the sum of $55 (being a balance due under the first agreement), and also the additional sum of $500, and to procure permanent employment for the plaintiff; the latter on his part agreeing to dismiss the appeal. Said appeal was accordingly dismissed.

Defendant, as in the case of the first agreement, failed to perform the terms of this new one, whereupon the plaintiff commenced the present action, alleging in his complaint, in addition to the facts just recited, that the defendant had fraudulently induced him to make the second contract, and that by reason of the defendant's failure to perform its terms plaintiff had sustained damages additional to those alleged in his complaint in his first suit. A demurrer was sustained to this complaint, whereupon plaintiff filed an amended complaint, setting up further facts tending to meet the point of the demurrer to his first pleading, viz. that his cause of action was barred by the statute of limitations. This amended complaint was filed on Wednesday, November 6, 1918, and plaintiff claims that it was also served on that day. In the forenoon of the 18th of said month, no pleading thereto having been filed or served, and no order or stipulation extending time therefor having been made, plaintiff caused defendant's default to be entered. Defendant, on the other hand, claims that the amended complaint was not served on him until the 7th day of November, so that the 17th, falling on a Sunday, he had the whole of Monday, the 18th, to plead. On August 29, 1919, the plaintiff filed a moratorium affidavit, and thereupon a judgment by default was entered against defendant. On October 31, 1919, the defendant moved to set aside the default and judgment entered thereon, which motion, after hearing, was on that day denied.

[1] In support of his appeal from such order the defendant contends that the motion to set aside the judgment should have been granted for the reason that it is a nullity and void on its face, and that an examination of the evidence taken on the hearing of the motion shows that the amended complaint was served on November 7th, and that the default, entered on the 18th, was for the reason already given premature, and the judgment based thereon unauthorized and void. The claim of the appellant that the judgment is void on its face is grounded on the theory that the complaint fails to state sufficient facts do constitute a cause of action. There is no merit in this contention; but, even if the complaint were open to this objection, it would not follow that the judgment is void unless it wholly failed to apprise the defendant of the general nature of the plaintiff's demand (Christerson v. French, 180 Cal. 525, 182 Pac. 27); and it is not seriously claimed, nor can it be held, that the complaint fails in this regard.

[2] Upon the other ground upon which the appellant claims that the judgment is void, it is sufficient to say that there is a substantial conflict in the evidence as to when the amended complaint was served, so that we are not at liberty to disturb the finding of the court as to that fact (Norton v. A., T. & S. F. Ry. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198), even if we were so inclined, which we are not.

[3-5] Again, it appears that the defendant, who was aware of the entry of his default within 2 days thereafter, waited nearly 11 months before moving to have the same vacated and set aside, at which time the judgment had also been entered for 2 months. His motion therefore was not seasonably made, and was properly denied. When the invalidity of a judgment does not appear upon its face, a motion to set it aside must be made within a reasonable time, not exceeding 6 months. People v. Thomas, 101 Cal. 571, 36 Pac. 9. When a judgment is not void upon its face, nor fraudulent, the court has no power to set it aside on motion unless the motion is made within a reasonable time, the limit of which is 6 months; but in such a case resort should be had to an independent action. People v. Temple, 103 Cal. 447, 37 Pac. 414. And the entry of the default fixes the beginning of the period within which the motion to set aside the default and judgment should be made. Title Ins. Co. v. King Land Co., 162 Cal. 44, 120 Pac. 1066.

[6-8] Finally, the defendant claims that, the moratorium affidavit not having been filed before the entry of his default, such entry was void, and afforded no valid basis for the subsequent entry of judgment against him. There are several answers to this contention, the first of which is that this was not one of the grounds of the motion to vacate the judgment, and therefore may not now be considered on an appeal from the order made thereon. Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620. Secondly, the affidavit having been filed before the entry of the judgment, it was seasonably filed according to the language of the act itself (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3078¼a–3078¼ss), which in part provides:

"If there shall be a default of an appearance by the defendant the plaintiff, before entering judgment, shall file in the court an affidavit," etc. Section 3078¼bb.

And, finally, it nowhere appears that the defendant was in the military service, or that he was in any way prejudiced or at all af-

fected by the fact that said affidavit was not filed prior to entering default.

The orders appealed from are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(52 Cal. App. 158)

HOGAN v. ANTHONY et al. (Civ. 3106.)

(District Court of Appeal, Second District, Division 2, California. April 4, 1921.)

1. Sales ⊜121—Buyer who used motor truck after discovery of fraud waived right to rescind.

Plaintiff buyer of an automobile truck, who, on discovering that the truck was a three-fourths ton instead of a one ton truck, which he had asked for, expressed willingness to return the truck to defendant seller, but continued to use it in his business for 23 days after discovery of the fraud, did not effect a rescission, having waived his right to rescind by using the truck in his business after discovery of the fraud.

2. Sales ⊜121—Buyer who ratified contract by using truck despite seller's fraud could recover damages but may not rescind.

Having ratified his contract for the purchase of a motor truck by using it in his business after discovering the falsity of defendant seller's representation that it was a one ton truck, the buyer could stand on his contract and recover any damages he might have sustained by reason of the fraud, but may not repudiate his obligations by seeking to rescind the contract he thus affirmed.

3. Sales ⊜121—Use of tools or machine by purchaser after refusal of tender in rescission defeats rescission.

Use of tools, implements, machine, or apparatus after the seller has refused tender of it in rescission of the contract, would defeat the attempted rescission, if such use was for the purchaser's personal benefit.

4. Sales ⊜92—Parties to sale after waiver of right to rescind may mutually effect rescission.

The parties to a sale may by mutual assent effect a rescission, though one had previously waived his right to rescind.

5. Sales ⊜476—Purchaser who acceded to demand for possession of truck cannot claim surrender not under contract.

The buyer of a motor truck, who, on refusing to pay an installment note given for the price on account of defendant seller's fraud in representing the truck was a one ton truck, acceded to the demand of the seller's agent and gave up the truck, cannot claim that his surrender of possession was not made under and by virtue of the contract merely because he did not see fit to exact the particular form of notice that the instrument prescribed as a condition precedent to defendant seller's right thereunder to terminate the so-called lease of the truck, for such notice could be waived by the buyer.

6. Sales ⊜92—Fact conditional seller may have mistaken rights under contract does not operate as a rescission.

Though the conditional seller of a motor truck may have mistaken his rights under the contract in claiming that he had a right to keep the property, retain the part of the price paid, and recover on an installment note, the fact did not operate as a rescission of the contract on his part; it being manifest that he did not contemplate anything of the kind.

7. Sales ⊜92—Evidence held to show no rescission by mutual assent.

In an action by the conditional buyer of a motor truck against the seller who took back the truck from the buyer with the latter's consent when the buyer refused to pay an installment note on the ground of defendant seller's fraud in representing the truck was a one ton truck, evidence *held* to show that there was no rescission of the contract by mutual assent.

8. Evidence ⊜442(6)—Parol evidence of truck seller's warranty of carrying capacity inadmissible in view of written contract.

In an action by the conditional purchaser of a motor truck, the contract having been in writing and complete, it was not permissible for plaintiff purchaser to show any oral agreement on defendant seller's part warranting the truck to have any particular carrying capacity; no such warranty appearing in the contract.

9. Sales ⊜391(9)—Buyer without right to rescind cannot recover money paid which is forfeited for his fault.

Where there has been no rescission of a conditional contract of sale, and the buyer is not entitled to rescind, the money paid by him on account of the purchase price belongs to the seller under the contract, and cannot be recovered by the buyer as in an action for money had and received, for the vendee's rights under a contract of sale may be forfeited for his breach of a contract condition.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by James P. Hogan against Earle C. Anthony and another. From judgment for plaintiff, the named defendant appeals. Reversed.

Paul Nourse, A. D. Laughlin, O'Melveny, Millikin & Tuller, and Hewlings Mumper, all of Los Angeles, for appellant.

Ralph E. Swing, of San Bernardino, for respondent.

FINLAYSON, P. J. This is an appeal from a judgment in plaintiff's favor in an action brought to recover $500 paid by him to the defendant Anthony on account of the purchase price of an automobile truck. Anthony is the only defendant who appeals. For convenience, we shall treat the case as though appellant were the sole defendant.

On August 12, 1914, defendant agreed to sell and plaintiff agreed to buy the truck for the sum of $1,650. At that time plaintiff paid $500 on account of the purchase price and agreed to pay the balance in eleven monthly installments of $100 each, and one, the last, of $50, all to be evidenced by promissory notes due and payable in accordance with the agreement. On the next day, August 13th, plaintiff and defendant executed an instrument designated "Lease and Conditional Sale of Automobile." At the same time plaintiff made and executed the promissory notes in accordance with his agreement, made the day before. Thereupon the truck was delivered to plaintiff, who used it in his business until September 18, 1914, when he surrendered possession to defendant. The last-mentioned instrument, that entitled "Lease and Conditional Sale of Automobile," is the one that evidences the final agreement of the parties. It contains a provision to the effect that it shall be construed as a "lease," with an option on the part of plaintiff to acquire title to the truck for the sum of $1, subject to a compliance with his covenants therein contained and payment of the notes according to their terms and conditions. Though the parties designated their contract as a "lease," it was, as held on a former appeal in this case (40 Cal. App. 679, 182 Pac. 52), a contract for the conditional sale of the truck.

To induce plaintiff to enter into the contract, pay the $500, and execute his notes for the balance of the $1,650, defendant, so the complaint alleges and the court finds, falsely and fraudulently represented that the truck had a carrying capacity of one ton. Upon this phase of the case the court found substantially as follows: At the time he entered into the contract plaintiff had no knowledge regarding such trucks and so informed defendant, and told him that he would have to rely upon defendant's representations. At that time plaintiff, who was engaged in the business of selling and delivering ice, informed defendant that he needed a truck with a capacity of and capable of carrying and conveying from 1 to 1¼ tons of freight, and that he could not use a truck of a less carrying capacity. Defendant thereupon represented to plaintiff that the truck in question was a ton truck, that it had a hauling capacity sufficient for plaintiff's business, and that it would easily carry and haul 1¼ tons of freight. Plaintiff relied upon defendant's representation as to the truck's carrying capacity and believed it to be true. Defendant's representation was false and fraudulent, the actual carrying capacity being but 1,500 pounds, or three-quarters of a ton. On August 26, 1913, plaintiff discovered that the truck was not a ton truck, and that its carrying capacity was but 1,500 pounds.

The theory of the action is that, after discovering the falsity of defendant's representation, plaintiff rescinded the contract. The findings upon this branch of the case are substantially as follows: On September 18, 1914, defendant demanded payment of plaintiff's note for $100—the first of the twelve notes to fall due. Although the note had become due and payable on September 13, 1914, plaintiff refused to pay it unless defendant furnished him with a ton truck. Instead of paying the note, plaintiff, at defendant's request, on said 18th day of September, 1914, which was 23 days after plaintiff had discovered the falsity of the representation, returned the truck to defendant, who ever since has had possession. Plaintiff returned the truck because it was not as it had been represented to be and because it could not be successfully used by him in his business. Defendant never furnished plaintiff with a truck having a carrying capacity of one ton. Prior to the commencement of the action, but about two months after the return of the truck, plaintiff demanded a return of the $500, which defendant refuses to pay.

The case has been in the District Court of Appeal twice before. On the first appeal (34 Cal. App. 24, 166 Pac. 861), defendant appealed from a judgment in favor of plaintiff. On that appeal the judgment for plaintiff was reversed on the ground that the only attempted rescission, as shown by the pleadings and findings then before the court, was a rescission of the contract evidenced by the writing executed on August 12, which, as pointed out by the court on that appeal, did not evidence the final agreement between the parties, their respective obligations being measured by the terms of the instrument executed August 13, entitled "Lease and Conditional Sale of Automobile," the very existence of which was, at that time, denied by plaintiff.

On the going down of the remittitur, following the decision on the first appeal, plaintiff filed a second amended complaint containing two counts. In the first he alleges facts which, if true, he insists show a rescission of the contract as evidenced by the last executed instrument. The second count in the amended complaint is a common count for money had and received by defendant for plaintiff's use and benefit. A trial was had of the issues tendered by this amended complaint, judgment passed for defendant, and thereupon plaintiff appealed. That appeal was upon the judgment roll alone. Plaintiff, as the appellant on that appeal, claimed that, on the findings made by the court on the second trial, he was entitled to a judgment for the $500 that he had paid on account of the purchase price, with interest thereon from the date of payment. The appellate court held with him in this contention, and reversed the judgment with directions to the lower court "to enter judgment upon the findings in favor of plaintiff for $500, together with interest thereon from August 12,

1914, and costs" (40 Cal. App. 679, 182 Pac. 52).

Upon the going down of the remittitur after the second appeal, the trial court, pursuant to the appellate court's instruction, entered a judgment on the findings in favor of plaintiff for $500, with interest thereon from August 12, 1914. The present appeal is from that judgment, defendant claiming that the evidence taken at the second trial is insufficient to justify certain of the findings upon which, on the second appeal, the appellate court ordered judgment to be entered in plaintiff's favor. Because the judgment that was the first to be entered on those findings (the judgment that was reversed on the second appeal) was in defendant's favor, this is the first opportunity he has had to attack the findings by an appeal from the judgment. That he now does, claiming insufficiency of the evidence to justify such of the findings as show a rescission. It thus will be seen that the main question presented to us on this appeal did not, and, in the nature of the case, could not arise on either of the two previous appeals. On the first appeal the contract that plaintiff then claimed had been rescinded was not the contract as finally agreed to by the parties. On the second appeal the question presented was, Are the findings sufficient to support the judgment? On this, the third appeal, the question is: Is the evidence sufficient to sustain those findings?

Appellant claims that the return of the truck was not made pursuant to a rescission of the contract, but that it was taken by him from plaintiff under a provision in the "lease" giving him a right thereto in the event that plaintiff breached any of his covenants or defaulted in any payment. That provision is, in substance, as follows: In the event that the lessee breaches any of his covenants or defaults in any payment when due, the lessor, at his option, "may terminate this lease by giving notice of such termination to said lessee in writing by registered letter deposited in the United States post office addressed to said lessee, and upon such termination said lessee shall lose all right to the possession of said automobile and all rights under this lease and the right to purchase said automobile as hereinbefore mentioned, and said lessor shall thereupon be entitled to the possession of said automobile and all parts thereof; it is agreed that such termination of this lease shall not release the lessee from the payment of any sums to the lessor up to and including the day of such termination." The instrument further provides that "time is of the essence of this lease." It thus will be seen that, under and by virtue of the express terms of their agreement, the parties contemplated that upon default in any of the purchaser's payments the seller should be entitled to have both the property and all the money due and payable by the purchaser up to the time when the seller elected to terminate the contract.

There is no substantial conflict in the evidence upon the question of rescission. Plaintiff himself testified on this point substantially as follows:

"I found out what the capacity of the truck was at the factory rating. I found this out some time after I got it. I don't remember just how long; a short time after I got it. * * * I only talked to Mr. Neff at that time. [Neff was defendant's agent through whom the conditional sale had been made.] * * * I told him how it was acting. I told him that I had found out that it was a 1,500-pound truck instead of a ton."

It was, as we already have pointed out, on August 26th that plaintiff discovered the falsity of defendant's representation as to the capacity of the truck. About a week after the discovery he met Neff and another of defendant's agents. Referring to the occasion of that meeting, plaintiff testified as follows:

"About a week after, I saw Mr. Neff. He and another gentleman came out one day and met me on the street. * * * The other man came up to me and wanted to know how the truck was acting. I told him about it, and he said: 'Well, there is a $100 due on it. What are you going to do about it?' And I said, 'I am not going to do a thing about it.' There was no one out prior to that time trying to operate the truck nor at any time subsequent to that. * * * When Mr. Neff and the other man came out to talk about the $100, this man came up to the machine and I told him how it was acting, and he wanted to know how it was getting along. I told him, and he said, 'Well, you've got to pay that hundred dollars due,' and I said: 'All right, come out and take it if you want it, but I am not going to pay any more until you make some settlement. I want somebody to come out here that knows something about it. I am willing to do anything agreeable, but I am not going to pay $100 until something is done.' And he said, 'We'll come and take the truck,' and I said, 'All right,' and he turned around and got into the machine and drove off, and I did the same. I didn't see anything of them after that for some time, and then this man [defendant's representative] came out and I met him on Second avenue and Upland. I do not remember whether I was alone or had a man with me, but I think I had a man with me, and he spoke about the truck and about the $100 and wanted to know if I was going to pay it, and I said 'No,' and he said, 'I am going to take the truck,' and I said, 'All right, but I think it would be better to make some settlement about it.'"

Respondent claims that this evidence shows that he then notified defendant that he would not be bound by the contract, and that he then and there offered to return the truck and rescind the contract.

About two weeks later plaintiff again met Neff, when, according to his own version, the following took place:

"'Well,' he said [referring to Neff], 'if you want to, pay the hundred dollars; if you don't I will take the truck.' I said, 'I will go down to the ice house and take the load off.' 'All right,' he said, 'I will go down.' He got in the machine and went down. He said, 'Don't you think you had better pay this note?' I said: 'I am not going to. This truck is no good to me and I will not pay any more money on it.' He said, 'I will tie this truck up,' and I said, 'Can you do it?' and he said, 'I have got the papers right in my pocket to do it,' and he said, 'If you don't want to give it up I will go up town and get an officer and tie it right up,' and I said: 'You need not do that; if you want the truck I will put it anywhere you say so.' And he said, 'Take it to that garage,' and I said, 'All right.'"

The truck, accordingly, was taken to the garage and thereupon defendant's agent, Neff, took possession. Continuing, plaintiff further testified as follows:

"I didn't feel like paying for something I could not use in my business. It wasn't a ton truck, and I needed a ton truck in my business. It was only a three-quarter ton truck, and I didn't feel like paying another one hundred dollars on something I didn't want and was no good to me."

In reply to a question asking him why he returned the truck to defendant, plaintiff testified:

"I returned it with the expectation that I would get my money back or a suitable truck."

[1] Plaintiff, it is true, upon discovering that the truck was not a ton truck, notified defendant of that fact and expressed a willingness to return it; but we cannot accede to his claim that he then and there effected a rescission. On the contrary, he continued to use the truck in his business up to the time he did return it—23 days after his discovery of the fraud. And then he returned it only after defendant's agent, Neff, had threatened to get an officer and seize it. Under the circumstances disclosed by plaintiff's evidence, we think that no rescission was effected, and, unless the contract of conditional sale was rescinded, plaintiff, under the terms of his contract, is not entitled to a return of the $500.

[2] By using the truck in his business after his discovery of the fraud, plaintiff waived his right to rescind. This is not one of those cases where the purchaser is allowed a reasonable time to ascertain by use, test, and trial whether the article is as warranted or as represented. The representation of which plaintiff complains was that the truck was a ton truck; that is, that its rated carrying capacity was one ton. If the representation had been that the truck would not heat to an unreasonable degree while being used in the ordinary and customary manner in plaintiff's business, irrespective of what its rated carrying capacity might be, it may well be that, in that event, he would be entitled to test its qualities by using it for a reasonable time in his business, that thereby he might ascertain whether it would heat to an undue degree when thus used. But here the representation upon which plaintiff alleges he relied was the specific representation that the vehicle was a ton truck. When plaintiff attempted to have it insured he was informed by the insurance agent that it was only a 1,500-pound truck, and that that was its factory rating. Notwithstanding this unequivocal information and his discovery, beyond all question, of the falsity of the specific representation upon which he claims to have relied when he made the purchase, he continued the daily use of the truck in his business for about three weeks thereafter. The purchaser of an article who wishes to rescind the contract of sale cannot play fast and loose in the matter. He is not allowed to go on and derive all possible benefit from the transaction and then claim the right to be relieved from his own obligations by a rescission or refusal to perform on his part. If, after the discovery of the misrepresentation, he conducts himself with reference to the transaction as though it still were subsisting and binding, he will not thereafter be permitted to impeach the validity of the contract by seeking to rescind it or to escape performance of his covenants. Having ratified the contract by using the truck in his business after he discovered the falsity of defendant's representation, plaintiff could stand upon his contract and recover any damages that he may have sustained by reason of the fraud, but he may not repudiate his obligations by seeking to rescind the contract that he thus has affirmed. The rule is stated in Black on Rescission and Cancellation, vol. 2, p. 1388, as follows:

"If the purchaser of a tool, implement, machine, apparatus, or any other article intended to serve a useful purpose, discovers he has been deceived and defrauded, but nevertheless continues to use it, not for the purpose of testing it or trying to make it available, but for the purpose of deriving benefit or advantage from its use, he will be held to have waived his right to rescind the purchase, and cannot thereafter return the article and claim a restoration of the money paid for it."

The theory of the doctrine is that, having recognized the contract as existing, and having done something to carry it into effect and to obtain or claim its benefits, although perhaps only to a partial extent, and having thus taken his chances, the purchaser cannot afterwards be suffered to repudiate the transaction and allege its voidable nature.

[3] If we concede respondent's claim that, in his conversation with Neff about a week after the discovery of the fraud, he then and there offered to return the truck, but that his offer was not accepted the fact will remain, nevertheless, that he waived his right to rescind. The rule is that the use of a

tool, implement, machine, or apparatus by the purchaser after the seller has refused his tender of it in rescission of the contract, will defeat the attempted rescission if such use was for his personal benefit. Hakes v. Thayer, 165 Mich. 476, 131 N. W. 174; Mizell v. Watson, 57 Fla. 111, 49 South. 149; note to Clark v. Wells, L. R. A. 1916F, 481.

[4, 5] It is suggested that notwithstanding plaintiff's conduct may unequivocally indicate his acquiescence in the contract, and not withstanding he thus may have waived his right to rescind, both parties, nevertheless, could, and in this case did, agree to and consummate a rescission when defendant was permitted to retake possession of the truck. The claim is that when plaintiff permitted defendant to retake the truck there was a rescission by consent. Without doubt the parties to a sale may, by mutual assent, effect a rescission notwithstanding one of them may previously have waived his right to rescind. But the evidence before us in this case fails to show a rescission by consent. To rescind a contract is to annul it, and claim nothing under it. Miller v. Steen, 30 Cal. 407, 89 Am. Dec. 124. If there be a rescission by mutual assent, each renounces all his rights under the contract and should put the other in statu quo. Here neither party renounced his rights under the contract. Defendant, when he took possession of the truck through his agent, asserted a right under the contract, namely, the right to seize the truck under that clause which permits him to terminate the "lease" if the "lessee" defaults in the payment of any installment of the purchase price when due. Just before taking possession, defendant's agent told plaintiff that he had better pay the $100 note that was then due and payable. Upon plaintiff demurring to this, the agent said:

"I will tie this truck up. * * * I have got the papers right in my pocket to do it. If you don't want to give it up I will go to town and get an officer and tie it right up."

It is obvious that in thus threatening to resort to the machinery of the law defendant's agent was asserting what he supposed to be a right under the contract, namely, the right which, in the event that plaintiff should default in any payment when due, the contract gives to defendant to "terminate this lease" and to take "the possession of said automobile and all parts thereof," without thereby releasing plaintiff "from the payment of any sum due lessor up to and including the day of such termination." It is true the contract makes the giving of a written notice, by registered mail, a condition precedent to defendant's right thus to terminate the lease; but this provision respecting notice is for the benefit of the purchaser or "lessee," and one, therefore, that he may waive, and which, in fact, he did waive, when, upon defendant's agent threatening to invoke the services of an officer, plaintiff himself voluntarily returned the truck without requiring the stipulated notice. Had he chosen to insist on a strict recognition of his contract rights, plaintiff could have refused to surrender possession until he had received the written notice by registered letter. Instead, he acceded to the demand of defendant's agent, and he cannot now claim that his surrender of possession was not made under and by virtue of the contract merely because he did not see fit to exact the particular form of notice that the instrument prescribes as a condition precedent to defendant's right thereunder to terminate the so-called "lease."

[6] For these reasons we conclude that there is nothing to indicate an intention on the part of defendant to rescind, but that every act, under the circumstances, indicates a contrary purpose. Instead of restoring or offering to restore plaintiff to the status quo, defendant, at all times, has stoutly maintained his right to keep the property, retain the $500, and recover on the $100 note that, by its terms, was payable at the time when his agent retook possession. Defendant may have mistaken his rights under the contract, but this does not operate as a rescission of the contract on his part, when it is manifest that he did not contemplate anything of the kind. Miller v. Steen, 34 Cal. 138.

Nor did plaintiff, when he permitted defendant's agent to retake the truck after the latter had threatened forcible seizure, intend to rescind, i. e., to claim nothing under the contract. Asked why he returned the truck, he testified:

"I returned it with the expectation that I would get my money back or a suitable truck."

The expectation that defendant might deliver to him a truck conforming to the representation that had been made shows that plaintiff never did unequivocally renounce all rights under the contract. There can be no partial termination of a contract. A party to a contract cannot assert rights thereunder for some purposes while regarding it as at an end for others.

[7] For the foregoing reasons we think it clearly appears that there never has been any rescission by mutual assent, and that plaintiff, by using the truck in his business after discovering the falsity of the representation, waived all right to demand a rescission.

[8] It is suggested that, because of his false and fraudulent representation as to the capacity of the truck, defendant had no right to retake it, and that, by doing so without right, he thereby breached the contract, thus giving to plaintiff the right to consider it as abandoned. The gravamen of plaintiff's case is fraud, not warranty. The case therefore must not be confounded with one in which the vendor has bound himself by a warranty,

that is, by contract. Defendant did not contract to sell plaintiff a ton truck or a truck of any particular carrying capacity. The contract reads: "Said lessor does hereby lease * * * one Stewart truck No. 348." Here is a complete description of a specific, clearly identified truck. The contract is in writing and contains no warranty that the truck specifically described therein is a ton truck. Upon its face the written instrument purports to be a complete expression of the whole agreement. No other provision, therefore, may be added to the agreement by parol. It is not permissible for plaintiff to show any parol agreement on defendant's part warranting the truck to have any particular carrying capacity. Harrison v. McCormick, 89 Cal. 330, 26 Pac. 830, 23 Am. St. Rep. 469; Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964; Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319; Kullman, Salz & Co. v. Sugar, etc., Co., 153 Cal. 725, 96 Pac. 369. What plaintiff complains of, and all he may complain of, is that he was induced by a false and fraudulent representation to enter into the contract to purchase the truck. But while he may complain that the contract was brought about by defendant's fraud, he cannot complain that the latter has not done what his contract calls upon him to do, namely deliver the truck described in the written instrument, to wit, "one Stewart truck No. 348." Defendant did deliver "Stewart truck No. 348," and none other. Plaintiff, therefore, though he may complain of fraud that induced him to enter into the contract, may not complain of any breach of the contract. This being so, he is not entitled to do a rescission upon the theory that defendant, by breaching his contract in a substantial particular, has permitted plaintiff to elect to rescind. When plaintiff, after his discovery of the fraud, continued to use the truck in his business, thereby waiving his right to repudiate the contract, defendant, notwithstanding his fraudulent representation and his liability for damages by reason thereof, was free to assert any right afforded him under the contract thus ratified by plaintiff's conduct, including the right to retake the truck upon plaintiff's default in the payment of any note when due, subject to plaintiff's right to recoup any damages that may have been sustained by him by reason of the fraud.

It may be suggested that, because plaintiff was entitled to recover damages for fraud, defendant could not insist upon the payment of the $100 note, or payment of any part of the purchase price, until there had first been deducted the amount recoverable by plaintiff as damages. Even so, this would only show that when defendant threatened to seize the truck because plaintiff had defaulted on the $100 note he had mistaken his rights under the contract. But, as said in Miller v. Steen, supra, 34 Cal. 144, such mistake would not operate as a rescission on his part when it was manifest that he did not contemplate anything of the kind. And by permitting defendant to retake possession in the assertion of a supposed right thereto under the contract, plaintiff himself was not contemplating a rescission.

[9] Finally, respondent claims that because his complaint contains a count for money had and received, no rescission of the contract was necessary. It undoubtedly is true that in an action for money had and received the plaintiff may recover from the defendant any money in the latter's possession which in equity and good conscience he ought to pay to plaintiff. And if, in this case, the contract had been rescinded by mutual assent, or if plaintiff, not waiving his right to a rescission, had elected to rescind the contract, then, in equity and good conscience, the $500 in plaintiff's possession would be money that he ought to pay to plaintiff. But where, as here, there has been no rescission, and plaintiff is not entitled to rescind, the money paid on account of the purchase price belongs to defendant under the contract. The forfeiture of the vendee's rights under a contract of sale, for his breach of a condition of the contract, is to be distinguished from a rescission of the contract in that it is an assertion of a right growing out of the contract, and it cannot be said that the money in the hands of the vendor as the result of such forfeiture is not rightfully his.

It follows that the judgment must be reversed, and it is so ordered.

We concur: WORKS, J.; CRAIG, J.

52 Cal. App. 155

ADAMSON v. LOS ANGELES COUNTY et al.
(Civ. 3680.)

(District Court of Appeal, First District, Division 1, California. March 29, 1921. Rehearing Denied April 27, 1921. Hearing Denied by Supreme Court May 26, 1921.)

1. Eminent domain ⟸167(3)—Sections of Political Code providing method for laying out public roads not exclusive of right of eminent domain.

Pol. Code, §§ 2681–2698, though providing a speedy and convenient method for the laying out of public roads, and the acquisition for such purposes of lands of private owners at fair valuations, were not intended to be exclusive to exclude boards of supervisors of counties and counties themselves from the exercise of those rights of eminent domain in the matter of acquiring land or rights of way for highway purposes, held by the state by virtue of its sovereignty and conceded to it by section 44; this in view of section 2643, subd. 4, and section

4041, Civ. Code, § 1001, and Code Civ. Proc. tit. 7, pt. 3.

2. Eminent domain ⊂=243(1)—Judgment in condemnation suit effective as setting apart land for highway.

Where by final judgment in a condemnation suit to acquire land for highway, brought by the county at the instance of the board of supervisors, it was adjudged that the strip of land in question was condemned for highway purposes, such land was thus acquired, set apart, and appropriated for the particular public use, and the last act essential to vest in the public a right to its use as a thoroughfare was accomplished.

3. District and prosecuting attorneys ⊂=9—Evidence ⊂=83(4)—Act of counsel in stipulating for increased judgment not void; county attorney presumed to do duty.

Act of counsel for a county, proceeding at the instance of its board of supervisors to condemn a strip of land for a highway, in consenting to an increase of the amount of compensation awarded the landowner by the verdict of the jury in the condemnation suit, *held* not void as without authority; the increase having been on account of discovery that the mileage of necessary fencing was greater than supposed, and the presumption being, in view of Code Civ. Proc. § 1963, that counsel for the county, the district attorney, a public official, regularly performed his official duty and was duly authorized to file his consent to the required increase.

4. Eminent domain ⊂=224—Court had power on motion for new trial to modify verdict by increasing award to landowner on account of low estimate of necessary fencing.

In suit by a county at the instance of its board of supervisors to condemn a strip of land for a highway, the trial court possessed power on motion for new trial to amend or modify the verdict of the jury by increasing the amount of compensation awarded the landowner, on account of a mistakenly low stimate of mileage of necessary fencing, to make such verdict conform to the evidence, and having exercised such power, and its order having been complied with, and the judgment in the condemnation suit become final, a taxpayer cannot come in and by injunction stop the public work already in progress on the highway merely on account of the inaccuracy of the court in computing the amount to which the landowner was entitled in damages.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Merritt H. Adamson against the County of Los Angeles and others to enjoin the expenditure of public money. From a judgment for defendants, on demurrer to the complaint, plaintiff appeals. Affirmed.

Anderson & Anderson and Nathan Newby, all of Los Angeles, for appellant.

A. J. Hill, Co. Counsel, and Paul Vallee, Chief Deputy Co. Counsel, both of Los Angeles, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants, entered after an order sustaining a general demurrer to the plaintiff's complaint without leave to amend.

The action is one in which the plaintiff, as a resident and taxpayer of Los Angeles county, seeks to enjoin said county and its board of supervisors from proceeding with the expenditure of public money and with the employment of county officials and employees, and the use of county tools and appliances and materials, upon the construction of a certain roadway upon and along a certain right of way 40 feet in width and about 22 miles in length, extending into and over certain private property known as the Malibu ranch, owned by the Rindge Company, a corporation. The complaint sets forth at length the proceedings had and taken before and by the board of supervisors of said county purporting to authorize the institution of an action on behalf of said county for the condemnation of the strip of land in question for the purposes of such highway, and also the institution and proceedings in such action resulting in a judgment in favor of said county condemning a right of way over said strip of land, and assessing and awarding damages to the defendant therein, the Rindge Company, for the taking of the same, which judgment became final, and also sets forth the proceedings before said board of supervisors authorizing and directing the prosecution of the work of constructing said highway at public expense, and the fact that said construction work was actually in progress at the time of the institution of the present action.

The first and main contention which the appellant makes upon this appeal is that the resolution of the board of supervisors purporting to authorize the said condemnation suit was not sufficient to confer jurisdiction upon the court of the subject-matter of said suit, and hence all proceedings had pursuant to said resolution were void, and as a sequence no road or right of way was condemned or laid out or established by such condemnation proceedings, and that therefore any and all expenditures of public money, and the creation or improvement of said proposed highway are and would be illegal. The entire basis for this contention on the part of the appellant rests in the assumption that the powers conferred by law upon boards of supervisors to lay out and established public highways are those embodied in those sections of the Political Code numbered 2681 to 2698, inclusive, providing for the laying out, altering, and discontinuing of roads. The method provided for laying out and establishing public highways by these sections of the Political Code is that commonly known as the "viewer" method,

frequently employed by counties in the acquisition of lands for new highways and in the laying out of the same; and it is the insistence of the appellant herein that this method is exclusive, and that, not having been followed by the board of supervisors of said county in the attempted acquisition of the right of way for the roadway in question, all subsequent proceedings in that direction were void.

In reply to this contention the respondent directs our attention to subdivision 4 of section 2643 of the Political Code, which it is urged confers express power upon boards of supervisors to acquire private lands and rights of way thereover for highway purposes by condemnation proceedings under the general right of eminent domain. This subdivision is part of the general section giving boards of supervisors the general control and supervision over roads within their respective counties, and by the terms of said subdivision they are empowered to "acquire the right of way over private property for the use of public highways, and for that purpose require the district attorney to institute proceedings under title 7, part 3, of the Code of Civil Procedure." The respondent further contends that, aside from this special provision granting this power and providing for this procedure, boards of supervisors possess the power to direct the institution of actions for the condemnation of private property for highways and for public uses under their general right of eminent domain under the provisions of section 44 of the Political Code and of section 1001 of the Civil Code; and it further contends that, in addition to these general grants of power, boards of supervisors have been expressly invested with these powers under section 4041 of the Political Code, which is embraced in article 4 of chapter 4 of part 4 thereof, under the title of "General Permanent Powers," and which section of the Code reads in part as follows:

"The boards of supervisors in their respective counties shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law * * * (4) to acquire and take by purchase, condemnation or otherwise land for the uses and purposes of public roads, highways, boulevards, turnpikes, and other public ways."

[1] We are entirely satisfied that the foregoing contentions on the part of the respondent herein must, both upon principle and authority, be upheld. The sections of the Political Code upon which the appellant relies in support of its contention, while they provide a speedy and convenient method for the laying out of public roads, and the acquisition for such purposes of the lands of private owners at fair valuations, were not intended to be exclusive, since to so hold would have the effect of excluding boards of supervisors of counties, and hence counties themselves, from the exercise of those rights of eminent domain in the matter of acquiring land or rights of way for highway purposes held by the state by virtue of its sovereignty and expressly conceded to it by the terms of section 44 of the Political Code, and would also render nugatory and meaningless the other sections and subdivisions of said Code to which we have above referred.

But, aside from this consideration, we think that the contention of the appellant as to the limited powers of boards of supervisors under the several provisions of the Political Code above referred to has been quite definitely determined in a case which by analogy is almost identical with the case at bar. That is the case of City of Los Angeles v. Leavis, 119 Cal. 164, 51 Pac. 34. In that case the city of Los Angeles, a municipal corporation, brought suit to condemn land for a public street. It was contended that it had no power to commence or maintain such an action without having first taken the steps and resorted to the processes provided in the Statutes of 1889, p. 70, relative to the laying out, opening, extending, widening and straightening of public streets in municipalities, which in quite a number of respects embrace similar provisions to those embodied in the sections of the Political Code upon which appellant relies in support of his contention. The Supreme Court says:

"The contention, we think, is untenable. The provisions of the Act of March 6, 1889, are not exclusive, and were not designed to prohibit a municipality from maintaining condemnation proceedings under the provisions of the Code of Civil Procedure. * * * In Pasadena v. Stimson, 91 Cal. 238, the court, after quoting section 1001 of the Civil Code, wherein it is provided that any person may, without further legislative action, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, declared: 'A corporation, whether private or public, is a person. It follows therefore that under this general law, general in the widest and fullest sense of the term, any public or private corporation, or any natural person, may, for any of the uses defined in section 1238 of the Code of Civil Procedure, acquire property, without the consent of the owner, by means of the proceedings described in part 3, title 7, of said Code.' In Santa Cruz v. Enright, 95 Cal. 105, the same construction is given to the law."

The provisions of article 6 of chapter 2 of title 6 of the Political Code, comprising sections 2681 to 2698 thereof, do not purport to be exclusive, and may not be held to be so in view of the express grant of power embodied in subdivision 4 of section 2643 above quoted, and of the even more comprehensive enumeration of the general permanent powers of boards of supervisors contained in section 4041 of the Political Code by which such

boards are expressly authorized "to acquire and take by purchase, condemnation or otherwise land for the uses and purposes of public roads, highways and so forth." We are therefore of the opinion that the first contention of the appellant cannot be sustained.

In arriving at this conclusion we are not unmindful of the cases which the appellant has cited as supporting his contention; but an examination of these cases discloses that either the direct point here made was not under consideration there, or that the proceeding assailed was one having its inception under the provisions of sections 2681 and 2698 of the Political Code, and that the error complained of in those cases consisted in an alleged departure from the procedure laid down in those sections of the Code. Such cases do not have application to an original condemnation proceeding instituted under section 1237 et seq. of the Code of Civil Procedure.

Having thus determined the appellant's main point against his contention he still insists that, conceding the superior court had jurisdiction to hear and determine the condemnation proceeding, and that it has done so, still the strip of land so condemned did not become a public highway so as to entitle the board of supervisors to proceed to expend the public moneys for its improvement without the passage of a resolution of the board of supervisors declaring said land to be a public highway, which resolution he claims was never adopted.

[2] We do not find any merit in this contention. The final judgment in the condemnation suit adjudged that the strip of land in question was "condemned for highway purposes." It was thus acquired, set apart and appropriated for this public use, and, as was said by the Supreme Court in the case of Wulzen v. San Francisco, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17:

> "When land within a street is 'condemned, appropriated, acquired, set apart, and taken for public use,' it would seem that the last act in the series essential to vest in the public a right to its use as a thoroughfare is accomplished."

We are cited to no case which undertakes to lay down a different rule.

The appellant's final contention is that the conditions prescribed by law as the prerequisite to entitle the county of Los Angeles, through its officials, to take possession of the strip of land in question for the purpose of doing highway work thereon were not complied with, and hence that these officials had no right to expend public money in the improvement of land to the possession of which they were not lawfully entitled. This contention rests upon the following state of facts:

The condemnation suit was tried before a jury which, among other things, found that the amount of fencing in mileage requisite to fence the Rindge Company's land along the roadway was 29 miles, and that its cost would be $18,850, or $650 per mile, to which sum said company would be entitled in compensation. A motion for a new trial was made, one of the specifications of which was that the jury was in error as to the proper amount of this mileage of required fencing. The trial court was of the opinion that this was correct, and that the mileage of said fencing should have been 31½ miles, for which increase the Rindge Company should have been awarded further compensation at the specified rate per mile. It therefore required the plaintiff to consent to this increase as a condition of its order denying the motion for a new trial, whereupon counsel for plaintiff filed a written stipulation consenting to this increase in the defendant's amount of compensation, and thereupon the court entered its order denying the motion for a new trial. The contention of the present appellant is that the counsel for the county had no authority to stipulate for this increase in the judgment, and that the court had no power to make it, and by so doing to change the amount of compensation fixed by the jury.

[3, 4] We find no merit in the contention that the act of counsel for the county in consenting to an increase of the amount of the compensation awarded to the defendant by the verdict of the jury in the condemnation suit was void as without authority. The record does not so disclose, and in the absence of any showing to the contrary the presumption will be that counsel for the county—who in that case was himself a public official, namely, the district attorney, regularly performed his official duty and was duly authorized to file his consent to the required increase. San Luis Obispo v. Hendricks, 71 Cal. 242, 11 Pac. 682; Code Civ. Proc. § 1963. Further than this, we have no doubt that the trial court possessed the power upon a motion for a new trial to amend or modify the verdict of the jury in the respect it did so as to make it conform to the evidence in the case, and that having that power, and having exercised it, and its order in that regard having been complied with, and its judgment in said condemnation suit having become final, this plaintiff cannot, merely by virtue of being a taxpayer, come in and, by way of injunction sought in this latter action, stop the public work already in progress upon the strip of land condemned in said former action for public use as a highway, merely because of some alleged inaccuracy on the part of the trial court in computing the amount to which the defendant therein would be entitled in damages.

Upon a review of the whole record we are satisfied that the strip of land sought to be

taken for highway purposes in the condemnation suit was adaptable to and properly subject to condemnation for such purposes; that the condemnation suit was one of the alternative methods provided by law for the acquisition of private lands by counties for highway uses; that the judgment made and entered in said condemnation proceeding was a legal and proper judgment, and that its effect was to transfer a right of way over the strip of land in question to the county of Los Angeles for highway purposes, and that no other or further act or declaration on the part of the board of supervisors was required to effectuate that purpose; and, finally, that the trial court committed no error or abuse of its discretion in refusing to grant or issue an injunction upon the plaintiff's complaint herein, the demurrer to which we hold to have been properly sustained.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(52 Cal. App. 75)

SILVA v. ANGELO. (Civ. 2183.)

(District Court of Appeal, Third District, California. March 26, 1921.)

1. Landlord and tenant ⇐326(1)—Farm lease held not to show that tenant should bear total expense of threshing and baling hay.

Where a farm lease provided that the lessee should deliver to the lessor one-half of all crops of every nature, in stack and sack, according to the custom of making divisions in the neighborhood, and there was no provision that the lessee should bear the total expense of threshing grain or baling hay, the lease providing that each party should furnish one-half of the feed, the lease cannot be construed as requiring the lessee to bear the total expense of baling hay and threshing grain, particularly as hay could be delivered unbaled, etc.

2. Landlord and tenant ⇐331(6)—Evidence held to warrant finding that farm lease required parties to share expense of threshing grain and baling hay.

In an action by the lessor to reform a farm lease which did not specify as to how the expense of threshing grain and baling hay was to be borne, testimony by the lessee that the expense was to be borne equally, which, of course, was competent, *held* sufficient to sustain the judgment denying reformation and to establish that the expense should be divided.

3. Trial ⇐404(1)—Findings should be construed to support judgment.

Findings must be construed as to support the judgment if reasonably possible.

4. Reformation of Instruments ⇐45(9)—Findings in action to reform farm lease held to support judgment that parties should share expense of threshing grain and baling hay.

In an action by a lessor to reform a farm lease so as to require the lessor to bear the entire expense of threshing grain and baling hay, findings that the lease recited in detail all the conditions, and that the lessor was indebted to the tenant for paying his share of the cost of threshing and baling the crops, *held* to support the judgment denying reformation, etc.

5. Costs ⇐32(3)—Where plaintiff recovered substantial judgment, he is entitled to cost of course, though some relief denied.

In an action to reform a farm lease and for an accounting, plaintiff is, under Code Civ. Proc. § 1022, subd. 3, entitled to costs as of course, or as a matter of right, where he recovered a substantial amount, though reformation of the lease was denied.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by A. J. Silva, by his guardian ad litem, Mary F. Silva, against Antone Angelo. From a judgment denying plaintiff part of the relief sought, as well as costs, plaintiff appeals. Judgment reversed, so far as it denied costs; otherwise, affirmed.

O. G. Hopkins, of Sacramento, for appellant.

John C. March, of Sacramento, for respondent.

HART, J. The object of this action is: (1) To reform a certain lease, whereby the plaintiff demised certain real property to the defendant for the term of three years, commencing on the 1st day of November, 1916, and ending on the 31st day of October, 1919; (2) to recover judgment against the defendant for the sum of $983.80, alleged to be for moneys received by the defendant for plaintiff for the sale of hay and potatoes; (3) for an accounting by defendant "for the balance of the crops and proceeds of said leased premises."

The lease concerning which the controversy involved herein arose, as it was executed by the parties hereto, is set out in full in the complaint.

Among other covenants and conditions, the said lease, which appears in the complaint as paragraph 2 of the first cause of action thereof, is the following:

"The lessee further agrees that he will deliver and pay over to the said lessor, his executors, administrators or assigns, or to his or their order, annually, one-half of all proceeds and crops produced on the said farm and premises aforesaid, of every nature, kind and description, in stack and sack, according to the usual course and custom of making such divisions in the neighborhood and in a seasonable time after said crops have been gathered and harvested."

The lease contains no specific provision as to how or by whom the expense for threshing the crops and baling the hay produced upon the demised premises should be borne—that is to say, whether such expense should be borne equally by the lessor and lessee or entirely by the latter—the plaintiff contending that the understanding was that the defendant was to bear the whole of the expense incident to the harvesting of the crops and the baling of the hay produced upon the demised premises during the term of the lease. It is in this particular that the reformation of the lease is sought, and as the predicate for such relief, the complaint thus speaks:

"That prior to the execution of the said lease, and during the negotiations therefor, and the terms thereof, it was agreed between the said lessor and the said lessee, as one of the terms of said lease, that defendant, as such lessee, was to do, and he agreed to do, all the baling of hay and all the threshing of crops on said leased premises, during the term of said lease, at his expense, the said lessor to furnish one-half of the wire for baling and one-half of all sacks necessary; that subsequent thereto, plaintiff and defendant visited the law office of one O. G. Hopkins, at Sacramento, for the purpose of causing the terms of said agreement of lease to be put into written form, and executing same; that by mutual mistake, neglect, and inadvertence of both of said parties, they failed to recite to the said attorney that portion of the terms of said lease as hereinbefore set out, and the said terms in detail were omitted therefrom on account of such neglect; that the omission of said terms from said lease was not discovered by said plaintiff until about the month of May, 1918; that at or about said time, the defendant refused to carry out said lease as agreed upon as aforesaid, and demanded of plaintiff that he pay for one-half the cost of all baling and threshing and for one-half of all wire and all sacks used during the years 1917 and 1918."

The complaint then sets out (paragraph 5) an instrument in writing, as to which it is alleged:

"That at and before the making and executing of the said lease, this plaintiff and defendant intended and agreed that the said instrument and lease should mean, and the legal consequences thereof should be, as follows:"

The instrument thus set forth is, with the exception of the following paragraph, precisely the same in its language and provisions as the lease subscribed and so executed by the parties:

"The lessee further agrees that during said term he will do all the baling of hay and all the threshing of crops on said premises at his own expense, the lessor agreeing to furnish one-half of the wire for baling and one-half of all the sacks necessary."

It is then alleged that, through the mutual mistake of plaintiff and defendant, "the said lease contract hereinbefore alleged and set out did not, and does not, truly state or express the intention of said parties, and does not truly express or set out what were to be the legal consequences of said legal contract," in that it failed to state specifically that the lessee agreed that he would himself bear the whole of the expense necessary to be incurred for the threshing of the crops and the baling of the hay produced during the term of the lease on the demised premises.

The complaint further states that, on the 16th of November, 1918, the plaintiff demanded of defendant in writing that the latter consent to a reformation of the lease in the particular above specified, so that it would conform to the agreement made between them in said particular, but that defendant refused to give his consent to a change in the lease so demanded, and still refuses to assent thereto.

Following the foregoing averments are allegations that the plaintiff has at all times complied with the provisions of the contract of lease required of him thereby, and by the actual agreement of the parties, and that defendant has received into his possession and retains certain moneys, aggregating $983.80, which belong to the plaintiff, as his share of the proceeds of the sale by defendant of certain of the products of the premises in question.

The defendant answered, specifically denying all the averments of the complaint, and also filed a cross-complaint, in which it is alleged that the written contract of lease as executed by the parties contained the full and complete agreement between them, and that the terms, conditions, and covenants as set out in said contract of lease are therein stated and expressed as the plaintiff and the defendant understood and agreed were to be the terms, etc., upon which the premises were to be leased to defendant. It is alleged in the cross-complaint that—

"The usual course and custom of making such divisions in the neighborhood where said premises are situated was, at the time of the executing of said lease, and now is, that the lessor and lessee shall each pay one-half of the cost and expense of all baling of hay and all threshing of crops grown on such leased premises, and one-half of the wire for such baling and one-half of all sacks necessary for such crops; that said defendant paid the cost of all the baling of the hay and all the threshing of the crops grown on said premises during the years 1917 and 1918, which amounted to the sum of $945.70; that one-half of said sum * * * was paid by said defendant for and on behalf of said plaintiff."

The total amount which it is alleged in the cross-complaint defendant paid out for the use and benefit of plaintiff is the sum of $586.75, for which sum, in addition to the prayer that plaintiff be awarded nothing by

reason of his action, the defendant prays for judgment.

The court found:

Finding 2: "That the parties hereto, on the 22d day of December, 1916, entered into the written agreement of lease which was executed by them, and which is set out in paragraph 2 of the first cause of action of the complaint, and that under said lease defendant took possession of the property described in said lease."

Finding 3: "That it is not true that at and before the making and executing of the said lease, plaintiff and defendant intended and agreed that the said instrument and lease should mean, and the legal consequences thereof should be, as set out in paragraph 5 of plaintiff's first cause of action in said complaint."

Finding 4: "That it is not true that, through the mutual mistake of plaintiff and defendant, the said lease contract set out in paragraph 2 in plaintiff's first cause of action in said complaint did not, and does not, truly state or express the intention of the said parties, and does not truly express or set out what were to be the legal consequences of said legal contract."

Finding 5: "That the said lease, as signed and executed by the said plaintiff and defendant on the said 22d day of December, 1916, recited fully, in detail, all the terms and conditions as agreed upon by and between said parties."

Finding 6: "That during the first year of the lease, to wit, 1917, plaintiff furnished one-half the wire for baling and one-half the sacks necessary; that defendant furnished the other half, and paid the expenses of baling and threshing, and accounted to the plaintiff for the balance due on the sale of crops for 1917, according to the terms of the lease."

It was further found that the defendant, during the year 1918, sold hay and potatoes for the sum of $983.80, which sum defendant received "to the use and benefit of plaintiff," and that no part of said sum has been paid to the last named by defendant; that, during the years 1917 and 1918, the defendant raised on the leased land certain crops, calves, and hogs, and let out for hire a team of horses belonging to plaintiff, all of which totaled in value the sum of $224.75, one-half of which belongs to plaintiff, and of which no accounting to plaintiff has been made by defendant.

The court also found that the defendant, in the years 1917 and 1918, paid out for the benefit and use of plaintiff, under said lease, for the baling of hay, threshing of crops grown on the demised premises, and for other small items of expense, the total sum of $513, "no part of which has been paid," and that defendant "is entitled to have set off against the claims of plaintiff the said sum of $513," together with the sum of $50, which it was found was the reasonable value of services performed by defendant for plaintiff in taking care of certain horses belonging to the latter during the term of said lease, making a total of $563.

No specific finding was made as to the alleged "course and custom" in the neighborhood where the premises are situated with respect to the division of crops between the lessor and lessee of lands devoted to agricultural and other kindred purposes.

The court, as a conclusion of law, declared that plaintiff was entitled to a judgment for the sum of $533.85 "and that neither of said parties have judgment for costs herein." Judgment was entered accordingly. Plaintiff moved for a new trial, which was denied, and he brings the cause here on appeal from those portions of the judgment allowing defendant a set-off in the sum of $480.51 against the amount adjudged to be owing to him (plaintiff) by defendant, and denying to plaintiff his costs of suit.

It will be observed, from the particular in which the plaintiff sought to secure a reformation of the lease, that the whole controversy between the parties here centers in this proposition, namely: Whether the plaintiff was, under the contract of lease, obligated to bear one-half of the expense of harvesting the crops and baling the hay raised on the demised premises during the term of the lease, the contention of the plaintiff being that, even under the terms of the agreement of lease as it was executed by the parties, the defendant himself was required to pay all expenses so incurred.

The plaintiff contends that, from the language itself of the lease, it is perfectly clear that the agreement was that the entire expense of baling the hay and of threshing the crop was to be borne by the defendant. We are unable to coincide with that view. Indeed, while the construction that the pleader may put upon a written instrument is not controlling or binding upon the courts, the position of the plaintiff is, singularly enough, directly at variance with his plea for a reformation of the lease so that the instrument would unquestionably show that the understanding was that the entire cost incident to the labor and the expense required for the threshing of the crops and the baling of the hay was to be borne by the defendant. The lease specifically provides that the lessor and the lessee shall each, during the term of the lease, "furnish one-half of all seed necessary to be used in planting and farming said land, and one-half of barley necessary for horse feed, and extra parts of machinery." There is no other provision in the instrument which contains an express stipulation as to how or by whom the other expenses of carrying on the farming business on the demised land shall be paid or be borne. It is therefore very clear that a construction of the covenant in question cannot be materially aided by examining it in comparison with other provisions of the lease or the general context thereof.

The contention of plaintiff is, however, that the language of said covenant, to wit: "The lessee further agrees that he will de-

liver and pay over to said lessor * * * one-half of all proceeds and crops produced on the said premises, * * * of every nature, kind and description, in stack and sack, according to the usual course and custom of making such divisions in the neighborhood," etc., when read and considered by the light of the paragraph in the lease immediately following said language, can lead to no other rational conclusion than that the clear and essential implication is that the expense of threshing and baling was wholly to be paid by the defendant. The paragraph referred to reads:

"The lessee further agrees that, after such division or divisions have been made annually, he will haul and transport the share of crop or crops due to the lessor to such shipping point as the lessor may direct, without cost to the lessor."

[1] The argument supporting that proposition is that the transportation of the crops produced upon the premises, which, to facilitate the proper handling and shipping thereof, are required to be either baled or put in sacks, would require that they should be baled and placed in sacks, and, since the lessee is required to make delivery of the crops in that mode without cost to the lessor, it would follow that it was intended that he should, without cost to the lessor, put the crops in such condition as would admit of their proper delivery to the lessor at any point to be named by him. It is difficult to see wherein the latter provision can be of any assistance in the ascertainment of the intent of the parties upon the question whether the burden of the cost for threshing and baling should be upon the defendant alone or equally borne by the plaintiff and the defendant. The language of that paragraph, it will be noted, is that after the divisions are made, as provided in the preceding paragraph of the instrument, the lessee must—

"haul and transport the share of crop or crops due to the lessor to such shipping point as the lessor may direct, without cost to the lessor."

That by that provision of the lease the duty of performing the service of such hauling and transportation free of all expense to the lessor is placed upon the lessee, is a proposition so clear as to admit of no possible dispute; but it is equally clear that the requirement of the performance of that service by the lessee at his own exclusive expense is as far as the provision goes, either expressly, or upon any reasonable construction. It is obvious that it throws absolutely no light upon the question whether the expense necessarily required to thresh the crops and bale the hay was to be wholly paid by the lessee, or equally paid by both the lessor and the lessee, and this is true whether the provision is viewed alone or by itself, or in comparison with the preceding paragraph of the lease. In a word, it is very clear that the covenant was intended to provide for the delivery into the possession of the lessor by the lessee the former's share of the crop after the division thereof had been effected, at the sole expense of the lessee, and, as stated, does not reflect any light upon the question whether the expense incident to the work of preparing the crop for such delivery should be borne solely by the lessee or in equal shares by both the parties to the lease. Thus, if there is to be extracted from the language of the lease itself an agreement or an intention in the parties, that the whole of the expense of threshing and baling should be borne by the lessee, we are driven to a determination of that proposition from the language of the preceding paragraph of the instrument, and, as before declared, we cannot reasonably so construe said language as to bring about that result. The controlling language of said provision, in this connection, is that the lessee "will deliver over and pay to the said lessor" his share of the crop, "in stack and sack, according to the usual course and custom of making such divisions in the neighborhood," etc. It is first to be noted that the word "bale" is not used in said provision, nor, for that matter, is there any express or direct provision anywhere in the lease requiring the crops to be "baled." Nor is there in the lease any express reference to the threshing of the crops. These circumstances we mention, however, not that we feel justified in holding that the threshing of the crops and the baling of such crops as are required thus to be preserved to be properly handled for commercial purposes are not required of the defendant under a fair and reasonable construction of the lease considered in its entirety, but particularly because the absence of the word "bale" from that particular provision, and the use of the word "stack" therein (the word "stack," as applied to farm crops, being commonly understood to refer to those crops which also may be "baled") would seem to limit the obligation of the lessee, in the matter of delivering to the lessor his one-half share of the crops, to the delivery thereof in "stack" and "sack." In other words, for the reason suggested, it would appear from the face of the provision in question that, when the lessee should "deliver and pay over" to the lessor in "stack" and "sack" his share of all the crops produced on the premises, the former's duty to the lessor under the lease had been fully performed. But, even if the covenant in question were reasonably amenable to the construction that those crops susceptible to baling were to be delivered to plaintiff baled, still we find nothing in the language of said covenant from which it can be inferred that the expense of baling was to be entirely met by the defendant. If the contention is that the words, "according to the usual course

and custom of making such divisions in the neighborhood," were understood and intended by the parties to mean, and were inserted in the lease to express such intention, that certain of the crops were to be delivered to the plaintiff baled, and that the defendant was to pay the whole of the cost of baling, as well as the cost of threshing, then, so far as the face of the instrument is concerned, the intention of the parties in that particular is still enveloped in obscurity, for nowhere does the lease, by its express language, enlighten us upon the nature and scope of the "usual course and custom in the neighborhood" where the premises are situated in the matter of the division of crops between the lessor and lessee of farming lands.

Thus we have considered the lease for the purpose of showing that, upon or from its face, it cannot be determined whether the agreement was that the lessee was to bear the whole of the cost of threshing and baling the crops. And the result of this conclusion is that, since the lease itself does not expressly provide how or by whom the expense for threshing and baling shall be borne, and is indefinite and uncertain as to that proposition, it was requisite, to ascertain whether it was the intention and understanding of the parties, that the lessee should bear the whole of the expense of threshing and baling the crops produced upon the demised premises, or that such expense should be borne in equal shares by both, either to prove what was the "usual course and custom of the neighborhood," if such course or custom would throw any light upon such intention, or to take testimony of the oral contemporaneous negotiations eventuating in the written lease, assuming that such negotiations would disclose such intention.

As shown, the plaintiff asked for a reformation of the lease in the respect in which we are now considering it and the defendant pleaded the custom of the neighborhood as to the division of crops, and alleged that it was the custom in the neighborhood in which the leased premises are situated for the lessor and lessee of farm lands, where the compensation of the lessor for the use of the land was to be one-half of the crops produced on the premises demised, to bear the expenses incidental to the threshing and the baling of the crops equally. Thus the plaintiff opened up inquiry into the oral negotiations immediately leading to the execution of the lease and the defendant likewise made the nature and scope of the alleged custom an issue. The burden of proving such custom was therefore upon the defendant.

The plaintiff introduced testimony to the effect that the express understanding was, before the written lease was drafted and subscribed by the parties, that the defendant was to pay the whole of the cost of threshing and baling, and that it was understood that a provision or covenant to that effect should be inserted in the written lease; that, through inadvertence or oversight, the plaintiff, at whose instance the lease was drawn by Mr. Hopkins, her attorney, neglected or failed to call the attention of her attorney to that particular part of the agreement, and that it was because of such inadvertence or neglect on her part that said provision was pretermitted from or not inserted in the lease.

[2-4] The defendant failed to sustain his claim, as set out in his cross-complaint, that it was the custom in the neighborhood in which the demised land is situated for the lessor and lessee in such a case as this to bear equally the cost of threshing and baling the crops. One witness testified that, while it was true that he himself had leased to a tenant land situated in the neighborhood in which the land in question is situated upon an agreement, among others, that the cost of threshing and baling the crops should be borne in equal shares between them, he was unable to say that such a custom prevailed or existed in said neighborhood. Other witnesses called by the defendant could not say that such a custom existed, or had ever existed, in said neighborhood. But the defendant himself, replying to the testimony presented by plaintiff as to the parol contemporaneous agreement as to the expense of threshing and baling, testified that it was explicitly agreed and distinctly understood between him and the plaintiff that each should bear an equal share of the cost of threshing and baling the crops. This testimony was, of course, competent under the issue joined upon the allegations of the complaint looking to a reformation of the lease, and, having been accepted by the court as disclosing the truth of the matter to which it related, was sufficient to warrant the finding that "the said lease, as signed and executed by the said plaintiff and defendant on the said 22d day of December, 1916, recited fully, in detail, all the terms and conditions as agreed upon by and between said parties," and the further finding that plaintiff was indebted to defendant for paying his (plaintiff's) share of the cost of threshing and baling the crops during the years 1917 and 1918. And that these findings support the judgment, notwithstanding that there is no direct finding that the agreement was that the lessor and the lessee were each to pay one-half of the expense of threshing and baling, there can be no doubt. Said findings necessarily include or, at least, imply the finding of such an agreement. The rule is that the findings must be so construed as to support the judgment, if reasonably it can be done, and upon such construction of the findings here as a whole, it is manifest that, as stated, the judgment is sufficiently supported.

[5] We think, however, that the court erred by its refusal to award plaintiff his costs. The action on the part of plaintiff was not only for a decree reforming the lease, but also for a money judgment against defendant, for money due the former as his share of the proceeds of the sale by defendant of certain crops produced on the premises in question. While the defendant did not deny in his answer that he was indebted to plaintiff in some amount, but, on the contrary, admitted that certain products of the farm had been sold by him, and that the proceeds of such sale were in his possession in the form of a draft, he did not offer to pay to or deposit in court for plaintiff the amount due the latter, even upon the basis of the counterclaim he set up against the plaintiff. The judgment for plaintiff was for the sum of $533.85, and such judgment carried costs as a matter "of course," which means, as a matter of right. Code Civ. Proc. § 1022, subd. 3; Stoddard v. Treadwell et al., 29 Cal. 281; Schmidt v. Klotz, 130 Cal. 223, 62 Pac. 470; Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569; F. A. Hihn Co. v. City of Santa Cruz, 24 Cal. App. 365, 141 Pac. 391; Peake v. Harris, 192 Pac. 311, 317.

The judgment, in so far as it denies to plaintiff his costs, is reversed, with directions to the court below to allow plaintiff his costs. In all other respects, the judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

185 Cal. 648

In re GARTENLAUB'S ESTATE.

GARTENLAUB v. UNION TRUST CO. OF SAN FRANCISCO et al.

(S. F. 9326.)

(Supreme Court of California. May 12, 1921. Rehearing and Petition for Modification of Judgment Denied June 9, 1921.)

1. Trusts ⟸274(4)—Premiums paid on bonds to be charged against income by trustee.

A premium paid for securities purchased by a trustee under a will should be charged against the income of the estate, and the principal must be maintained intact from loss, in the absence of a clear direction in the will to the contrary.

2. Trusts ⟸217(4), 218(1)—Trustee not permitted to buy and sell bonds on speculation; fluctuations in prices of bonds purchased by trustee disregarded.

A trustee is not permitted to buy and sell bonds on speculation and the fluctuations in market value after purchase by the trustee are merely changes in the value of the assets of the trust estate, which are to be wholly disregarded in any accounting between life tenant and remaindermen for funds from the trust estate invested in income-bearing property.

3. Trusts ⟸274(4)—Deduction from interest of premiums paid by trustee not violation of statute.

Where testamentary trustee purchased bonds at a premium, deduction from interest of the amount paid as premium is not a violation of Civ. Code, §§ 723, 724, prohibiting accumulations of income except during minority.

4. Wills ⟸684(5)—Principal of trust not to bear loss occasioned by wearing away of premium paid for bonds.

A bequest of three-fourths of the "entire net income" *held* not to contemplate that the principal of the trust estate should bear the loss occasioned by the wearing away of premium paid by the trustee in purchase of bonds.

5. Trusts ⟸227—Trustee held entitled to reimbursement for attorney's fees.

Where litigation arose upon the settling of a trustee's accounts and concerned the interpretation of the instrument creating the trust and a determination of the proper mode of executing the trust, the trustee was therefore directly interested in its representative capacity, and had authority to employ a legal representative in the interests of the trust estate, and was entitled to reimbursement for attorney's fees at the hearing and upon appeal, although the appeal arose out of conflicting claims of beneficiaries, and it was immaterial that the attorney first supported one beneficiary's claims and later altered his position.

6. Trusts ⟸274(3)—Extraordinary expenses of trust taken from principal and ordinary from income.

Where litigation becomes necessary to remove a doubt or ambiguity so as to insure the correct administration of the trust, the expense is an extraordinary charge, which, unless otherwise provided by the testator, should be borne by all parties, and if the expense of litigation incident to the trust is paid from principal, the life tenant as well as the remaindermen shares the burden, for in that event the life tenant is deprived of the interest on the sum taken from principal; but expenses in regard to matters concerning the ordinary management of the trust, such as the preparation of annual accounts, are usually payable from income.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

In the matter of the Estate of Abraham Gartenlaub, otherwise known as A. Gartenlaub, deceased. From an order setting forth annual account of the Union Trust Company of San Francisco, as testamentary trustee, Alice G. B. Gartenlaub appeals. Modified and affirmed.

See, also, 197 Pac. 90.

Garret W. McEnerney, of San Francisco, for appellant.

Norman A. Eisner, Heller, Powers & Ehrman, and Samuel S. Stevens, all of San Francisco, for respondents.

LENNON, J. Objections interposed to the settling of an annual account of a testamentary trustee form the basis of the present appeal. The decedent, Abraham Gartenlaub, who died June 1, 1914, devised and bequeathed the greater part of his estate in trust to the Union Trust Company of San Francisco, and empowered the trustee to convert into money the estate thus received and invest the same in certain described bonds. By the terms of the will the trustee was directed to pay to Alice G. B. Gartenlaub, the wife of the testator, monthly, during her lifetime, three-fourths of the "entire net income, revenue, and profit of every kind arising from said estate in said month in any way whatever." The said Alice Gartenlaub appeals from an order of the superior court of San Francisco settling the fourth annual account of the trustee. Sarah Fox, who is the sister of the testator and the life tenant in respect to the remaining one-fourth of the "net income, revenue, and profit," her two children, Harry and Gussie Fox, who are the remaindermen under the trust, and the trustee are the respondents. Appellant contends that, in the account attacked, the trustee has erroneously deducted certain sums from "income" and credited them to "principal."

Pursuant to the provisions of the will, the trustee has invested funds of the trust estate in certain bonds which it purchased at a premium. Obviously the amount of the premium cannot be collected from the obligor when the bonds mature, for the latter is liable only for the face value thereof. Conse-

quently, if the bonds are retained by the trustee until maturity, the principal of the trust estate will be depleted by an amount equal to the premium paid. For the purpose of preventing a shrinkage of the principal in this manner, the trustee has, on each coupon date, deducted a portion of the interest collected on the bonds and credited the same to principal. It is calculated that at maturity the sum of the amounts thus taken from interest and credited to principal will equal the premium originally paid for the bonds. This deduction from interest is assigned by appellant as an unwarranted diminution of the income of the life tenant.

Whether a premium paid for securities purchased by a trustee for a trust estate should be charged against the principal or the income of the estate has never been decided in California, and upon this question we find the decisions in the other states in sharp conflict. Whatever view may be accepted, it is clear that some definite rule of action must be prescribed by this court and departures therefrom permitted only where the creator of the trust has given a clear and unmistakable direction to the contrary of that rule. The determination of the course to be pursued by trustees in such cases cannot be made wholly dependent upon the peculiar circumstances of each case as it arises, as has been attempted in some states. McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; Hemenway v. Hemenway, 134 Mass. 446, 452; Shaw v. Cordis, 143 Mass. 443, 9 N. E. 794. Such attempt has proven unsatisfactory in these states, for the reason that in the majority of cases the creator of the trust fails to make specific provision for the contingency in question, and therefore, if the duty of the trustee in this particular be governed entirely by the intention to be ascertained from the instrument creating the trust or the circumstances surrounding the execution of that instrument, "no trustee will know how to safely act, and a question constantly arising in the administration of estates will be involved in great confusion and be the cause of great litigation." In re Stevens, 187 N. Y. 471, 80 N. E. 358, 12 L. R. A. (N. S.) 814, 10 Ann. Cas. 511; New England Trust Co. v. Eaton, 140 Mass. 532, 4 N. E. 69, 54 Am. Rep. 493.

[1] The decisions which hold that a premium must be charged wholly to the principal of the trust estate, which is the rule contended for by appellant, are based largely upon the reason that a premium is paid to secure safety of investment, as well as high interest, and that therefore the premium is for the benefit of the remainderman as well as the life tenant. There is also the argument that there is a possibility that the bonds may be sold before maturity and, owing to fluctuations in market value, may, when thus disposed of, bring more than the sum for which they were purchased, so that these matters are likely to balance themselves in time. Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; In re Penn-Gaskell's Estate, 208 Pa. 346, 57 Atl. 715. The weight of authority, however, and, we believe, the better view, is the rule finally adopted in New York in the case of In re Stevens, supra, to the effect that—

"In the absence of a clear direction in the will to the contrary, where investments are made by the trustee, the principal must be maintained intact from loss by payment of premium on securities having only a definite term to run."

This rule has been consistently followed in New York (Dexter v. Watson, 54 Misc. Rep. 484, 106 N. Y. Supp. 80; Furniss v. Cruikshank, 191 App. Div. 450, 181 N. Y. Supp. 522, 528), and has been adopted in New Jersey, Connecticut, and Wisconsin (Ballantine v. Young, 74 N. J. Eq. 572, 70 Atl. 668; Curtis v. Osborn, 79 Conn. 555, 65 Atl. 968; In re Wells, 156 Wis. 294, 144 N. W. 174). See note, 4 A. L. R. 1249.

A testator who creates a trust such as that in the instant case has two objects in view: First, the payment of the income arising from a fund to certain persons during lifetime; second, the transfer of that fund to certain individuals upon the death of the life tenants. The existence of a corpus, principal, or fund is an essential element of the trust, and the preservation of this principal until the termination of the life estates is indispensable to the fulfillment of the testator's plans. Therefore, any depletion of the principal tends to frustrate the fundamental purpose of the trust and should be avoided, and, where the price paid for a bond consists of more than the par value thereof, that method of accounting should be adopted which will prevent the impairment of the principal unless the testator has clearly directed to the contrary. Otherwise the life tenant who is entitled to receive only income, will, in effect, have received a part of the principal. In other words, where a premium is paid, the ostensible interest yielded by the bond cannot be considered entirely as interest on the face value of the bond, for a sum in excess of the face value has gone into the investment, and the amount of interest remains unchanged, resulting, necessarily, in a decreased rate of return. A portion of the nominal interest is therefore a repayment of the premium.

[2] This duty to restore to principal the total amount invested in the bonds cannot be evaded upon the theory that the bonds may, as a result of fluctuations in market value, be sold at higher prices than those for which they were purchased. A trustee is not permitted to buy and sell on speculation. The fluctuations in market value after purchase

by the trustee are merely changes in the value of the assets of the trust estate, which are to be wholly disregarded in any accounting between life tenant and remainderman for funds from the trust estate invested in income-bearing property. In re Stevens, supra.

[3] The deduction from interest of the amount paid as premium is not a violation of sections 723 and 724 of the Civil Code, prohibiting accumulations of income except during minority and for the benefit of the minor. The entire net income from the bonds is distributed, for, as previously stated, a portion of the interest on the bonds is in reality return of a part of the principal invested therein to the corpus of the trust estate, in the same sense that sums of money are returned to principal when a loan is repaid in installments. The trustee is not withholding any part of the income for the purpose of investing it as new capital. Estate of Steele, 124 Cal. 533, 541, 57 Pac. 564.

[4] In the present case the testator has given no direction that the principal of the trust estate should bear the loss occasioned by the wearing away of premium. The bequest to appellant of three-fourths of the "entire net income" cannot be interpreted as such a direction, in view of the fact that part of the interest on the bonds is not, strictly speaking, income, but a return of capital. It is pointed out that the testator provided that no investments of trust funds should be made in bonds of the United States, "for the reason that said bonds yield too low a rate of interest." At the time of the hearing, United States Liberty bonds were yielding a higher rate of interest than many of the bonds of the trust estate after the deduction from their interest return of a proportionate part of the premium. This, it is urged by appellant, shows that no deduction should be made from the interest on the bonds of the trust estate, since the return to the life tenant would thereby be made lower than intended by the testator. This inference cannot be drawn from the provision in question, for any inference deduced from the provision in regard to United States bonds must be based upon the facts existing at the time the testator made the provision. At the time the will was executed and that the testator died, the year 1914, the interest on United States bonds was far lower than the lowest yield of any bonds of the trust estate after deductions on account of premium. The will contains the following provision:

"If at the end of any one year it shall appear that my said wife has not received an average of at least the sum of seven hundred and fifty ($750) dollars for each month of said year, * * * *then and in that event* said trustee shall resort to the personal property of the *corpus* of said trust estate, and thereout shall take sufficient to make up and pay over to my said wife a sum sufficient to make the aggregate receipts of my said wife the equivalent of seven hundred and fifty ($750) dollars for each month of said year." (Italics ours.)

Appellant's income from the estate has not fallen below the sum of $750 per month, but has far exceeded that minimum, and, consequently, the only contingency upon which the testator has authorized payments to the life tenant from the corpus of the trust estate has not arisen. The testator has not only not directed the charging of premium to principal, but has clearly indicated that the corpus is not to be resorted to unless the income falls below the specified minimum.

[5] The order appealed from made an allowance to the trustee of $500 as compensation to its attorney for legal services rendered by the latter upon a former appeal to the Supreme Court from an order settling the second annual account of the trusteee (Estate of Gartenlaub, 197 Pac. 90), and $250 for services rendered upon the hearing of the fourth annual account of the said trustee. It is contended that these matters constituted litigation between the life tenant and remaindermen which was not hostile to the trust itself and in which the participation of the trustee was gratuitous and uncalled for, and therefore that the trustee is not entitled to an allowance for attorney's fees. It is a general rule that trustees are entitled to reimbursement for expense incurred in good faith in the execution of the trust. Denvir v. Park, 169 Mo. App. 335, 152 S. W. 604. While the participation of a trustee in litigation between rival claimants not involving the execution of the trust would seem unwarranted, the present case does not present such a state of facts. The litigation arose upon the settling of the trustee's accounts, and concerned the interpretation of the instrument creating the trust and a determination of the proper mode of executing the trust. The trustee was therefore directly interested in its representative capacity, and was not without authority to employ a legal representative in the interests of the trust estate.

"The rule which has been applied in a great variety of cases affecting the administration and execution of trusts is that a trustee has a right, whenever necessary to the proper administration, preservation, and execution of the trust and the prosecution or defense of action, to employ counsel and to be reimbursed from the trust estate for whatever sums he has paid for the services of such counsel. The rule is applicable even though the cestui que trust employed counsel to represent the same interests, and although, to a certain extent, the private and personal interests of the trustee may also be involved in the litigation." 39 Cyc. 339.

It is immaterial that counsel for the trustee supported appellant's claim upon the hearing of the fourth account and later altered his position, maintaining on this appeal that the items representing a portion of the premium on bonds were correctly charged

against income. The duty of the trustee and its counsel was to aid the court in deciding upon a correct administration of the trust funds, without regard to the conflicting claims of beneficiaries. If, upon the appeal, the order of the court below appeared to the trustee correct, it was the duty of the trustee to support that order.

[6] The $500 thus allowed the trustee for attorney's services rendered in the litigation, as well as an additional allowance for so-called "ordinary" services of attorneys in connection with the preparation and presentation of the annual account of the trustee, were ordered paid from the income of the trust estate. The reasonableness of the sums allowed is not questioned, but it is claimed that they should have been charged to principal rather than income. The decision of Cogswell v. Weston, 228 Mass. 219, 117 N. E. 37, lays down the following rule for the payment of the expenses incurred in the execution of a trust:

"The regular annual or periodically recurring expenses arising in the administration of a productive trust commonly are paid out of the income, while extraordinary and unusual expenses are chargeable against the capital. The costs of litigation generally fall in the latter class. These rules apply in cases where the question concerns life tenants and remaindermen, both guiltless of any wrong against the trust and where the point of incidence of proper expenses must be determined as between innocent persons."

The following cases hold that costs of litigation in connection with the execution of a trust are payable from the principal of the trust: In re Osborne, 209 N. Y. 450, 103 N. E. 723, 731, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298; In re Schaefer, 222 N. Y. 533, 118 N. E. 1076, affirmed 178 App. Div. 117, 165 N. Y. Supp. 19, 23. Where litigation becomes necessary to remove a doubt or ambiguity so as to insure the correct administration of the trust, the expense is an extraordinary charge, which, unless otherwise provided by the testator, should be borne by all parties. If the expense of litigation incident to the trust is paid from principal, the life tenant, as well as the remainderman, shares the burden, for in that event the life tenant is deprived of the interest on the sum taken from principal. However, expenses in regard to matters concerning the ordinary management of the trust, such as the preparation of annual accounts, are usually payable from income. Howe's Income and Principal, p. 67. That these ordinary expenses are to be paid from income in this case, at least, is clear from the fact that the will provided that the life tenants should have only the "net" income, thus indicating that all current expenses are to be deducted from income.

The order appealed from must be modified in accordance with the rule set forth in the immediately preceding paragraph; that is to say, the income must be credited and principal charged with the amount allowed to the trustee as compensation for its attorney for "extraordinary" services in connection with the execution of the trust. The trial court is directed to so modify the order, and when so modified the order will stand affirmed, without costs to either party upon this appeal.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.

185 Cal. 464

FRASER'S MILLION DOLLAR PIER CO. v. OCEAN PARK PIER CO. (L. A. 6023.)

(Supreme Court of California. April 30, 1921.)

In Bank.

Supplemental opinion.

For former opinion, see 197 Pac. 328.

Milton K. Young, Davis, Kemp & Post, and Kemp & Clewett, all of Los Angeles, for appellant.

Goudge, Robinson & Hughes, of Los Angeles, for respondent.

PER CURIAM. The discussion in the opinion concerning the common-law rule on the subject of the direction of the extension of boundary lines into streams, lakes, or ponds, when the lands of different persons abut thereon and the rights of the landowners in or upon the water is involved, is wholly based upon the facts shown in the record on appeal. It was not intended to be a decision construing the terms of the Santa Monica charter on the subject. The charter in connection with the sections of the Political Code (sections 3901–3959) defining county boundaries, to which the charter refers, leaves it somewhat difficult to determine whether the boundaries do or do not extend into the ocean. We withhold any expression of opinion on that subject. The judgment of the superior court on the point involving this question is sustained on the other ground mentioned.

All concur.

52 Cal. App. 118

PEOPLE v. COFFEE et al. (Cr. 548.)

(District Court of Appeal, Third District, California. March 28, 1921. Rehearing Denied April 23, 1921. Hearing Denied by Supreme Court May 26, 1921.)

Burglary ⊂=4—Chicken house held a "house" under burglary statute.

Under Pen. Code. § 459, defining burglary, a chicken house, used for housing chickens, is a "house" within the statute; and it was immaterial that it may have been attached to skids so that it could be moved.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, House.]

Appeal from Superior Court, Stanislaus County: J. C. Needham, Judge.

John Coffee and another were convicted of burglary, and appeal from the judgment, and from an order denying their motion for new trial. Judgment and order affirmed.

L. J. Maddux, of Modesto, for appellants.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The charging part of the information against the defendants was as follows:

"That said John Coffee and J. R. Hopkins on or about the 8th day of July, A. D. 1920, at and in said county of Stanislaus, state of California, prior to the filing of this information, did then and there willfully, unlawfully, feloniously, and burglariously enter the chicken house of one T. B. Michael, and upon the premises of the said Michael, located one half mile south of Hughson, on what is known as the Tully boulevard, in the county of Stanislaus, state of California, with the felonious intent then and there to commit the crime of larceny."

Section 459 of the Penal Code defines burglary as follows:

"Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary."

One of the contentions of appellants is that the information does not charge the offense of burglary, inasmuch as it appears therein that the house was for the use of chickens, instead of human beings, the objection growing out of the common-law conception of burglary. At common law, as is well known, only the habitation of human beings could be the subject of the burglarious breaking and entry. It may be added that certain decisions of the courts in interpreting the meaning of the statutory definition of the offense have been greatly influenced by a consideration of what the crime meant at common law. People v. Richards, 108 N. Y. 137, 15 N. E. 371, 2 Am. St. Rep. 373.

But in this state the courts have clearly distinguished between the common-law and the statutory definition, and have pointed out that the latter is much more comprehensive than the former. People v. Stickman, 34 Cal. 242; People v. Barry, 94 Cal. 481, 29 Pac. 1026.

In the latter case it was said:

"It will thus be seen that common-law burglary and the statutory burglary of this state have but few elements in common, and consequently English cases give us but little light upon the question under examination."

The Stickman Case, supra, holds that burglary may be committed by the entry of a chicken house, and the decision is directly opposed to the contention of appellants herein. There it is said:

"While the language of the statute might have been made more definite and certain by employing words in common use, it could not well be made more comprehensive, and we think that the absence of more particular terms of description indicates an intention on the part of the Legislature to include every kind of buildings or structures 'housed in,' or roofed, regardless of the fact whether they are at the time, or ever have been, inhabited by members of the human family. A house, in the sense of the statute, is any structure which has walls on all sides, and is covered by a roof."

Accordingly, the Supreme Court held that it was not error for the trial court in that case to refuse to give the following instruction:

"The breaking and entering, to constitute a burglary, must be into a house, room, apartment, or tenement, or a tent, vessel, or water craft, usually used, or at any time used, as a sleeping place or residence for human beings, or wherein some person dwells, or persons dwell and lie in. If the jury find from the evidence that the chicken house which the defendant is charged with having feloniously entered was at any time used as a sleeping place or residence for human beings, or wherein some persons dwell, or persons dwell and lie in, and they also find that defendant feloniously entered with intent to commit grand or petit larceny, or any felony, they will find the defendant guilty as charged in the indictment. If they do not so find from the evidence, they will acquit the defendant."

Other cases from various jurisdictions are in harmony with the foregoing. In Williams v. State, 105 Ga. 814, 32 S. E. 129, 70 Am. St. Rep. 82, the defendant was charged with entering a chicken house and stealing therefrom certain pigeons. The prosecutor testified that—

"He had a large number of pigeons in a coop, from which a number were stolen. In describing the coop he testified that it was a chicken house; that the house was made of

wire, and was about eight feet tall, two stories, covered with shingles; that while he called it a coop, it was really a chicken house; that it was nailed to the fence; it could not be moved about; that the posts that held it were not in the ground, but that the structure was stationary."

The Supreme Court held that the structure was a building within the meaning of the section of the Penal Code defining burglary. It is true that said structure was nailed to the fence, but it is difficult to see how it could have been any the less a house or building if it had been on "skids," and therefore movable with less difficulty.

In Gillock v. People, 171 Ill. 307, 49 N. E. 712, it was also held that a "chicken house" was a building that could be burglariously entered, the court saying:

"The purpose of the Legislature in passing the foregoing section of our statute was to radically change the common law as to the crime of burglary, and make those who burglariously enter other buildings than a mansion or dwelling house guilty of that crime."

In Favro v. State, 39 Tex. Cr. R. 452, 46 S. W. 932, 73 Am. St. Rep. 950, it was held that "a tent or structure made by placing two forked mesquite poles, about seven feet high, into the ground, with a ridge pole thereon, and stretching over this a wagon sheet, the ends of which are brought down to the ground and nailed on each side to planks nailed to stakes in the ground, the east end of the structure being boxed up with boards, with a door and some boxes, with the wagon sheet tied over them, close up to the west end," was a "building" within the contemplation of the Penal Code.

Other decisions are collated in Words and Phrases (1st Ed.) under the term "House," vol. 4, p. 3351, most of which are in line with the foregoing. Those apparently in favor of the contention of appellants represent somewhat different facts from what are found herein, and they require no specific notice.

At any rate, the law in this state was correctly set forth in the following instruction of the trial court:

"This jury is instructed that, if you believe from the evidence, beyond a reasonable doubt and to a moral certainty in this case, that the building described in the information was an inclosed building, about 6 feet long and 5 feet wide, with a height of 6 feet on one side and 4 feet on the other, covered with a roof, and that the building was constructed with doors to be used in entering the building, and was used by the complaining witness as a building within which to keep his chickens, then I instruct you that that chicken house would constitute a building as contemplated by our statute defining burglary, to wit: Section 459 of the Penal Code, even though said chicken house may not have had any floor, and may have been attached to skids so that the same could be moved, if you should so find."

To this instruction, in addition to the contention that such a structure does not constitute a house or building within the meaning of said section, appellants make the further objection that it is obnoxious to the constitutional provision forbidding judges from charging juries as to questions of fact. In this appellants are in error. The instruction did not assume the existence of any of the component elements of the structure, but it declared what the legal conclusion must be if certain facts were shown by the testimony. It is true that there is no conflict in the evidence as to the size and character of said building and, therefore it would have been without prejudice if the court had declared what they were. But what the court really did was to define or explain one of the important terms used in the definition of burglary, as it was necessary to have it explained in order that the jury might apply it to the evidence in the case. It was no more an invasion of the province of the jury than for the court to tell them, that if they believed a burglary was committed between sunset and sunrise it was burglary of the first degree. The only difference is that what constitutes burglary in the first degree is defined in the statute, whereas the definition of the term building, or house, must be sought in the dictionary and decisions of the courts. The instruction, it may be added, contained a proper conception of the term, according to said authorities. Undoubtedly, the court might have defined the term in the abstract, might have stated, for instance, in the language of the Supreme Court that "a house, in the sense of the statute, is any structure which has walls on all sides and is covered by a roof," but the concrete form adopted by the court was more easily understood and applied. The jury might well have complained if the court had failed to state the meaning of the term as fixed by the authorities in reference to those elements of the structure that were established by the evidence. As laymen, they would be supposed to understand the meaning of the term "house" as used in common parlance, but they needed the assistance of the court to understand the word as a part of the legal terminology of the case.

In view of the fact, as before stated, that the evidence as to the building was without conflict, it would not have been prejudicially erroneous for the court to instruct the jury that said structure was a house, as contemplated by said section of the Penal Code. Willis v. State, 33 Tex. Cr. R. 168, 25 S. W. 1119.

From the foregoing it follows that the trial court committed no error in refusing certain instructions proposed by defendants, which were similar to one another, of which the following is an example:

"You are further instructed that if the alleged chicken house was portable, and made

for the express purpose of being carried from place to place for the purpose of holding chickens, and was constructed on skids, and was not used or intended to be used for any purpose connected with habitation, or other purpose for which houses are ordinarily used, then you cannot convict the defendants of burglary."

The other refused instructions proposed by defendants, as far as correct in principle, were fully covered by the charge of the court.

There is no merit in the contention that the evidence is insufficient to support the verdict. It is a fair inference from the showing made that the owner of the premises, being aroused by the barking of a dog between 12 and 1 o'clock at night, went from his residence to the chicken house, a distance of some 300 feet and he found the defendants a short distance therefrom, having in their possession certain chickens which were accustomed to roost in said structure. There was evidence also that certain human tracks were found in the chicken house which corresponded with the tracks made by the defendants where they were apprehended by said owner. Indeed, without further specification of the evidence, we may say that there can be no reasonable doubt that the charge was fully sustained.

We find no error in the record, and as the defendants seem to have been fairly tried and justly convicted, the judgment and order are affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

On Petition for Rehearing.

PER CURIAM. Appellants in their petition for rehearing contend that this court misunderstood their position in stating that—

"One of the contentions of appellants is that the information does not charge the offense of burglary, inasmuch as it appears that the house was for the use of chickens instead of human beings, the objection growing out of the common-law conception of burglary."

They state in their petition that—

"What the appellants intended to convey was that there is no such term used in the statute defining burglary as chicken house, and that in arriving at the question whether or not the structure designated as chicken house came within the terms defining burglary, that it either had to come under the term 'house' or 'other building.' The question of whether or not it was inhabited or occupied by human beings is not raised by appellants."

We willingly accord to appellants the benefit of this explanation of their position, but we are satisfied that it can make no difference in the result of the appeal. The term "house" is used in the statute, and the addition of the qualifying expression "chicken" does not detract from the force of the information in stating the offense of burglary. Whether it was a "house" in contemplation of the statute was a matter of proof to be presented at the trial. We are still entirely satisfied that such proof met the conditions of the statutory requirement, and we think no satisfactory reason has been shown why the cause should be reheard.

The petition is therefore denied.

52 Cal. App. 177

In re PINNELL'S GUARDIANSHIP.
(Civ. 3762.)

(District Court of Appeal, First District, Division 1. California. April 5, 1921.)

1. Parent and child ⟸2(3)—Court may award custody to either parent under such regulations and conditions as it may require.

In awarding the custody of a minor, the court is to be guided by its consideration of the child's best interests as to temporal, mental, and moral welfare, and, as between parents, neither is entitled to custody as of right, and, other things being equal, the child, being of tender years, should be given to the mother (Civ. Code, § 246); and, where father and mother are separated without being divorced, the court may grant the custody to either for such time and under such regulations as the case may require, under section 214.

2. Parent and child ⟸2(4) — Decree, after hearing and observing witnesses, that mother is qualified to care for minor daughter upheld.

Where a father and mother were not divorced and the father sought the custody of a minor daughter, and the trial court heard all the testimony and saw and observed the witnesses, its mandate, giving the custody to the mother, should be followed.

3. Parent and child ⟸2(4)—Decree as to custody that both parents give bond that minor remain in jurisdiction held proper.

Where, on the father's application, custody of a child was awarded to the mother, with provision that the father could visit it, the direction that both should give a bond, conditioned that the minor should not be removed from the jurisdiction of the court, is a reasonable regulation, authorized by Civ. Code, § 214.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

In the matter of the guardianship of the person and estate of Mildred Bernice Pinnell, a minor, wherein John H. Pinnell, her father, applied for guardianship, which was opposed by Erma M. Pinnell, his wife, mother of said minor, and from an order granting custody to the child's mother, giving the father permission to visit his daughter at reasonable times, and placing both under bond not to take the minor out of the county, the petitioner appeals. Order affirmed.

See, also, 193 Pac. 574.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

A. M. Drew, of Fresno, for appellant.
Henry Hawson, of Fresno, for respondent.

WASTE, P. J. John H. Pinnell, the petitioner and appellant in this matter, sought to be appointed guardian of the person and estate of Mildred Bernice Pinnell, the three year old daughter of himself and Erma M. Pinnell, his wife. At the time the application was made the minor was in the care of the mother, who, the petitioner alleged, was an unfit and improper person to have the custody of the child. These accusations were denied by the mother. The trial court found that the petitioner and respondent are husband and wife, living in a state of separation, but not divorced. It determined that both parents are fit and proper persons to have the care and custody of the minor, and that neither has any right superior to the other in that regard while they continue to live separate and apart. It determined that it would be for the best interests of the minor that she be placed, and remain, in the custody of the mother. It made an order to that effect, and directed Mrs. Pinnell to file an undertaking in the sum of $2,000 conditioned that she would not take, or permit the child to be taken, from the county of Fresno. The father was granted permission to visit his daughter at all reasonable times, and to have her in his exclusive custody during suitable hours of the day not to exceed two days in each week, provided that he should file an undertaking in the sum of $1,000, payable to Mrs. Pinnell, conditioned that he could not take, nor permit the child to be taken, from the county of Fresno. From this order the petitioner has appealed.

The appellant specifies several errors as grounds for this appeal, none of which we find of sufficient merit to warrant a reversal of the judgment of the lower court.

It appears from the record that petitioner and respondent married in Fresno in 1916. The child was born in December of that year. Two years later the parties went to reside in the state of Washington, the petitioner later going to Wyoming, where he was employed in the oil fields, and where the mother and child joined him. The father's employment took him away from home for long periods. In the latter part of 1919, while petitioner was absent at his work, the respondent with the little girl, in company with a woman friend and her three children, removed from her home in Glenrock to a cabin some 35 miles in the country. Here the petitioner found her some time later, living, he claims, in improper relations with one Safford. The child, at the time, according to the petitioner's testimony, was in an unkempt and neglected condition. Petitioner was accompanied by a deputy sheriff, who had a warrant for Safford's arrest, charging him with adultery committed with Mrs. Pinnell. There was introduced upon the hearing in the court below the record of a judgment of conviction of Safford in the justice court of Converse county, Wyo., from which it appears that Safford pleaded guilty to the charge and was fined and sentenced to a term in the county jail.

Petitioner took the little girl, and at the request of Mrs. Pinnell, she was allowed to accompany him back to their home. The parties then appear to have separated, the father taking the child to the home of his parents in the state of Washington. Some time later Mrs. Pinnell went to Washington, and in the absence of her husband filed a petition in the superior court of Pacific county for a writ of habeas corpus, alleging that her husband had failed for more than a year to support either herself or their child. The little girl was placed by the court temporarily in the custody of the probation officer, but, pending final determination of the habeas corpus proceedings in the Supreme Court of Washington, the mother obtained possession of her and brought her back to Fresno county in this state. The father followed, and initiated this guardianship proceeding. In addition to the foregoing testimony, a number of witnesses testified as to the general reputation of Mrs. Pinnell for morality and chastity while she resided in Wyoming, stating it was bad. Another witness testified that Mrs. Pinnell and Safford behaved in an improper manner.

Mrs. Pinnell appears to have made no effort to refute the testimony of the witnesses who testified to her bad character while she lived in Wyoming. She did, however, deny the specific allegation of improper conduct with Safford, and introduced testimony of a number of witnesses to the effect that since she returned to this state and resided in Fresno her behavior and her reputation are good, and counsel for petitioner in open court admitted this to be the fact.

[1] In awarding the custody of a minor the court is to be guided in its consideration by what appears to be for the best interests of the child in respect to its temporal, mental, and moral welfare. As between parents adversely claiming custody, neither is entitled to its as of right. Other things being equal, the child being of tender years, it should be given to the mother. Section 246, Civ. Code. When, as in the instant case, the husband and wife live in a state of separation without being divorced, the court has power to award the custody of the minor child of such parents to either for such time and under such regulations as the case may require. Section 214, Civ. Code. The child's welfare should be the controlling consideration in such matters. In re Campbell's Estate, 130 Cal. 382, 383, 62 Pac. 613.

[2] The marital relations of the appellant and respondent appear to have been most unhappy, jealousy and discontent, perhaps, lending color to accusations made by each

against the other in the present proceeding. In view of the broad powers vested in the chancellor in providing for the custody of children, particularly those of tender years, and of deciding such matters in the manner, in his opinion, which conduces most to the welfare of the child, we think it very rarely happens that an abuse of discretion will be found. In the instant case the trial court seems to have been patient and to have allowed the parties ample opportunity to produce all the testimony they had at hand. The petitioner, contestant, and little girl were before him. After such hearing and personal observation, he has entered a decree which on its face is in keeping with the consideration which must govern in such matters. In a case of this kind, as in others, there may well be a locus penitentia. Where the present conduct of the mother satisfies the court that the child of tender years may safely be committed to her care, the mandate of the section should be followed. In re Mash, 28 Cal. App. 692, 153 Pac. 961.

[3] The provisions in the order as to the custody of the child, and the direction of the lower court that each of the parties should give a bond conditioned that the minor should not be removed from the jurisdiction of the court, is reasonable regulation authorized by section 214, Civil Code of California. Cole v. Superior Court, 28 Cal. App. 1, 4, 151 Pac. 169.

The order is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

52 Cal. App. 110

ARMSTRONG v. SACRAMENTO VALLEY REALTY CO. et al. (Civ. 2227.)

(District Court of Appeal, Third District, California. March 28, 1921. Hearing Denied by Supreme Court May 26, 1921.)

1. Compromise and settlement ⟸20(1)—Notice in writing of additional appraiser lists held waived.

Where a compromise agreement provided that one party should be paid by the other parties a certain sum in cash and a further specified sum in lands at a certain value to be ascertained by means of an appraisement, and that each side should select 15 names of proposed appraisers, placing the names in sealed envelopes, and that, if three names were found to be common to both lists, these three should be the appraisers, and, in carrying out this provision, three names were found to be common to both lists, but one of the three appraisers refused to act, the fact that when the stakeholder went to the representative of the parties who were to make the payment, and demanded the selection of additional lists for the purpose of choosing another appraiser, such parties declined to submit them on the ground that the agreement made no provision for additional lists in such case, amounted to a waiver of a written notice.

2. Specific performance ⟸114(2)—Complaint held sufficiently to plead consideration.

In action to specifically enforce a contract of compromise, the complaint of the party to be paid under the compromise agreement sufficiently alleged an adequate consideration for the agreement where it contained a direct statement or averment that the other parties thereto did receive an adequate consideration, and in addition contained in its allegations an affirmative showing that they all received an adequate consideration, and that as to them the agreement was just.

3. Compromise and settlement ⟸6(3)—Compromise of litigation held adequate consideration.

Where one of the parties to a compromise agreement was a party to the litigation settled by such agreement, the compromise of such litigation was not only a valuable, but an adequate, consideration for her obligation; it being immaterial whether her obligation was primarily her own or was entered into in behalf of some of her co-obligors.

4. Vendor and purchaser ⟸39—Agreement of vendor to procure consent of wife to execution of conveyances does not render contract void.

A contract wherein one of the parties agrees that he will procure the consent of his wife to the execution of certain conveyances therein provided to be made is not void, although, under Civ. Code, § 3390, it might be a contract that could not be specifically enforced.

5. Vendor and purchaser ⟸8—Vendor may agree to convey lands owned at the time by another.

One may agree to convey lands which at the time of contracting are owned by another, it being presumed that the contracting party is advised that he can at the proper moment procure the title or procure the holder thereof to make or join in the proper conveyance.

6. Specific performance ⟸10(1) — Contract may be enforced in part.

That legal title was outstanding as to part of the property sued for, was not a complete defense, but plaintiff would be entitled, in any event, to specific performance as to such portion of the property as stood in the names of defendants or any of them.

7. Compromise and settlement ⟸11—Failure of contract providing for appraisal to provide for selection of another appraiser in case one already selected refused to act held immaterial.

Where a compromise agreement provided for payment in part in land to be valued by an appraisement, each side to select fifteen names of proposed appraisers, and if three names were found to be common to both lists, these three to be the appraisers, the contract was not ineffective because failing to provide a method of selecting an alternate in place of an appraiser so selected who refused to act; for,

in view of Civ. Code, §§ 1636, 1643, 1655, it would be assumed that a vacancy arising from such a refusal to act should be filled in a manner provided in the contract for filling other vacancies, namely, by resort to additional lists of fifteen names submitted by each side, such fixing of values being merely a means to an end, and not of itself a vital part of the agreement; and in such a case the refusal of one set of parties to the contract to join in the selection of a third appraiser justified the trial court, sitting as a court of equity, in itself fixing the values and affording such parties an opportunity to complete the transaction upon the values thus fixed.

8. Specific performance ⟸128(1) — Monetary relief may be granted.

Where, through no fault of plaintiff, specific performance cannot be decreed, the court, if it has jurisdiction, will grant, as an alternative, monetary relief, which, in an action strictly at law, would be by way of damages.

9. Compromise and settlement ⟸20(2)—Interest allowed from breach of agreement.

On defendants' breach of a compromise agreement by refusing further to perform and by declaring to plaintiff that further performance was impossible, plaintiff was entitled to interest from the date of such breach.

10. Specific performance ⟸128(1) — Money judgment held proper.

In action for specific performance of a compromise agreement, where the court had extended to defendants an opportunity to convey in accordance with the agreement, of which opportunity they declined to avail themselves, the court thereupon properly afforded relief by way of a money judgment for the sum provided in the agreement to be paid.

Appeal from Superior Court, Glenn County; H. D. Gregory, Judge.

Action by W. S. Armstrong against the Sacramento Valley Realty Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 185 Pac. 874.

Claude F. Purkitt and W. T. Belieu, both of Willows (Courtney L. Moore, of San Francisco, of counsel), for appellants.

Frank Freeman and George Freeman, both of Willows, for respondent.

PREWETT, Presiding Justice pro tem. This is an appeal from a judgment in favor of the plaintiff and respondent and against the appellants in an action brought against them to enforce the terms of a contract dated on April 27, 1917. Though the record in the case is somewhat voluminous, the actual matters in dispute may be brought down to a very narrow compass.

On December 6, 1910, the respondent and other persons owned 1,251 shares of the capital stock of Armstrong-Quatman Company, a corporation, and the appellant Mrs. Quatman owned the remaining 1,249 shares. On said day said corporation entered into a contract with the appellant Sacramento Valley Realty Company, a corporation, whereby Armstrong-Quatman Company sold to the latter corporation certain tracts of land situated in the counties of Glenn and Colusa for the agreed price of $25,000, payable in small installments.

The appellants C. L. Donohoe, A. H. Quatman, and H. J. Barceloux were stockholders in the Sacramento Valley Realty Company, and they made themselves parties to said contract of December 6, 1910. Divers differences having arisen among the parties, the respondent commenced an action against the parties to the contract. In this action Mrs. Quatman became an intervener, asserting by way of intervention that she had an interest in the proceeds of the sale as owner of 1,249 shares of stock. Judgment went against all the defendants therein and the intervener, and they all appealed the case to the Supreme Court. The action of that tribunal is reported in 179 Cal. 648, 178 Pac. 516.

[1] While that appeal was pending the parties got together on the terms of a proposed compromise. These terms were embodied in a lengthy agreement dated April 27, 1917, which agreement constitutes the foundation of the present action. It will be seen that Mrs. Quatman, claiming, as she did, practically one-half the proceeds of sale to arise from the earlier contract, was vitally interested in the outcome of the compromise agreement. This compromise agreement provided substantially that the various suits pending between the parties, some 20 in all, should be dismissed; that the appellants herein should pay to the respondent the sum of $5,000 in cash and a further sum of $12,796.01 in lands at a certain value to be ascertained by means of an appraisement. It is out of the provisions for this appraisement that most of the points on this appeal arise. The agreement provides that each side should select fifteen names of proposed appraisers, placing the names in sealed envelopes, and that if three names were found to be common to both lists, these three should be the appraisers. No specific provision was inserted in the agreement for the selection of an alternate in case one of the three should refuse to act, although it was provided that, if three names were not found to be common, then additional lists of fifteen names should be prepared until the requisite number was thus obtained. Three names were found to be common to both lists, but one of the three appraisers refused to act. The agreement provides that such additional lists should be prepared on two days' notice in writing, and no such written notice was given. However, the stakeholder went to

the representative of the appellants and demanded the selection of additional lists, but the appellants declined to submit them on the ground or claim that the agreement made no provision for additional lists in such case. This amounted to a waiver of a written notice, since such claim demonstrated that a more formal notice would have been unavailing. The respondent promptly prepared his additional list. The appellants contended, and on this appeal contend, that the omission of the agreement to make specific provision for supplying the place of an appraiser who refused to act rendered the entire agreement incapable of performance and consequently null and void. No claim was made by any of the appellants prior to the commencement of this suit, so far as the record informs us, that the agreement was inequitable, unjust, or unconscionable, nor that the money agreed to be paid was not justly due. It is a case where the litigants withhold both the land and the money and refuse to submit a list of appraisers on the plea that it is not so nominated in the agreement.

[2] All the appellants make the point that the complaint does not show that they received adequate consideration for their undertaking, and that as to them it is equitable and just. While the appellants devote much space in their briefs to this point, it is sufficient to say that the complaint contains a direct statement or averment that they did receive an adequate consideration, and, moreover, contains in its many allegations an affirmative showing that the appellants and each of them received an adequate consideration, and that as to them the agreement is just. No more is required. No more could be stated.

[3] The appellant Letitia Beretta Quatman makes the further point that, while the complaint may show that the agreement is equitable and just and founded on an adequate consideration as to the other appellants, yet as to her it fails to do so. But she was a party to this litigation—the very controversy that resulted in the compromise agreement. She had intervened in the principal suit and had appealed from an adverse judgment therein. The compromise of the litigation in which she had so vital an interest was not only a valuable, but an adequate, consideration for her obligation, and it matters not whether her obligation was primarily her own or was entered into in behalf of some of her co-obligors. In this view of the matter, the complaint shows that the consideration for her obligation was adequate. It does not seem to be seriously disputed that such consideration may be sufficiently shown by the general allegations of the complaint; but any doubt on the subject is fully settled by the following extract from a late opinion:

"It is not necessary, however, that the complaint for specific enforcement should declare, in the very words of the Code, that there was 'an adequate consideration for the contract' and that it was 'just and reasonable.' * * * The proper mode of pleading is to set forth the facts from which the court may conclude that the contract is supported by an adequate consideration and is, as to the defendant, fair and just." Magee v. Magee, 174 Cal. 276, 162 Pac. 1023.

[4-6] 2. The appellants insist that the agreement is void for the reason that C. L. Donohoe contracts therein that he will procure the consent of his wife to the execution of certain conveyances therein provided to be made. But, first, such a provision does not render a contract void, although it might be a contract that could not be specifically enforced (section 3390, Civ. Code); and, secondly, in this case the appellant Donohoe has entered into no such stipulation. There is a provision in the agreement that a conveyance from her would be sufficient. It is in no way unlawful for a party to agree to convey lands which at the time of contract are owned by another. In such case it is presumed that the contracting party is advised that he can at the proper moment procure the title or procure the holder thereof to make or join in the proper conveyance; but in any view that is his own affair. He is none the less answerable for his breach, even though he may have placed himself in a position where he cannot comply with the terms of his contract. This principle is a complete answer to the claim of appellants that the respondent cannot maintain this action because he knew at the time of contract that the appellants did not own the property involved. However, it is not shown that he knew this, although it is shown that at least a portion of the legal title stood in the names of others. But respondent was nevertheless entitled, in any event, to specific performance as to such portion of the property as may have stood in the names of appellants or any of them. Farnum v. Clarke, 148 Cal. 610, 84 Pac. 166.

3. Complaint is made that the court found without sufficient evidence that Frank Freeman had executed a certain quitclaim deed, but neither party is complaining that this deed was not executed, neither party assigns this is a breach, and neither party is injured by the finding. The delivery of such a deed was preliminary to the payment of the first or initial check of $5,000, and neither party complains that this check was not delivered, nor does either party set out its delivery or nondelivery in their pleadings as a breach. The whole matter is unimportant.

[7] 4. Other points urged, save one, are unimportant, and they require no special attention. This one excepted point is the failure of the agreement to provide a method of selecting an alternate in place of an appraiser refusing to act. The appellants boldly insist that this condition blocks the en-

forcement of the agreement, although they make no pretense of controverting the justice of the respondent's claim to the land or money. The agreement to select three names from the lists of fifteen necessarily implied the names of persons who would be willing to act. This is not a violent nor an unreasonable interpretation of the agreement. It is fundamental that a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contract. Section 1636, Civ. Code. It must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if this can be done without violating the intention of the parties, as such intention existed at the time of contract. Section 1643, Civ. Code. Stipulations which are necessary to make a contract reasonable are implied. Section 1655, Civ. Code. In the light of these obvious principles of interpretation, no embarrassment is encountered in holding that a vacancy arising from the refusal of an appraiser to act should be filled in the manner provided in the contract for filling other vacancies, to wit, by resort to additional lists of fifteen names submitted by each side. If this is a correct view, then the appellants committed a breach of the agreement when they refused upon request to submit additional lists. If this view is open to question, then we have a condition where, owing to the incompleteness of the agreement, no method of carrying it into effect is provided, and equity can adopt the method most in harmony with the covenants of the parties. In either view, the court was authorized to entertain the action and to render equitable relief.

The selection of the appraisers was merely a means to an end and is not of itself a vital part of the agreement. It was no more than a method of selecting unbiased appraisers. The court is an unbiased appraiser, and under the authorities is competent to appraise the land. As said by the Supreme Court of Washington in the case of Cogswell v. Cogswell, 70 Wash. 178, 126 Pac. 431:

"The matter in suit having been settled by the solemnly executed contract of the parties, that contract having been partly performed on both sides, the failure to arbitrate relating only to a nonessential incident, not giving ground for a rescission, it follows that the appellants have mistaken their remedy. They should have applied to the court for the enforcement of the contract by fixing the price of the land."

And quoting from another case:

"In such a case the courts hold that the matter of determining the price is matter of form, rather than of substance; and if it becomes evident that it cannot be determined in the manner provided for in the contract, by reason of the refusal of one party to do what in equity he ought to do, the court will determine it upon the application of the other." Town of Bristol v. Bristol Waterworks, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740.

To substantially the same effect are Cooke v. Miller, 25 R. I. 92, 54 Atl. 927, 1 Ann. Cas. 30, and Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304. In Parsons v. Ambos, 121 Ga. 98, 48 S. E. 696, the umpire died, and the court itself determined the values. The court said:

"So, too, in contracts of sale the parties may stipulate * * * that the value of the property shall be ascertained by appraisers before either has the right to sue. This fixing of values, however, is a mere incident and not of the substance of the contract. It rather serves the office of evidence, than of a finding which construes the contract or determines rights."

[8] We entertain no doubt that the refusal of the appellants to join in the selection of a third appraiser justifies the trial court, sitting as a court of equity, to take the matter in hand and itself fix the values and and afford the appellants an opportunity to complete the transaction upon the values thus fixed. Upon their failure so to do, it is well settled that the court could grant, as an alternative, a judgment for monetary relief. Our Supreme Court says:

"And, finally, it is indisputable that where, through no fault of the plaintiff in equity, specific performance cannot be decreed, the court, having obtained jurisdiction of the subject-matter properly within its cognizance, will grant as an alternative monetary relief, which in an action strictly at law would be by way of damages." Messer v. Hibernia S. & L. Soc., 149 Cal. 122, 84 Pac. 835.

[9] 5. The court allowed the respondent interest on the sum found due, or rather on the sum admitted to be due, from July 1, 1917. At or about this date the appellants committed a breach of the agreement by refusing further to perform and by declaring to the respondent that further performance was impossible. From that date the respondent was entitled to interest.

[10] 6. The court extended to the appellants an opportunity to convey, of which opportunity they declined to avail themselves. The court thereupon afforded relief by way of a money judgment for the sum provided in the agreement to be paid. This method of procedure is open to no objection, and is in harmony with the usual practice.

We find no error in the record and the judgment is accordingly affirmed.

We concur: HART, J.; BURNETT, J.

49 Cal. App. 43

ELLIS v. CHAMBERS, State Controller, et al. (Civ. 2208.)

(District Court of Appeal, Third District, California. Aug. 5, 1920.)

Mandamus ⊂⊃14(3)—Writ denied, where respondents are willing to do acts desired.

Application for a writ of mandate, to be directed to the state controller and state treasurer, requiring them to credit proceeds of certain checks to "the proper state highway fund," will be denied, where it appears that respondents have at all times been willing, and are still willing, to credit any payments received on account of any co-operative projects to any funds lawfully designated by the state engineering department.

Application by W. R. Ellis for writ of mandate, to be directed to John S. Chambers, as Controller of the State of California, and Friend W. Richardson, as Treasurer of the State of California, requiring them to credit proceeds of certain checks to "the proper state highway fund." Writ denied.

Dunn & Brand, of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and Robt. T. McKisick, Deputy Atty. Gen. (C. C. Carleton and James L. Atteridge, both of Sacramento, of counsel), for respondents.

PER CURIAM. It appears to the court in this proceeding that the respondents have at all times been willing, and are now ready and willing, to credit any payments received from the general government on account of any co-operative projects to any fund or funds as may be lawfully designated by the state engineering department.

It follows that no writ of mandate should issue herein; and it is so ordered.

52 Cal. App. 222

NEW RICHMOND LAND CO. v. IVANOVICH. (Civ. 3738.)

(District Court of Appeal, First District, Division 1, California. April 12, 1921.)

1. Vendor and purchaser ⊂⊃84—Provision giving vendor right to forfeit payments in event of default does not give purchaser option to abandon contract.

Where a contract for the purchase of land on installments provided that in event of the purchaser's default the vendor might forfeit all rights under the agreement and retain amounts paid, the provision was one clearly for the benefit of the vendor giving him an option, but the purchaser has no option which will allow him to abandon the contract on pain of forfeiture of installments paid.

2. Evidence ⊂⊃461(1)—Parol evidence inadmissible, where written contract is definite.

Where a written contract for the purchase of lands on installments was definite and gave the purchaser no right to abandon on pain of forfeiting payments made, parol evidence offered for the purpose of showing that the parties intended the purchaser should have the right to abandon is inadmissible, in view of Civ. Code, § 1639.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by the New Richmond Land Company against Martin Ivanovich. From judgment for plaintiff, defendant appeals. Affirmed.

Ralph L. Hathorn, of San Francisco, for appellant.

Faulkner & Faulkner, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of plaintiff in an action brought to recover a balance alleged to be due under a contract by the terms of which the defendant agreed to purchase from the plaintiff certain lots of land in the city of Richmond, the purchase price to be paid in monthly installments. Defendant made a number of such payments, and then abandoned the contract, whereupon the present action was brought to recover the balance of such installments.

In support of his appeal the defendant contends that, according to the terms of the contract entered into between the plaintiff and himself, in the event that he should fail to make the specified payments, the only remedy of his vendor was the retention by him of the amount of money already paid on the purchase price, the respective rights and obligations of the parties being thereby terminated, which excluded any right on the part of the vendor to recover any unpaid balance. The provision of the contract upon which this claim of the appellant is predicated reads as follows:

"The due performance of all covenants and agreements on the part of the buyer is a condition precedent whereon depends the performance of the agreements on the part of the seller. In the event of a failure of the buyer to comply with the covenants and agreements, or any part thereof, on his part entered into, the seller shall be released from all obligations in law or equity to transfer and convey said property, or any part thereof, and the buyer shall forfeit all rights under this agreement, and all rights to any and all moneys which he shall theretofore have paid hereunder, as liquidated damages for such default, and not as a penalty."

[1] We are unable to concur in appellant's construction of this provision of the contract. It is clearly one intended for the benefit of

the vendor by which, at his option, in the event of the vendee's default, he is relieved of his obligation to convey the lots sold, and may regard as forfeited all payments theretofore made by the vendee, or, waiving the forfeiture, he may require the vendee to complete his contract. The vendee is given no option, but must abide by the election of the vendor. Smith v. Mohn, 87 Cal. 489, 25 Pac. 696; North Stockton v. Fischer, 138 Cal. 100, 70 Pac. 1082, 71 Pac. 438; Glock v. Howard, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Shenners v. Pritchard, 104 Wis. 287, 80 N. W. 458.

In Wilcoxson v. Stitt, 65 Cal. 596, 4 Pac. 629, 52 Am. Rep. 310, where a similar contract was under review, it was held that under a contract for the sale of land, in which the vendee agrees to pay a balance of the purchase money on or before a certain date, and the vendor agrees to convey upon such payment, and which provides that if the vendee shall fail to make such payment he shall forfeit all right to the land, and the vendor shall be released from all obligations to convey, "and the agreement shall be void," if the vendee neglects or refuses to pay the vendor has the option to avoid or enforce the contract, and may, if he so elects, sue and recover the unpaid balance of the purchase money.

The instant case is distinguishable from the case of Beckwith Land Co. v. Allison, 26 Cal. App. 473, 147 Pac. 482, and other cases relied upon by the appellant. Here, as we have seen, it was optional with the plaintiff whether he should declare the amounts paid forfeited, or should insist upon performance of the contract; while in the cases relied upon by the appellant the contract unconditionally provide that upon failure of the purchaser to comply with the conditions to be performed by him a certain sum was to be forfeited as damages for his nonfulfillment of those conditions. In such a situation it is plain, as stated in those cases, that the purchaser has an option to purchase without any obligation beyond the fact that he is subject to the loss of his forfeit money if he does not complete the transaction.

[2] Finally, we think the court properly excluded parol evidence offered for the purpose of showing that the parties intended that the purchaser should have the right to abandon the contract at any time upon suffering the loss of payments already made. Here the contract is free from uncertainty or ambiguity, and, accordingly, the intention of the parties, must be ascertained from the formal agreement. See Civ. Code, § 1639; Payne v. Com. Nat. Bank, 177 Cal. 68, 169 Pac. 1007, L. R. A. 1918C, 328.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

52 Cal. App. 55

BOZARTH v. BIRCH. (Civ. 3671.)

(District Court of Appeal, First District, Division 1, California. March 24, 1921. Hearing Denied by Supreme Court May 23, 1921.)

1. Fraud ⟸34—Rescission essential to recovery for undue influence.

In an action for damages based solely on defendant's exercise of undue influence over plaintiff in the procurement of a contract whereby plaintiff, who had lent to the corporation in which defendant was stockholder and director, surrendered his notes and stock, the complaint, not averring rescission of the contract, did not state facts sufficient to constitute a cause of action.

2. Fraud ⟸34—Rescission held not essential to attack on surrender of notes and stock by one unduly influenced and deceived.

In an action sounding in fraud by plaintiff against defendant stockholder and director in the corporation to which plaintiff had lent, on account of defendant's having induced plaintiff to surrender his notes of the corporation and stock, complaint *held* not based wholly or chiefly on defendant's undue influence over plaintiff, so as to necessitate rescission before suit, but to sound in fraud, consisting in the fraudulent design and false representation of defendant whereby plaintiff was induced to part with his notes and stock without adequate consideration.

3. Fraud ⟸31—Defrauded party may rescind or sue for damages.

One defrauded has the choice of remedies, either to disaffirm the contract through its rescission, or to affirm it and sue for damages.

4. Fraud ⟸11(1)—Misrepresentations as to insolvency of corporation statements of fact.

Defendant stockholder and director's alleged misrepresentations to plaintiff lender to the company, to induce him to surrender his notes and stock, as to the insolvency of the corporation and its imminent danger of bankruptcy, *held* statements of fact based on defendant's superior knowledge of the affairs of the corporation.

5. Fraud ⟸52—Evidence of defrauded party's unsoundness of mind admissible.

In an action by the lender to a corporation against its stockholder and director, who induced him by fraud and undue influence to surrender his notes and stock by misrepresenting the insolvency of the company and its imminent danger of bankruptcy, evidence as to plaintiff's unsoundness of mind was admissible, as tending to show he was more easily led by defendant's misrepresentations.

6. Appeal and error ⟸1050(1)—Evidence of defendant's wealth and business experience harmless to him in view of verdict.

In an action by a lender to a corporation against its stockholder and director who, by fraud and undue influence, misrepresenting the company's imminent bankruptcy, induced plaintiff to surrender his notes and stock, evidence as to defendant's wealth and business experience, if inadmissible, in view of Civ. Code, §

3294, was harmless to defendant, where the verdict awarded plaintiff only a sum which represented the actual value of his stock at the time of the transaction in question.

7. Trial ⟸248—Instructions having reference to facts not abstract.

Instructions which were not only correct in point of law, but had immediate reference to the facts as pleaded and proven in the case, were not abstract.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by C. W. Bozarth against A. Otis Birch. From a judgment for plaintiff, defendant appeals. Affirmed.

Schweitzer & Hutton, Geo. H. Woodruff, and Clyde C. Shoemaker, all of Los Angeles, for appellant.

John C. Stick and Muhleman & Crump, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor for the sum of $9,550 damages. The complaint set forth facts upon which the plaintiff predicated his prayer for damages in substance as follows:

That the Lyon-McKinney-Smith Company was a corporation having its principal place of business in Los Angeles, with a capital stock of $100,000 divided into 1,000 shares of the par value of $100 per share; that plaintiff was the owner and holder of 194 shares of the capital stock of said corporation from the time of its incorporation in the year 1902 up to the 20th day of August, 1916; that in the year 1912 the defendant became a stockholder in said corporation, and also a director thereof; that from time to time thereafter he acquired additional shares of stock therein, until on January 1, 1916, he was the owner of the majority of its stock; that during the same time the corporation had become indebted to the defendant in the sum of approximately $100,000, so that he was on the last-named date the largest creditor thereof; that by reason of his said ownership of the majority of the stock of said corporation, and of the fact that he was its largest creditor, the defendant had come to completely dominate the board of directors of said corporation and the officers thereof, and also the control and financial policy thereof, and had thereby craftily stimulated and fostered in the minds of the said officials thereof the idea that, if he were to become dissatisfied or displeased with the conduct of the affairs of said corporation, he could and would wreck the business of the same; that the plaintiff had also, from time to time, loaned various sums of money to the corporation, until on August 19, 1916, it was indebted to him in the sum of $13,000, evidenced by two certain promissory notes, one for the sum of $10,500, bearing interest at the rate of 10 per cent. per annum, and one for the sum of $2,500, bearing interest at the rate of 7 per cent. per annum, which principal sums, with accumulated interest, were then due and unpaid; that these sums of money had been loaned by plaintiff to the corporation for its accommodation, use, and benefit, and that, in order to so loan the same, the plaintiff had himself borrowed the sum of $9,000 of said moneys so loaned by him to it, upon which he was at said time paying interest at the rate of 8 per cent. per annum, and of which last-named indebtedness he would be unable to pay either the principal or interest except out of the moneys due as principal and becoming due as interest from the corporation to him; that on January 1, 1916, the plaintiff suffered a nervous breakdown, and was incapacitated for business, or for any proper understanding of the conduct and affairs of said corporation, which enfeebled mental and bodily condition of the plaintiff continued thereafter up to and after August 20, 1916; that at some time prior to August 19, 1916, the said defendant conceived the design of despoiling the plaintiff of his said 194 shares of the capital stock of said corporation without paying him any adequate compensation therefor through his control of said corporation, and through his manipulation and control of its board of directors, and that, on August 19, 1916, in furtherance of his said design, he falsely and fraudulently represented to plaintiff that said corporation was insolvent, and was in immediate danger of bankruptcy, and that, at a meeting of said corporation held on said day, with intent to intimidate the said plaintiff and lend stress to said representation, the said defendant proposed that an assessment be levied on the capital stock of said corporation at the rate of 20 per cent. of the par value thereof, if paid in cash, or of 40 per cent. of the par value thereof if paid in stock; that at said meeting the said defendant further falsely and fraudulently stated and declared that the plaintiff could not have paid to him his interest on his notes of said corporation any more; that at the time of the making of these statements by the said defendant they were knowingly false and untrue, in that said corporation was not insolvent, and was not in condition to make no more payments of the interest on plaintiff's notes to him, but that the said plaintiff, by reason of his enfeebled mental and physical condition, and of the fact that he had thereby been unable to keep himself informed as to the actual condition of the affairs of the corporation, believed the said statements and false assertions of the defendant to be true, and was greatly distressed thereby; and that, while he was in this state of distress, the defendant offered said plaintiff, immediately following said statements, to buy his said notes of

said corporation from him, paying him the face value thereof, without accrued interest, but only upon condition that the said plaintiff would turn over to said defendant all of his said stock in said corporation without any other consideration therefor than the payment of the said face value of the plaintiff's said notes, and that said plaintiff, under the belief and influence of said defendant's false assertions that said corporation was insolvent, and in immediate danger of bankruptcy, and unable to pay the interest on his notes, and also under the compulsion and distress occasioned thereby, and being thus overreached and oppressed by the defendant, transferred to him his said notes for the sum of $13,000, the face value thereof, without accrued interest, and also transferred to him his said 194 shares of the capital stock of said corporation, without any other or further consideration therefor; that said notes were at said time of the reasonable value of the sum of $13,000, and that said stock was at said time of the reasonable value of $19,400; and that, by the aforesaid acts and grievances complained of, the plaintiff has suffered damage in the sum of $25,000.

The defendant demurred to the plaintiff's complaint on several grounds, and also moved to strike out several portions thereof; and, the said demurrer having been overruled, and said motion denied, filed his answer, denying specifically most of the material averments of said complaint, and denying any unfairness or overreaching on his part in his transactions with the defendant. He also set up as a separate and affirmative defense that the plaintiff had, prior to the institution of this action, and after he had become mentally competent and thoroughly cognizant of all the acts and things of which he complained in this action, instituted an action against said corporation for certain recoveries, by which said action said plaintiff had confirmed his said transactions with said defendant, whereby he was now estopped from maintaining the present action.

The case went to trial before a jury upon the issues as thus framed, at the conclusion of which the jury rendered its verdict in the plaintiff's favor, fixing his damages at the sum of $9,550, for which sum judgment was presently entered, and from such judgment defendant prosecutes this appeal.

[1-3] The first contention of the appellant is that the trial court erred in its order overruling its demurrer to the plaintiff's complaint, for the alleged reason that the cause of action attempted to be set forth therein was one based upon the exercise of undue influence upon the part of the defendant in procuring the contract from plaintiff for the transfer of his notes and stock, and that, this being so, it was requisite for him to have averred a rescission of said contract; and that, lacking such averment, the complaint did not state facts sufficient to constitute a cause of action. In making this contention the defendant relies upon the two cases of Bancroft v. Bancroft, 110 Cal. 374, 42 Pac. 896, and McDougall v. Roberts, 185 Pac. 483. It may not be denied that, if the appellant's premise to the effect that this is an action based solely upon the defendant's exercise of undue influence over the plaintiff in the procurement of the contract in question, his conclusion as to the insufficiency of the plaintiff's complaint in the respect indicated would be correct under the foregoing cases; but an inspection of said complaint, as hereinbefore stated, in substance convinces us that this action is not based wholly, or chiefly, upon the defendant's undue influence over the plaintiff in the procurement of said contract, but that it is one essentially sounding in fraud, consisting in the fraudulent design and false representation of the defendant by which the plaintiff was induced to part with his notes and stock without adequate consideration. The two cases above cited as upholding the appellant's contention expressly limit the application of the doctrine therein declared to cases wherein undue influence is alleged to be the sole inspiring cause of the contract complained of; and, in our opinion, this doctrine should not be extended to cases, like that at bar, wherein advantageous contracts have been procured by false and fraudulent misrepresentations as to matters of fact, even though a plaintiff, by reason of mental infirmities, has been the more easily misled and unduly influenced thereby. This being so, the well-established rule applicable to cases sounding in fraud, which gives to the plaintiff his choice of remedies, either to disaffirm the contract through its rescission, or to affirm it and sue for damages, should be given application to the facts of the case at bar; and the plaintiff herein having elected to seek the latter remedy, his complaint must be held to have sufficiently stated a cause of action.

[4] As to the objections which the appellant urges to the plaintiff's complaint upon the other grounds, we think they are not well taken, for the reason that the defendant's alleged misrepresentations as to the insolvency of the corporation and its imminent danger of bankruptcy were not made as mere matters of opinion, but as statements of fact based upon the defendant's superior knowledge of the affairs of the corporation. Being so made to the plaintiff, at a time when, by reason of his impaired physical and mental powers, he was not in a condition to know or learn the truth respecting the defendant's assertions, he has, we think, sufficiently brought himself within the principles governing fair dealing between parties to contracts, as laid down in the case of Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011. We think, also, and for the reasons above stated, that the motion of the defendant to strike

out certain portions of the plaintiff's complaint was properly denied.

[5] The defendant's next contention is that the trial court erred in admitting evidence as to the plaintiff's unsoundness of mind. We confess ourselves not quite able to follow the refinement of the appellant's reasoning in support of this contention. The gravamen of the plaintiff's complaint was that, by reason of his physical and mental infirmities, he was the more easily misled by the defendant's representations as to matters of fact which, had he been in his normal state of mind and body, he would have known, or could have learned to be untrue. Seven witnesses testified as to his enfeebled condition, some of whom even went so far as to declare him entirely incompetent on the date of the transaction in question. Had he brought suit to set aside said transaction as entirely void, the above evidence would, it is conceded, have been admissible; and we fail to see why the same evidence would not be competent in an action wherein the defendant is alleged to have been able to successfully misrepresent an existing condition because the plaintiff's weakened mental state made it impossible for him to know or learn the truth. The case of Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276, cited by the appellant on this point, has no application to it that we can discover. The point is not well taken.

[6] The appellant further urges a number of respects wherein he claims the evidence is insufficient to support the findings of the jury upon the special issues presented to it for determination at the defendant's request. We have examined each of these findings in the light of the pleadings in the case and of the evidence educed in support thereof, and from such examination we are satisfied the findings of the jury upon these issues are each sufficiently supported by the evidence in the case. It would not be profitable to review these in detail; nor do we deem the several alleged errors of the trial court in the admission of evidence, conceding them to be such, sufficiently prejudicial to justify a reversal of the case—as, for example, the alleged error of the court in admitting evidence as to the defendant's wealth and business experience. It is argued that this sort of evidence is only admissible in actions wherein exemplary damages may be awarded; and it is urged by the appellant that this is not, in its nature, such an action, since section 3294 of the Civil Code confines such damages to actions "for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied."

It may well be doubted whether an action for damages founded upon misrepresentation and deceit, with particular circumstances of oppression, is not one of those actions upon tort to which the rule governing exemplary damages would apply; but however that may be, the evidence upon which the appellant has urged this objection does not appear to have been prejudicial, since the verdict of the jury awarded to the plaintiff not the large amount of damages which he prayed for, but only a sum which represented the actual value of the plaintiff's stock at the time of the transaction in question, as fixed by the testimony of the defendant himself.

The final contentions of the appellant are that the court erred in the refusal to give, or in the modification of, certain instructions requested by him, and in the giving of certain other instructions which appellant insists are merely abstract statements of the law relating to fraud and deceit. As to the first of these contentions, we find that the alleged errors of the trial court had reference to the appellant's claim that, this being an action based upon undue influence, it was not maintainable, except upon proof of the rescission of the contract obtained thereby. This point has already been disposed of in an earlier part of this opinion.

[7] As to the point that the court's instructions upon the subject of fraud and deceit were merely abstract statements of law, and hence ought not to have been given, we hold that this contention has no merit, since the instructions complained of were not only correct in point of law, but had immediate reference to the facts as pleaded and proven in the case.

No error appearing in the record, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

52 Cal. App. 215

MORIYAMA v. VEYSEY et al. (Civ. 3478.)

(District Court of Appeal, Second District, Division 1, California. April 12, 1921.)

Injunction ⊂=146—Injunction pendente lite should not be granted where verified answer denies allegations of complaint.

An injunction should not be granted pendente lite upon a complaint, where, in response thereto, a verified answer is filed explicitly and unequivocally denying the allegations of such complaint; therefore where the lessee of lands sued to compel the lessor and mortgagee to reinstate and relocate 10 shares of water stock as an appurtenance to the land, and the mortgagee by verified answer denied that he was the purchaser of the stock or claimed to be the owner thereof, etc., a temporary injunction should not have been granted.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by S. Moriyama against Charles F. Veysey and others. From an order granting

a temporary injunction, defendant named appeals. Reversed.

Conkling & Brown, of El Centro, for appellant.

James L. Allen, of Brawley, for respondent.

CONREY, P. J. This is an appeal by the defendant Charles F. Veysey from an order granting a temporary injunction.

The complaint alleged that on the 12th day of September, 1918, the defendants Groshen, owners of certain land in Imperial county, leased to the plaintiff for a term of three years the said land for farming purposes, also giving to the lessee the right to the use of the water stock located on the land; that said water stock consisted of 416 shares of stock of Imperial Water Company No. 8 owned by the lessors and appurtenant to the land, which said stock was sufficient to provide for the furnishing of water to the land; that the corporation was organized for the purpose of distribution of water for irrigation, and that by the issue of the shares of stock the company obligated itself to furnish all water to irrigate the said land for farming and domestic purposes, and that said corporation at all times had sufficient water in its canals to supply the needs of the lands of all of its stockholders and other persons entitled thereto; that said land is valueless for farming purposes except when furnished with water for irrigation. It was further alleged that defendants Groshen, being indebted to defendant Veysey, mortgaged the described land to Veysey to secure that indebtedness; that as additional security therefor the defendants pledged to Veysey their said shares of water stock; that as additional security for the protection of Veysey against sale of the water stock for delinquent assessments and for the payment of taxes defendants Groshen assigned to Veysey the rents accruing from said lands, said rents to be applied against any overdue interest owing to Veysey, except sufficient amounts to be carried to cover taxes and water assessments to keep them from becoming delinquent; that on the 9th day of October, 1918, an assessment was levied by the water company on said water stock, which assessment, not having been paid, was declared delinquent, and afterwards, on the 29th day of November, 1918, the corporation sold 10 shares of said stock to pay said assessment, and Veysey was the purchaser at said sale and now claims to be the legal owner and holder of said 10 shares of stock; that the defendant corporation at all times knew of said facts existing respecting the mortgage and pledge to Veysey and his purchase of the stock at said delinquent sale; on information and belief, that said 10 shares of stock had not been transferred on the books of the corporation to other lands and remains and still is appurtenant to said land, and that the water company "has heretofore furnished to plaintiff, as tenant of said lands, sufficient water for the irrigation of said lands and plaintiff is entitled to have such water." It was further alleged that on November 29, 1918, the water company notified plaintiff "that said 16 shares of water stock had been sold and unless the owner of the land should purchase an additional 16 shares of stock in said corporation no future delivery of water would be furnished for use on said lands; that although plaintiff has demanded that said corporation furnish water to said lands, and offered to pay for such water, the said corporation refused and still refuses to furnish any water to said lands;" that plaintiff has demanded of the defendant Veysey that he arrange with the defendant water company to allow plaintiff to use said water stock and procure water for use on said lands, and said defendant Veysey has failed and refused so to do; that a like demand was made of the defendant Floren Groshen, to which demand the defendants Groshen have not replied; that the plaintiff has paid the rent due and for all water used on the land. Further facts were alleged showing loss and damage suffered and that will be suffered by the plaintiff by nondelivery of the water, and that the defendants Groshen are insolvent.

The defendant Veysey in his answer (which, like the complaint, was duly verified) denied that as additional security, or otherwise, for the payment of the indebtedness of defendants Groshen to him, said shares of stock were pledged to him; denied that he is now the equitable owner of said shares of stock or of said land, or of any thereof; denied that as additional security or for the protection of Veysey against the sale of said water stock for delinquent assessments, or otherwise, or for the payment of taxes, or for any other purpose, the defendants Groshen, or either of them, assigned to him the rents accruing or arising from the land described in the lease, or any of such rents; denied that the water company sold 10 shares of the stock mentioned in the complaint to pay any assessment, or for any purpose whatever, to the defendant Veysey, and denied that the defendant Veysey was the purchaser at any such sale, or that he is now the owner or claims to be the owner of said 10 shares of water stock, or any water stock in said corporation whatever. There are other denials in the answer of facts alleged in the complaint, but those herein stated are sufficient for the present purpose. At the hearing on the order to show cause which was first issued in this matter there was read in evidence, in addition to the complaint and answer, a complaint in an action commenced by Veysey against defendants Groshen on December 30, 1917, "to foreclose a mortgage on the land and shares of water stock described in the complaint herein, and in which complaint duly verified by said Veysey it was

stated, 'That as collateral security for said mortgage said defendants pledged with said plaintiff 387 shares of stock in the Imperial Water Co. No. 8,'" which said stock and land were and are the same stock and land described in the complaint in this action. Said action of foreclosure of mortgage was thereafter dismissed without prejudice.

From the evidence thus produced, it was established (if we may presume that the mortgage and pledge in the foreclosure action were the same mortgage and pledge referred to in plaintiff's complaint herein) that the mortgage and pledge to appellant were executed prior to the making of the lease by defendants Groshen to plaintiff. It is likewise established that appellant, under oath, by his answer, denied the equities of the complaint, in this, among other things, that he denied that he purchased any of said shares of water stock, or that he is or claims to be the owner thereof. If this be true, it would be impossible for him to comply with the injunction which commands that he "reinstate and relocate said ten shares of stock as an appurtenance to the lands described in the complaint herein."

"The rule is well settled that an injunction should not be granted pendente lite upon a complaint alone where, in response thereto, a verified answer is filed explicitly and unequivocally denying the allegations of such complaint." Martin v. Danziger, 21 Cal. App. 563, 564, 132 Pac. 284.

We think that plaintiff was not entitled to a temporary injunction against appellant.

The order is reversed.

We concur: SHAW, J.; JAMES, J.

185 Cal. 678

HOPPIN v. MUNSEY. (L. A. 2845.)

(Supreme Court of California. May 19, 1921. Rehearing Denied June 16, 1921.)

1. Vendor and purchaser ⊂=187—Acceptance of payments overdue extends time for balance only for reasonable time.

The acceptance by a vendor of payment of a portion of the overdue interest after the installments on the principal were all overdue does not eliminate the provisions of the contract that time was of its essence, that the purchaser's failure to make the payments should release the vendor from all obligation to convey, and that the payments already made should be forfeited by such failure, but its only effect as to the future was to give the purchaser a reasonable time after the payment within which to perform his part of the contract.

2. Appeal and error ⊂=931(4)—Finding as to reasonable time for payment of balance due on contract implied.

What is a reasonable time within which a purchaser is required to pay the balance due on his contract after the vendor has accepted payment of a portion of the interest when all the principal was overdue depends on the particular circumstances in the case and is primarily a question of fact for determination by the trial court, and in support of a judgment for the vendor the Supreme Court must assume that the trial court had found such reasonable time had expired before the vendor refused to accept a subsequent payment.

3. Vendor and purchaser ⊂=341(3)—Evidence held to warrant finding reasonable time for further payments had expired.

In a suit by the assignee of a purchaser to recover money paid by the purchaser upon a contract for the sale of land, evidence that less than one-sixth of the purchase price had been paid, and that all of the accrued interest had not been paid, and that the purchaser had never been put in possession of the premises, *held* to sustain the court's finding that a reasonable time for the payment had elapsed when the purchaser tendered a new payment four months after the last payment of a portion of the interest had been accepted.

4. Vendor and purchaser ⊂=148—Tender of deed unnecessary if it would be fruitless.

Under Civ. Code, § 1511, subd. 3, providing that formal tender is excused when the person who should have made it is induced not to do so by an act of the other party naturally tending to have that effect, a tender of a deed of conveyance by the purchaser to the vendor is not necessary to entitle the vendor to forfeit the contract where the declarations of the purchaser indicate that such a tender would be fruitless.

5. Vendor and purchaser ⊂=148 — Tender of deed held excused by purchaser's statement he could not pay.

Where the purchaser informed the vendor when the latter declined to accept a small payment upon the accrued interest and demanded a payment upon the principal that he could not pay anything on the principal at that time, but hoped at the end of the season to be able to pay a small portion of it, the tender by the vendor of a deed of conveyance was unnecessary to entitle him to forfeit the purchaser's rights under the contract.

6. Vendor and purchaser ⊂=95(2)—Payments held forfeited to vendor notwithstanding acceptance of partial payments after maturity.

Where a contract for the sale of land provided that on the purchaser's failure to complete the payments the amounts theretofore paid should be forfeited to the vendor, the acceptance by the vendor after all payments of the principal had become overdue of a portion of the accrued interest does not preclude his right to forfeit the payments made by the purchaser, especially where the purchaser did not tender payment of the balance until more than four months after the vendor had conveyed to another with the purchaser's knowledge.

7. Vendor and purchaser ⊂=95(2), 101—Repeated acceptance of small overdue payments held not waiver of forfeiture requiring vendor to give notice of intention to forfeit.

The fact that the vendor had in the past repeatedly accepted small payments on the accrued interest, though it waived previous defaults, did not waive the condition of the contract for forfeiture of the payments made on the purchaser's failure to complete the payments, and does not require the vendor to give formal notice of intention to forfeit, especially where the purchaser had not been given possession and his conduct showed a disposition to postpone performance indefinitely for speculative purposes.

8. Appeal and error ⊂=1056(3)—Exclusion of evidence as to an option held harmless where option could not give any rights.

In an action by the assignee of a purchaser for breach of a contract for the sale of land, the exclusion of evidence that, before the vendor had refused to accept further payments by the purchaser, he had given an option to another for the same property, was harmless, where the option does not appear to have been supported by any consideration, and there was no evidence that it was carried out before its expiration.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by H. I. Hoppin against Fred E. Munsey on a contract for the sale of real estate. Judgment for defendant, and plaintiff appeals. Affirmed.

George W. McDill, of Los Angeles, for appellant.

Donald Barker, of Los Angeles (Wm. H. Neblett, of Los Angeles, of counsel), for respondent.

SHAW, J. This is an action by the assignee of a vendee to recover money paid by his assignor to the vendor upon a contract of sale of real estate, including certain taxes paid on the land. The defendant had judg-

ment in the court below, from which the plaintiff appeals.

The contract of sale was made between Munsey, the defendant, and one F. W. Abbott, assignor of plaintiff as aforesaid. The complaint alleges that on September 14, 1914, Munsey and Abbott executed an agreement whereby Munsey agreed to sell to Abbott certain real estate for $1,600, payable as follows: $250 in cash, then and there paid; $675 on or before September 10, 1915, and $675 on or before September 10, 1916, with interest on said installments from the date of the contract until paid at 7 per cent. per annum, payable quarterly; that he had from time to time made certain payments on the contract covering portions of the interest accruing thereon, amounting in all to $152.68—the last payment being $5 on March 31, 1917—and had also paid certain taxes upon the land amounting to $45.85; that on August 20, 1917, Munsey, without having tendered to Abbott a deed of said property and without having demanded the payment of the remainder of the contract price from him, sold and conveyed the property to one Clara H. Mackey; that thereafter and before the commencement of this action Abbott tendered to Munsey the whole amount of principal and interest then due on said contract of sale and demanded of Munsey that he cause said property to be conveyed to Abbott; that Munsey refused the sum offered and refused to cause any conveyance of the property to be made to Abbott; and that after said demand and refusal Abbott assigned to the plaintiff all his rights and claims against Munsey. The prayer was for a judgment for the sum of $448.51.

The answer admitted, by not denying, the allegation that Munsey had not tendered a deed to Abbott and the allegations that Abbott had tendered to Munsey the principal and interest due on the contract and had demanded a conveyance thereof from Munsey to him, which Munsey had refused to execute or cause to be executed. These allegations therefore stand as admitted for the purposes of the case.

The answer further alleged that the contract provided that time was of the essence thereof, and that on the failure of Abbott to comply with its terms Munsey should be released from all obligation in law and equity to convey the property, and that Abbott should thereupon forfeit all right thereto and to all moneys theretofore paid thereunder; that prior to said conveyance by Munsey to Mackey as alleged in the complaint Abbott was in default for failure to pay the principal and interest due on the contract price; that thereafter, and before said conveyance to Mackey, Munsey had demanded of Abbott the payment of all of the remainder of the principal and interest of the contract price, but said Abbott failed to pay the same; that because of said default and failure he (Munsey) had declared a forfeiture of the rights of Abbott under the contract; and that defendant was thereby released from all obligation to convey to Abbott and was entitled to retain the money paid to him by Abbott.

The court found that Munsey conveyed the property to Mackey on August 21, 1917, but that before doing so, and after the maturity of the whole of the contract price, Munsey demanded from Abbott the payment of the principal thereof, and that he was at that time excused from tendering a deed of the property to Abbott by the fact that Abbott then and there declared that he was unable to pay the same and failed to comply with the demand for payment; that Abbott made no payment or offer of payment of the contract price or any part thereof between the time he declared himself unable to pay the price and the month of January, 1918; that the tender so made in 1918 was not made within a reasonable time after the acceptance of the last payment of $5 on the overdue interest, which was on March 31, 1917; that the conduct of Abbott was such as to justify Munsey in acting on the belief that Abbott could not and did not intend to pay the price within a reasonable time after such waiver as resulted from the acceptance of said $5. It also found that the contract was in the form alleged in the answer, and that Munsey had declared a forfeiture of the rights of Abbott before making the conveyance to Mackey and after having demanded of Abbott the payment of the balance owing upon the contract price, and that Munsey was justified in refusing the tender made in January, 1918. It thereupon concluded that the plaintiff was not entitled to recover any part of the money paid on the contract by Abbott and rendered judgment accordingly.

The facts admitted by the pleadings are to be taken in connection with the evidence in the case, so far as they may assist in determining the weight thereof and the inferences to be drawn therefrom. Since the findings were in favor of the defendant, the evidence must be considered in the light most favorable to the defendant, and the testimony of the defendant is to be considered as the truth, so far as it is inconsistent with the evidence offered in behalf of the plaintiff.

The plaintiff contends that these findings are contrary to the evidence, and, second, that, even if correct, they do not support the judgment.

The following facts appear from the evidence: The first installment of the price was due on September 10, 1915. Up to that time Abbott had made six payments, amounting in the aggregate to $70.92, which was not sufficient to pay even the interest then accrued. Thereafter and prior to September 10, 1916, when the whole sum fell due, seven small sums were paid, amounting to $54.76.

The default continued, and on February 12, 1917, nothing more having been paid, Munsey gave to Abbott a notice in writing, signed by Munsey, as follows:

"In reply to your note of the 10th, just to hand, I wish to notify you that unless you pay up the interest amounting to $84 before the 10th of March, 1917, I will have to cancel deal with you on lot.

"I have waited long enough for payments past due, but will not wait longer on interest, which is a year now past due.

"Then when you catch up with interest I will expect some money paid on lot in a reasonable time.

"As I told you before I was willing to give you a chance as long as you kept interest paid up and am willing to still give you chance if you will keep interest paid, but now you are so far behind on interest I must insist on it being paid as per above notice."

Thereafter Abbott paid $10 on March 5, 1917, $12 on March 18, 1917, and $5 on March 31, 1917. Nearly all of the payments had been made by checks sent to Munsey by mail These payments lacked $60 of paying the overdue interest. On July 31, 1917, Munsey received from Abbott through the mail a check for $22. No offer of payment had been made in the meantime. The same day Munsey called on Abbott and returned the check, saying that he could not accept such a small amount. Abbott said that he was unable to pay any more; that if Munsey would wait until the summer season was over he might possibly pay up the interest. Munsey asked for a payment on the principal, to which Abbott replied that he could not make a payment on the principal nor pay the interest due at that time. The question was then asked of Munsey, "What else did you say to him as to your reason for declining the amount?" to which the answer was, "In the first place that he had gone a year and some months behind in his interest; that I had given him previous notice four months previous and I supposed that he had not been able to meet it, and was surprised to receive such sum, after four months had expired on this notice and that I needed the money and that I sold the lot." Abbott never was in possession of the property, and he had no right of possession thereof under the contract. Abbott's testimony was to the effect that Munsey demanded full payment, and that he (Abbott) said that he was unable to make payment, but that he was negotiating a loan and expected to pay up when he got the money. As the sale to Clara H. Mackey was for $1,500, which was only about $50 more than was due from Abbott, the court evidently doubted the good faith of Abbott's statement about the loan.

[1] It may be admitted that the acceptance by Munsey of the two small payments on March 18 and March 31, 1917, operated as a waiver of the demand contained in the notice of February 12th and of any right to declare a forfeiture as of the date of March 10th fixed in said demand. It waived all past defaults in performance, but it did not alter the terms of the contract with regard to the future or eliminate as to future occurrences the three provisions that time was of its essence, that if Abbott failed to comply with its terms Munsey should be released from all obligation to convey, and that the payments already made should be forfeited by such failure. Its only effect as to the future was to give Abbott a reasonable time after the payment on March 31, 1917, within which to perform his part of the contract. Unquestionably it did not extend the time of payment further than that. It therefore follows that immediately upon the expiration of such reasonable time Munsey could have made tender of a deed and demanded full payment, and that upon the failure of Abbott to comply with the demand he could at once have begun an action against Abbott for specific performance, or to foreclose Abbott's rights, or for damages for breach of the contract. Glock v. Howard, 123 Cal. 10, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Keller v. Lewis, 53 Cal. 118; Fairchild v. Mullan, 90 Cal. 194, 27 Pac. 201.

[2, 3] The question of what is a reasonable time depends in each case upon its own particular circumstances. It is primarily a question of fact for the determination of the trial court. In support of the findings and judgment this court must assume that the trial court decided that such reasonable time had expired before the refusal of Munsey to accept the payment of $22 offered on July 31, 1917. Abbott had shown no desire to meet his obligation promptly during the long period of indulgence that had already elapsed and Munsey was under no obligation to continue that indulgence or tax his own patience further. Less than one-sixth of the purchase price had been paid in cash at the time of the making of the contract and no further part of the price had been paid or offered. The payments made on interest had not been sufficient to discharge that already accrued. The whole contract price was long past due and all the money was due immediately upon the acceptance of the $5 on March 31st. Abbott had never taken possession. No circumstances appear which appeal to a court of equity as necessary grounds for a considerable extension of time. We think the conclusion that the reasonable time for performance implied by the principles of equity had elapsed prior to July 31, 1917, was warranted by the circumstances of the case.

The result is that on that day Munsey had the right to refuse further time, demand full performance then and there, and decline to accept any partial payments, and then to assert his right under the terms of the contract to declare it ended and the payments for-

feited to his use. He had that right on September 10, 1916, the day fixed for the final payment by the terms of the contract, and when the reasonable time expired after the payment of March 31, 1917, his rights were the same as if the contract had originally fixed the period of expiration of such reasonable time as the time for full payment.

[4] Furthermore, it may be noted that, while the tender of a deed by Munsey, or the existence of a lawful excuse, would ordinarily be necessary as a condition precedent to any right of Munsey to proceed in the enforcement of the contract by suit, as for specific performance, or for damages, he is not here seeking such relief, but is only contending that the contract could not be enforced against him after such default by the vendee. We need not determine whether or not for the latter purpose a tender is necessary, for we think the facts disclosed by the evidence were sufficient to excuse such tender, even if it were otherwise required. A tender is not necessary where the conduct or declarations of the vendee are such as to show that it would be unavailing.

"It is a maxim that the law does not require a man to do a vain and fruitless thing, so it has been held that a strict and formal tender is not necessary where it appears that if made it would have been vain and fruitless." 3 Elliott on Contracts, § 1972.

The want of a formal tender is excused when the person who should have made it is induced not to do so by any act of the other party "naturally tending to have that effect, done at or before the time at which such performance or offer may be made." Civ. Code, § 1511, subd. 3.

[5] On July 31, 1917, when Munsey declined a small payment on the interest and asked for a payment on the principal, Abbott informed him that he could not pay anything on the principal or interest at that time, but that, if he would wait until the summer season was over, he "might possibly" pay up the interest. This informed Munsey that Abbott was then unable to pay anything, and that the most he then hoped for was that at the end of the summer season he might be able to pay a very small portion of the price, all of which was at that moment long past due. In view of the past delays, Munsey could come to no other conclusion than that the tender of a deed at that time would be wholly vain and fruitless. This continued failure and these statements would naturally tend to induce him not to go through such an idle ceremony, but, on the contrary, to act in the case upon the theory that Abbott did not expect a tender and neither would nor could pay the money and accept the tender if it were made. Abbott's statements were an admission to that effect. The tender was excused, and Munsey's rights are the same as if he had then made a formal tender and demand and had met with a failure and refusal.

[6] Under these circumstances Munsey had the right to treat the money paid as forfeited to him, to consider his obligation under the contract terminated, and to sell and convey the property to another person. The case was precisely the same as that existing in Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 Pac. 363, after the failure of the vendee there to pay the third installment of the price at the expiration of an extension of the time given therefor. The vendor thereupon elected to treat the contract as at an end and refused a subsequent offer of the balance of the price. The opinion, in referring to the contract, designates it as an option, but the contract is set forth, and from its terms it clearly appears that after the first payment of $10,000 was made, if not before, it became a contract of sale, so framed as to make time of its essence, and the context of the opinion shows that it was so considered. The deed was deposited in escrow, to be delivered upon full payment of the price. The contract was essentially the same in effect as that in the present case. The suit was to recover the price paid, upon the theory that the vendee had the right to rescind upon the refusal by the vendor to accept the tender of the balance due on the price. The court said that—

"Under such a contract the refusal of the vendor to accept a tender made by a purchaser, in default, and to convey to the purchaser after such default, does not effect a rescission of the contract, nor entitle the vendee to recover the money paid. Neither will equity relieve such purchaser who has made an unexcused default and has not fulfilled conditions precedent to the vesting of his right of action." 162 Cal. 545, 123 Pac. 365.

So in Oursler v. Thacher, 152 Cal. 744, 93 Pac. 1009, the court quoted and approved the following passage from the opinion in Glock v. Howard, 123 Cal. 14, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17:

" 'While it is essentially true that in case of a rescission the vendee may demand that he be restored to his original condition, it does not follow that a vendor who refuses to convey after such breach by the vendee thereby rescinds. To the contrary, in refusing to convey after the vendee's default he is not treating the contract as at an end, but is expressly standing upon it, and basing his rights upon its terms, covenants, and conditions.' Also: 'But the vendor, in refusing to accept the tender and to repay the money, is neither violating his contract nor rescinding it, nor treating it as at an end. He is standing squarely upon its terms.' "

The meaning of this, of course, is that the vendor in such a case is standing upon the terms of the contract by appropriating the money paid to his own use and is without liability for its return. In Glock v. Howard it is said further:

"It would be to the last degree unjust and inequitable to allow a vendee, after his default under such a contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee without risk could speculate indefinitely in the land of the unfortunate vendor. The vendee would enter into a contract in which time would be declared of the essence, and stipulate under conditions precedent, as in this case, to make payment at a certain time. Failing to make payment, he would three months, six months, one year, or, as in this case, over three years, after the date of the failure, make an offer to perform, and if the land had risen in value, according to the theory of respondents here, could compel performance; but in every case he could recover the moneys paid."

In this case it is to be observed that Abbott did not make a tender of the purchase price until more than four months after the conveyance by Munsey to Mackey, of which sale he had knowledge. It follows from what has been said that the plaintiff had no right to recover any portion of the purchase money which Abbott had previously paid.

[7] The plaintiff seeks to avoid the effect of these principles by the claim that the repeated acceptance of payments, however small, upon the contract price, not only operated as a waiver of all previous defaults, but also constituted a waiver of the provisions of the contract declaring time of its essence, and that the purchase money should be forfeited upon a failure to pay at maturity. His position is that after such waiver the aforesaid provisions cannot be again asserted or enforced until the vendor shall have served the vendee with notice that at the expiration of a stated period, which must be a reasonable time, performance would again become due and would be demanded. In this he relies upon Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126, and Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751. These cases do not hold that such stipulation for forfeiture may not be restored and enforced by the vendor in any other manner than by giving a definite and specific notice of the intent to do so. There is a declaration to that effect in Monson v. Bragdon, 159 Ill. 66, 42 N. E. 383, which is quoted in Boone v. Templeman, but the quotation is given in support of the statement that from the facts alleged in the complaint "a court might infer a waiver of the conditions regarding forfeiture and time," and that because of such possible inference "they supported the general allegation of the complaint that Templeman had waived those conditions." The general allegation of waiver was attacked by a special demurrer for uncertainty. It is evidently this attack that was in mind when the court said that it was "supported" by the particular allegations showing such waiver. On general principles there can be no doubt that if, after such waiver as the law infers from acceptance of partial payments after maturity, the conduct of the vendor and vendee in subsequent dealings is such as to justify the inference that both parties understood that the conditions regarding forfeiture were to be treated as restored and were in force, and that the vendee understood that he was then in default, the vendor may have the advantage of the forfeiture as completely as he may obtain it by a definite notice to the vendee, and when, in this situation, the vendor demands full payment, and the vendee admits his utter inability to comply, the rule that a tender of a deed by the vendor need not be made when it would obviously be unavailing becomes applicable, and he may treat the failure and inability of the vendee as an abandonment of the contract, declare the money paid forfeited, and resell the property to another, without liability to refund to the vendee the money paid. Especially is this true when the vendee has not been given possession and his conduct has shown a previous disposition to postpone performance indefinitely and has evidenced a design to keep up the relations solely for speculative purposes, as is indicated by his conduct here. Neither of the cases cited is contrary to this conclusion. The Boone Case was a suit by the vendee against the vendor for specific performance, and not for a recovery of money paid, as upon a rescission. Stevinson v. Joy was a suit by the vendor to quiet title. There was a trial, and the court found that the conditions as to forfeiture had been waived, and that the vendee had offered to pay the whole sum then due on the price. The vendee was in possession and had made valuable improvements on the land. The question above stated was not involved in either case. In the Boone Case the demurrer admitted all facts alleged, and in the Stevinson Case the findings were against the vendor's contention. They present the opposite condition so far as inferences are concerned to that here presented. In this connection it may be again remarked that Abbott made no offer to pay any money until January 9, 1918, and that before he attempted to do this he had discovered that Munsey had already conveyed the property to Clara H. Mackey, and undoubtedly knew that Munsey could not comply with the demand. Immediately upon his refusal to do so Abbott demanded a rescission of the contract and a return of the money paid. These facts are significant on the question of Abbott's good faith. In the present case the finding of the court is against the contention that at the time the forfeiture was declared and the property reconveyed by the vendor there was any waiver in force which enlarged or continued the rights of the vendee, and, as we have seen, the evidence supports this finding.

The plaintiff also relies upon the decision of Hayt v. Bentel, 164 Cal. 680, 130 Pac. 432. In that case there was an express allegation

and finding that the vendor had waived the delay in making payment under the contract. What is said about the effect of acceptance of payments after maturity must be understood to refer to the fact that the court had made all inferences which might arise from that fact in favor of the proposition that it constituted a waiver. These cases have no application where the finding is to the contrary and there is no uncontradicted proof of an express waiver. For these reasons the cases relied upon are inapplicable to the present case.

[8] It is claimed by the plaintiff that the court erred in refusing to allow proof that on July 30, 1917, the day before the conversation between Abbott and Munsey, Munsey had given an option to another person to buy the real property. We do not think this error, if it was one, was material. The contract was offered and it is set forth in the record. It does not appear to have been made upon any consideration and it expired on August 9th. There is no evidence that it was carried out, and, unless there was consideration, it was not binding. Apparently it did not in any respect bind Munsey to comply therewith or prejudice the rights of Abbott in the matter.

No other points are presented that deserve consideration.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

185 Cal. 720

ELLIS v. STEPHENS et al., State Board of Engineering. (Sac. 3141.)

(Supreme Court of California. May 20, 1921.)

Highways ⊂⊃99¼, New, vol. 14 Key-No. Series—Engineering department must deposit federal aid in fund under their control, and could not deposit it in general fund to reimburse loss on sale of bonds.

St. 1917, pp. 692, 694, §§ 9, 13, relating to the construction of state highways, providing that unexpended moneys shall be under control of the engineering department, and shall be transferred to its credit, and that federal aid moneys shall be credited to such fund or funds as it may designate, and that all expenditures for highways shall be under its full charge, and that all moneys appropriated for such purpose shall be made payable on demand of said department, etc., was intended to authorize expenditure of federal aid for such highway purposes as it was authorized to expend the state funds, and to that end designate a fund under its control, and hence the advisory board of the department must cause federal aid fund to be deposited in some road fund under their control, and they could not cause it to be deposited in the general fund of the state to reimburse a contemplated loss on a resale at a discount of highway bonds purchased by the state board of control from surplus money, pursuant to Pol. Code, § 679, since this would violate the express prohibition of Const. art. 16, § 2, authorizing the issue of such bonds and sale thereof, subject to the control of St. 1915, p. 652, section 4 of which forbids sale at less than par, and St. 1913, p. 564, § 3, providing as to bonds purchased with surplus money, that they shall not be sold at a price resulting in a net loss to the state.

In Bank.

Application by W. R. Ellis for mandamus against W. D. Stephens and others, constituting the State Department of Engineering. A writ was denied by the District Court of Appeal of the Third District, and on petition therefor the matter was transferred to the Supreme Court for hearing. Writ granted.

Dunn & Brand, of Sacramento, for petitioner.

U. S. Webb, of San Francisco, and R. T. McKisick, of Sacramento, for respondents.

WILBUR, J. Petitioner prays for a writ of mandamus directing the members of the department of engineering of the state of California to make a proper order indicating to the state treasurer the highway fund to which to credit the proceeds of certain checks on the treasurer of the United States aggregating $329,011.82, now in his possession. These checks were issued in payment of the obligation of the United States to the state of California under a contract entered into between the state highway commission and the Secretary of Agriculture of the United States, whereby the United States agreed to pay a portion of the costs of the construction of certain state highways therein designated under plans thereby approved and adopted. This contract for government aid to the state in building these highways was authorized by act of Congress, approved July 11, 1916 (39 Stats. at Large, 355), whereby certain moneys were appropriated for the purpose of aiding the various states in the construction of such highways as were approved by the Secretary of Agriculture. A writ of mandate was denied by the District Court of Appeal of the Third District, and upon petition for transfer to this court, the matter was transferred to this court for hearing. It appears from the answer of the defendants that they have ordered the proceeds of said checks to be credited to the "surplus of the general fund" of the state to make up a contemplated deficiency due to a loss expected to be suffered by the purchase and sale of $3,000,000 par value of the "third state highway bonds" of 1919, being a portion of the $40,000,000 bond issue authorized by the amendment to the Constitution in that year. Const. art. 16, § 2 (see St. 1919, p. 1518). It is proposed by the state board of control,

acting in concert with defendants, to purchase the $3,000,000 of the third state highway bonds at par, and to sell them at the market discount of 6.4138 per cent., thereby suffering a loss of $192,414.

The petitioner contends that this procedure is in violation of law, and that it is the duty of the state officer to deposit this fund in the proper highway fund. It is alleged by the defendants that the proposed procedure was adopted by the state board of control, acting in concert with the defendants because of the fact that state bonds bearing 4½ per cent. interest per annum could not be sold for more than 93.5862 per cent. of such par value, and that it is the purpose of the defendants and state board of control to cover this loss by the application of the funds coming from the United States government to that difference.

The United States statute in question makes it clear that the fund derived from the United States government under the abovementioned act to aid the state in the construction of "rural post roads" represents the amounts paid by the federal government as its share of the cost of construction. These amounts may be paid either upon completion of the work, or if so arranged, during the progress of the work. The federal statute directs (section 6 [Comp. St. § 7477f]) that after the approval of the plans for the highway—

"The Secretary of the Treasury shall thereupon set aside the share of the United States payable under this act on account of such project, which shall not exceed 50 per centum of the total estimated cost thereof. No payment of any money apportioned under this act shall be made on any project until such statement of the project, and the plans, specifications, and estimates therefor, shall have been submitted to and approved by the Secretary of Agriculture. * * * The Secretary of Agriculture and the state highway department of each state may jointly determine at what times, and in what amounts, payments, as work progresses, shall be made under this act. Such payments shall be made by the Secretary of the Treasury, on warrants drawn by the Secretary of Agriculture, to such official, or officials, or depositary, as may be designated by the state highway department and authorized under the laws of the state to receive public funds of the state or county."

The United States statute authorizes the treasurer of the United States to pay not exceeding 50 per cent. of the cost of work by paying that amount to the state instead of paying it directly to the contractor or others doing the work.

As the voters of the state have provided for certain funds in connection with the financing of the acquisition and construction of highways known as the "third state highway fund," "third state highway interest and sinking fund," "third state highway revolving fund," and "third state highway sinking fund" (Const. art. 16, § 2), and as the money was advanced by the state to pay the one-half of the cost of the highways agreed to be paid by the United States government, it would seem that the logical destination of the aid from the United States would be in the fund depleted by such payment.

In this particular instance, a contract having been entered into between the authorized officers of the state and of the United States by which it was agreed in advance that the United States should pay certain amounts to the state in connection with the improvement of certain highways to be constructed by the state of California, the substance of such an arrangement is that the state of California pays for only such portion of the highway as is not covered by the appropriation from the federal government; that is to say, its one-half of the cost. The amount paid to the state is a reimbursement of the state and of the particular funds used by the state in the progress of the work.

So far as the United States government is concerned, the payment of the funds to the proper state officer terminates its interest in the fund. In no instance is the fund payable by the United States government until the work for which it is apportioned has been actually performed. As the money thus paid by the United States government belongs to the state of California, it is subject to the control of the state, acting through its appropriate officials. The duty of the state and its officers to the United States government has been fully performed when the highway approved by the Secretary of Agriculture had been constructed by the state in accordance with the contract. It is no concern of the government of the United States what is done by the state with the funds turned over to it. The control of such funds so paid is one entirely for the determination of the state Legislature, or, if thereto authorized by Constitution or statute, by such other officers of the state as are given control of the funds.

We will turn now to a consideration of the law of the state bearing upon the question. Section 13 of the act relating to the construction of state highways (Stats. 1917, p. 694) provides that all co-operative engineering work now existing or to be engaged in by the state with the United States government shall be placed under the department of engineering; that the advisory board shall have full power to determine the kind, quality, and extent of such work under co-operation with said government before entering into agreement with said government for such work. It further provides:

"All unexpended moneys provided for by law on the aforesaid co-operative basis shall be expressly placed under the full control of the department of engineering and the state controller shall transfer such funds to the credit of the said department. * * * All moneys received

by the state treasurer from the United States government under project agreements relating to federal aid road work shall be credited by the state controller to such fund or funds as the state department of engineering shall designate."

The question here involved is whether the advisory board of the state engineering department must cause funds received from the United States government to be deposited in some road fund under their control, or whether they can cause it to be deposited in the surplus of the general fund of the state for the purpose of reimbursing those funds for loss caused by the sale of the state highway bonds by the board of control on the market at a discount.

While the authority of the advisory board, as above stated, is in terms broad enough to authorize them to deposit the money in question in any fund in the state treasury designated by them, that general authority must be read in the light of their powers, and the purpose of the legislation. By section 9 of the act (Stats. 1917, p. 692) the department of engineering is given full possession and control of all roads and highways which have been declared and adopted as "state roads" and "state highways" and all "state roads" and "state highways" which may hereafter be acquired and constructed. It is provided that—

"All expenditures by the state for highway purposes, except as otherwise hereafter provided by law, shall be under the full charge of the department of engineering, and all moneys appropriated for such purpose shall be made payable upon the proper demand of said department when approved and audited by the state board of control."

It is also provided that—

"Said California highway commission shall have the supervision and direction of all state roads and state highways now existing and the improvement, maintenance, repair and protection thereof, and have charge of and perform all other duties relating to state roads and state highways which may be imposed upon said commission by said advisory board."

It is apparent from this legislation that when the Legislature authorized the advisory board to designate the fund or funds into which payments from the federal government should be made it was intended that such payments should be made into funds under the control of the advisory board. It could not have been the intention, for instance, to delegate to the engineering advisory board the power to place these moneys in funds created to build state prisons, reform schools, insane asylums, or in the fund for the purchase of land for some then existing or contemplated state institution, or in the fund for state aid to orphans, half-orphans, and abandoned children. It is clear from the scope and purpose of the act creating the advisory board and the state engineering department, and from the duties and powers of such department, that the purpose and intent of the Legislature was to authorize the expenditure of this federal aid by the state engineering department for such purposes in connection with public highways as it was authorized to expend the funds of the state, and to that end to designate to the state treasurer and controller some appropriate fund under its control in the state treasury. Respondent board contends that, this being true, their appropriation of the money for the purpose of paying a deficiency in funds caused by the inability to sell state highway bonds at par, as required by the Constitution, is a proper exercise of the powers vested in them.

It is manifest that if such an appropriation of public money violates an express provision of the law it is not authorized by implication arising from the power of the board to designate the fund in which the money must be carried on the books of the treasurer and controller.

An examination of the Constitution and statutes on the subject makes it clear that such a use of public moneys is expressly prohibited by law. The constitutional amendment approved July 1, 1919 (Const. art. 16, § 2; Stats. 1919, p. 1518), authorizing issuance of the $40,000,000 bond issue, provides that the state highway act of 1915 (Stats. 1915, pp. 650, 652, § 4) relative to the advertising and sale of bonds shall control in the disposition of the bonds thereby authorized. This statute provides that the state treasurer shall sell the bonds to the highest bidder for cash at public sale, and shall not accept any bid which is less than the par value of the bonds plus accrued interest. It is for this reason that the state board of control proposes to purchase the bonds at par. Their authority to purchase bonds is found in section 679 of the Political Code, which authorizes the board of control to purchase state bonds when they have "surplus money" at their disposal for that purpose, and directs that the treasurer shall make appropriate transfers of funds upon his books in the event of such purchase from the surplus fund to the bond fund. "Surplus money," under this statute, is money agreed upon by the state treasurer and the members of the state board of control as not necessary for immediate use. Such amount so designated can be used for the purchase of bonds as therein authorized. Stephens v. State Treas., 195 Pac. 651. It is also provided in the same act (Stats. 1913, p. 564), section 3:

"Any bonds purchased or held under the provisions of this act may be sold or exchanged for other bonds of any of the classes described in section 1 of this act, and the money received from any such sale may be reinvested by the state board of control in the purchase of any

such bonds; provided, that no such sale or exchange shall be made *at a price which will result in a net loss to the state;* and provided, further, that any interest or premium collected or received by the state from any bonds purchased or held under the provisions of this act shall be credited by the state treasury to the fund to be known as the 'bond investment fund,' which fund is hereby established. The state treasury shall semi-annually, on the last days of June and December, transfer one-half of the amount then in said fund to the general fund, and shall transfer one-half of the amount then in said fund to the state school land fund." (Italics ours.)

This legislation, like the constitutional amendment, and most legislation regulating the sale of state and municipal bonds, is predicated upon the theory that there will be purchasers found for the bonds at not less than par. Nor is any provision made in the law for a sale of bonds purchased by the state board of control which cannot be sold except at a loss. On the contrary, this constitutional amendment expressly prohibits a sale of bonds for less than par, and the statute authorizing the purchase of the bonds of the state by the state board of control expressly prohibits a sale thereof at a net loss. Thus it would be the duty of the state board of control to hold all bonds purchased by it until authorized by the Legislature to dispose of them at a loss, if such loss is a necessary incident of a sale. So far as the purchase of state bonds by the state board of control is concerned, the transaction is essentially a bookkeeping one by which surplus funds of the state, that is, funds not immediately necessary for the purpose to which they are appropriated, may be transferred to the fund which the bonds were intended to create, thus making such funds immediately available pending the actual sale of the bonds to private parties. When so sold, the money derived therefrom would replenish the surplus fund of the general fund, and be distributed therefrom when needed to the appropriate fund from which the money was originally diverted.

As the state treasurer is prohibited from selling the highway bonds at less than par, it is clear that the state board of control, in purchasing such bonds, must bid par and accrued interest. That board is in turn prohibited from selling said bonds "at a price which will result in a net loss to the state." Stats. 1913, p. 564, supra. The state board of control proposed to buy bonds at par, and, in pursuance of an understanding theretofore had with a syndicate of bond buyers, to resell to them at 93.5862 per cent. It is clear that this will result in a loss to the state of the difference between the par value of the bonds and the percentage paid by the syndicate, and it is immaterial whether that loss takes the form of an allowance to the bond buyers as commissions or what the form of such loss may be, the fact will still remain that the state, by such purchase and sale, has suffered a loss to the extent that the par value of the bonds is depreciated. The phrase "net loss to the state" relates to the difference between the purchase price of bonds paid by the state board of control, and the net returns from the sale of such bonds by them. If the net returns of the sale are less than the purchase price of the bonds, there is a net loss, and this is prohibited. The purpose of the Legislature in prohibiting a sale of bonds at a "net loss" was to prevent a loss in the several funds established by law, and temporarily transferred to the surplus fund of the general fund.

If the statute authorizing the state board of control to purchase and resell state highway bonds issued under the constitutional amendment of 1919 should be construed according to defendants' contention, so that sale could be made by such board of control at a discount below par, the statute so construed would be clearly unconstitutional, as violating the provisions of article 16, section 2, authorizing and requiring the sale of said bonds for not less than par. The fact that the Legislature has authorized the state board of control to purchase the bonds at par and sell at a discount, if we so construe the law, would not justify the sale of these bonds in violation of the constitutional requirement that they be sold at or above par. The plain intent of the constitutional requirement is that the state shall receive the par value of the bonds, and any legislation which would justify a purchase and sale by officers of the state as a means of ultimately disposing of the bonds at less than par would be clearly unconstitutional. If, therefore, the legislative provision authorizing the state board of control to purchase and sell bonds is construed as contended for by the defendants, the law would be unconstitutional so far as applied to the third state highway bond issue.

But we do not so construe the statute. It is clear that the people, in adopting the constitutional amendment, and the Legislature, in authorizing the purchase and sale of bonds by the state board of control, did not intend that these bonds should be sold at a discount either by the treasurer or by the state board of control. It is no doubt true, as suggested by the Attorney General, that no one anticipated the situation that subsequently arose because of the war, whereby state and municipal bonds bearing 4½ per cent. interest were salable on the market only when offered for less than par. On the other hand, the very purpose of the constitutional requirement that the bonds should not be sold for less than par was to anticipate such a situation by prohibiting such a sale at all, for, if there was no danger of the bonds being sold for less than par, there was no reason for making the requirement that they must be sold at par.

The defendants' answer is framed upon the theory that there will be no net loss to the state by reason of the sale of the bonds as contemplated, because, if the bonds are not sold, highway work must be suspended, and great loss will result therefrom to the state. The loss prevented by securing funds for the continuance of the work is not to be added to the selling price of the bonds to ascertain whether there has been a net loss to the state. The gain to be derived by the state from the use of the money is not an element that enters into the question of whether there has been a net loss. In determining that loss only two items are to be considered, the cost of the purchase of the state bonds by the state board of control, and the net returns from the sale thereof. If the latter are not equal to or greater than the former, the sale is not authorized. Let it be observed that we are considering only the case of state bonds, so bought and sold.

It is clear from the foregoing that the defendants have no authority to direct the payment of this money into the surplus of the general fund for the purpose of paying the difference between the par and selling value of the bonds, whether in the form of commission or otherwise. It is also clear that the legislation authorizing the respondent board to designate the fund into which this money should be paid contemplated that it should be paid into funds which, under the statute organizing said board, are under the control of that board for the creation, maintenance, and repair of state highways.

It is ordered that a peremptory writ of mandate be issued directing the defendants to designate to the treasurer and controller the fund into which this money shall be paid, which fund shall be one already existing by law for the construction, maintenance, or repair of state highways, or one created or designated by the respondent board for that purpose.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; LAWLOR, J.; SLOANE, J.

185 Cal. 700

In re ANDERSON'S ESTATE. (S. F. 9071.)

(Supreme Court of California. May 20, 1921. Rehearing Denied June 16, 1921.)

1. Wills ⟸155(3)—Arguments or entreaties not enough to constitute "undue influence."

That a testator has been influenced by the arguments or entreaties is not enough to make the influence undue, there being no "undue influence" unless the pressure has reached the point where the mind of the testator gives way before it so that his will does not represent his conviction or desire, but that of another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

2. Wills ⟸166(1)—Evidence to show undue influence on testator of normal mind and body must be very strong.

Evidence to justify setting aside a will for undue influence, consisting simply in the pressure of importunity and entreaty, must be very strong in the case of a testator of normal strength of mind, in the full possession of his faculties, unimpaired by infirmity.

3. Wills ⟸166(12)—Evidence of undue influence must prove circumstances inconsistent with spontaneity of testator's act.

Evidence of undue influence upon a testator must show that pressure was brought to bear directly upon the testamentary act, and, though it may be circumstantial, it must do more than raise a suspicion, but must amount to proof of circumstances, inconsistent with the spontaneous character of the testator's act.

4. Wills ⟸166(5)—Will, considering amount of testatrix's estate, held not unnatural.

Where testatrix, after making her will, received considerable property from her husband, that she gave all her estate to her aunt instead of to her husband, if no child survived her, or that she gave one-half to her aunt instead of all to her child if one survived her, were not so unnatural, as to be inconsistent with the claim that the will was her spontaneous act, considering the small amount of the estate at the time of making the will the validity of which must be determined by the situation at the time it was executed.

5. Wills ⟸166(5)—Testamentary request that testatrix's aunt be made guardian of child, not unnatural.

A provision of a will, requesting that testatrix's aunt, the beneficiary of her will, be made guardian of her child, instead of her husband, was not so unnatural as to be inconsistent with the claim that the will was testatrix's spontaneous act, considering the old age of testatrix's husband and the sex of the husband and aunt.

6. Wills ⟸166(2)—Evidence held insufficient to show undue influence of aunt, made beneficiary of niece's will.

Where the relations existing between a testatrix and her aunt, the sole beneficiary of her will, were as close as those usually existing between a mother and daughter, and the aunt accompanied the testatrix to the office of the attorney, who drafted the will, but remained outside the room while testatrix conferred with him, and there was no evidence of the aunt importuning or otherwise exercising any pressure upon testatrix to make a will in her favor, and thereafter testatrix and her husband moved elsewhere where they lived together apart from the aunt for some time, the evidence was insufficient to show the exercise of undue influence by the aunt.

7. Wills ⟸163(2)—No presumption of undue influence from intimate relation between testatrix and beneficiary.

That an intimate and affectionate relation existed between a testatrix and her aunt, sole beneficiary under her will, did not give rise to a presumption of undue influence.

8. Wills ⟸163(5)—Acts of beneficiary held not such activity in procurement of will as to create presumption of undue influence.

The activity of testatrix's aunt, in the procurement of a will making her the beneficiary, was not such as to raise a presumption of undue influence, where she obtained a letter of introduction to the lawyer who prepared the draft of the will, and went with the testatrix to his office, where she remained in an outer room during testatrix's interview with him, as the activity necessary to give rise to such a presumption must be in the use of the relation between the beneficiary and testatrix for the overcoming of the will of the latter.

9. Wills ⟸53(2) — Declarations indicating mental state at time of utterance inadmissible, where such mental state not germane.

Declarations, indicating declarant's intention, feeling, or other mental state being competent only when they indicate such mental state at the time of their utterance, are not admissible when declarant's mental state at that time is not germane to the issue.

10. Wills ⟸165(2)—Declarations of testatrix some time after execution of will inadmissible, facts shown being immaterial and prejudicial, on issue of undue influence.

In the contest of a will on the ground of undue influence, testimony of a nurse in attendance on testatrix some months after the making of the will that she heard decedent praying God to forgive her sin and help make it right with her husband, and testimony of her husband that she several times requested him to get an attorney to draw some papers undoing an unjust act toward him, which her aunt and uncle caused her to do, were inadmissible, being hearsay, and indicating only that testatrix had changed her mind and regretted the will she had made; such facts being prejudicial and immaterial on the issue of undue influence at the time of the execution of the will.

11. Wills ⟸165(4)—On issue of undue influence testatrix's letter to beneficiary, stating will had been made at latter's request, inadmissible.

On an issue as to undue influence, a letter by testatrix to her aunt, the beneficiary under the will, to the effect that the will had been made at the latter's request, was not admissible, being merely a declaration as to a past event, and not indicative of the condition of mind of the testatrix at the time she made the will.

12. Wills ⟸165(4)—On issue of undue influence testatrix's request that husband protect her against her aunt, the beneficiary, held admissible.

In the contest of a will on the ground of undue influence, a request by testatrix of her husband that he protect her against her aunt, sole beneficiary under the will, was admissible, though hearsay, it indicating her then state of mind toward her aunt, which was material, having a reasonably direct bearing on what her mental attitude may have been when she executed the will not long before.

In Bank.

Appeal from Superior Court, Sonoma County; George H. Cabaniss, Judge.

Proceeding by Cora T. Jenkins, to probate the olographic will of Hazel Anderson, deceased. From an order in favor of contestant, Henry Anderson, refusing the admission to probate of the will, proponent appeals. Reversed.

R. L. Thompson and R. M. Barrett, both of Santa Rosa, for appellant.

J. R. Leppo and Kellogg & Kyle, all of Santa Rosa, and Roy W. Stoddard, of Reno, Nev., for respondent.

OLNEY, J. This is an appeal from an order refusing the admission to probate of a certain olographic instrument purporting to be the will of Hazel Anderson, deceased. The order was made after formal contest and jury trial. The authenticity of the instrument was not questioned, and the grounds of contest assigned were that it had been executed under the undue influence of the proponent, who was the sole beneficiary and is the appellant here, that it had been executed when the testatrix was of unsound mind, and that it had been revoked. At the trial a nonsuit was granted as to the two latter grounds, and the cause submitted to the jury upon the single issue as to undue influence. Upon this issue the jury found against the instrument, and upon their verdict the order appealed from was made. Of the grounds urged for reversal but two require consideration. They are (1) that the verdict is not supported by the evidence, and (2) errors in the admission of evidence. The first of these grounds necessitates a review of the evidence.

The proponent of the will is an aunt of the decedent, and the contestant is the decedent's husband. The decedent had been left an orphan when very young and had been brought up in the family of her aunt. The very closest relations existed between them, fully as close as those usually existing between a mother and an affectionate and tractable daughter, and they regarded each other as if that were in fact their relation. The deceased was a woman of education, intelligence, and individuality, and there is not present in the case any element of the control or domination of a weak or subnormal mind by a stronger or more vigorous personality. There was some testimony as to occasions when the deceased and her aunt had differed about minor matters, some of them purely personal to the deceased, such as matters of dress, and the deceased had given way to her aunt. But there was nothing more shown than the deference which, as between mother and daughter, the younger woman might very reasonably and properly show to the opinions of the older. The case is but

one of a close and intimate relation, as of mother and grown daughter, with no more of subserviency on the part of one to the other than may naturally and properly exist in such a relation.

At the time of the decedent's marriage the parties were living in Reno, Nev. The aunt's husband was managing a general store there, assisted by his wife, and the niece was employed in the store. There she met the contestant, who was one of the principal stockholders of the corporation owning the store, and married him. He was very much older than she, he being 67 at the time and she 27. He had been married previously, and had a family of grown children. He was also a man of wealth, while she had nothing.

Something over a year after the marriage, the deceased became pregnant, and in February, 1918, she and her aunt came to San Francisco to make purchases in preparation for the expected child and to attend to some other matters. It had been planned that the husband should accompany them, but his wife informed him that her aunt preferred that they should go alone, and he permitted them to do so. While the two women were thus alone in San Francisco, the instrument in question was executed. The decedent's mother had died in childbirth, and the decedent greatly feared the same fate for herself, and the will was undoubtedly made by her because of her approaching confinement and the danger incident to it. Her only estate at the time consisted in some personal belongings and shares of stock of the value of about $6,000 in the corporation owning the store at Reno managed by her aunt's husband, all of which the decedent's husband had given her from time to time after their marriage.

The will made by the decedent under the foregoing circumstances gave one half of her estate to her aunt, and the other half to any child or children that might survive her. If no child survived her, the whole estate was to go to her aunt. The will also named the aunt as executrix, and expressed the wish that she be appointed the guardian of the estate of any child who might survive the decedent. The will also stated that the decedent made no provision for her husband for the reason that he had ample means of his own and needed no provision from her separate estate.

There is no evidence of the aunt importuning the decedent or otherwise exercising any pressure upon her either to make a will or to make one in her aunt's favor. All that appears is that the decedent before coming to San Francisco had expressed a wish to make a will, and had told her aunt that she wished her to have what she had when she died. The sole witness as to the immediate circumstances under which the will was executed was the aunt, who was called for the purpose of testifying upon the point by the contestant himself. He is, of course, not bound by her testimony (section 2049, Code Civ. Proc.), and the jury were at liberty to reject any of it that did not seem to them worthy of belief, but, rejecting it, there is no evidence to take its place, and, as was said of a similar case in Estate of Kilborn, 162 Cal. 4, 120 Pac. 762, the case is without evidence upon the point. The circumstances as testified to by the aunt, were that shortly after the arrival of the two women in San Francisco, at the suggestion of the niece, the aunt made inquiry of a woman, with whom they had business, as to a competent lawyer. The woman recommended a Mr. Clark, a reputable attorney, and gave the aunt a letter of introduction to him. The aunt and the niece presented this letter together, the aunt asked him about some matters of her own, and then retired from the room while the niece consulted him about her will. The aunt remained without the room during the interview between the lawyer and the niece, except that at one time she was called in by the niece, who wished to inquire about a date. When the ladies left, the lawyer was to prepare a draft of a will which would express the wishes of the niece as told to him by her. This he did, and the ladies later returned, and the niece obtained the draft. From this draft she prepared the will in question here, writing it in her room one afternoon when the aunt was out, and putting it in her aunt's suit case in a sealed envelope. On her aunt's return she told her what she had done, and asked her to put the will in the safe of the store at Reno. The aunt kept the will until her return to Reno, and then placed it in the safe as requested.

There was also considerable evidence as to events occurring subsequent to the execution of the will, but for the most part this evidence is wholly immaterial upon the issue of undue influence, and yet is of a character to influence the jury strongly against the will, since it indicates that the decedent immediately before her death had changed her intention as to the disposition of her property and desired to revoke the will, a desire which her untimely death alone prevented her from carrying into effect. It seems that at the end of their stay in San Francisco the two ladies went to Sacramento, where they were met by the decedent's husband. From there the aunt returned to Reno, and the niece and her husband went to Santa Rosa pursuant to a plan they had to settle in California, if they found a place agreeable to them. They found Santa Rosa agreeable, and the husband purchased a home and a farm there at an aggregate cost of about $18,000. These he had conveyed to his wife, so that at her death her estate consisted of this property as well as of the $6,000 in stock and the personal belongings which she had at the time she made the will. The husband and wife remained at Santa Rosa, the aunt visiting the niece but once and then for but a few

days, and at the suggestion of the husband, in order that some one might be with his wife while he was away on business. Some three months after the making of the will, the expected child was born, but born dead. The mother was able to be about within a few days, but blood poisoning then came on, and she died on the eighth or the ninth day after the birth.

A nurse who was in attendance testified over the objection of the proponent of the will that some days after the birth she found the decedent by the side of her bed praying and repeating over and over, "Dear God, just now forgive my sin, and help me to make it right with Mr. Anderson."

The contestant, over the objection of the proponent, was permitted to testify to a number of conversations with his wife occurring after her confinement. According to his testimony, she several times requested him to get an attorney who might draw some papers undoing an unjust act that she had done toward him, and which her aunt and uncle were the cause of her doing. He put her off, saying that they could go to Reno and fix the matter directly with the aunt and uncle. In reply to this suggestion she asked that in case they went to Reno he protect her, as her aunt and uncle would be very cruel to her. Two days before her death she prepared a preliminary draft of a letter to her aunt and also a letter. The letter was mailed by her husband at her insistence, but was not received until after her death, and on its receipt was destroyed by her uncle. The preliminary draft read:

"June 13—1918, Santa Rosa, Cal.

"Dear Auntie: Will you kindly forward the original will which you witnessed in San Francisco when we were down there. I have not been able to sleep at night and feel when I get these papers here and get that ignoble act undone.

"Hope you and children are well.

"Hazel Lenore Anderson."

The letter itself, according to the contestant's testimony, read:

"Santa Rosa, California, June 13, 1918.

"Dear Auntie: Will you kindly forward those papers, which at your request was drawn up in San Francisco. I wish to revoke that ignoble act done, and forward same to me immediately. I have not been able to sleep since you left me.

"Hazel Lenore Anderson."

Although the decedent had expressed her wish to her husband to undo an "ignoble" act which she had done toward him, and although the husband read both the foregoing preliminary draft and the letter itself before the letter was mailed, and the matter was the subject of more than one conversation between them, the fact, according to his testimony, is that he did not know that his wife had reference to a will she had made, and did not know until after her death that she had made a will.

[1-3] The foregoing being the facts and circumstances of the case as shown by the evidence, the question presented by the appellant's first contention is, Are they sufficient to prove affirmatively, as a conclusion fairly to be drawn from them, that it was actually the fact that in executing the will the mind and will of the testatrix were overpowered by her aunt? Viewing the question purely as one of fact to be determined from the facts and circumstances shown in evidence, it would seem plain enough that the evidence is sufficient to raise only a suspicion, if even that, that the mind of the testatrix may have been overpowered, and is not sufficient to justify as the basis for judicial determination and action the definite conclusion that it was in fact overpowered. It is no easy thing to overpower the mind of a normal person in full possession of his senses by the mere pressure of importunities and entreaties, and there is certainly not even a suspicion in the present case that any more drastic or compelling form of pressure was used. The mere fact that one person has been influenced by the arguments or entreaties of another is not enough to make the influence an undue one. It is not undue unless the pressure has reached a point where the mind of the person subjected to it gives way before it so that the action of such person, taken in response to the pressure, does not in fact represent his conviction or desire, brought about perhaps by argument and entreaty, but represents in truth but the conviction or desire of another. As was said in Estate of Donovan, 140 Cal. 390, 394, 73 Pac. 1081, quoting from Chaplin:

"The true test of undue influence is that it overcomes the will without convincing the judgment."

This can happen but rarely in cases of persons of normal strength of mind in the full possession of their faculties, unimpaired by infirmity. The evidence which would justify the conclusion that it had occurred in any particular case of that character would have to be very strong indeed. This, of course, is not true where the mind of the person subjected to the pressure is naturally weak or is impaired by sickness, extreme physical weakness, or some other cause, and it will be found upon examination that in nearly every case where a will has been set aside as the result of undue influence consisting simply in the pressure of importunity and entreaty, there has existed the element of a mind and will weak or for some reason impaired. That element is not present here, and it is simply incredible, upon the facts presented in the case before us, that the mind of the testatrix, a woman of mature years and of at least normal strength of mind, intelligent, in the full possession of her faculties, and in good health, was overcome by

the pressure of importunities and entreaties on the part of her aunt. There is in fact no evidence that such pressure was exerted. The outstanding features of the case are simply: That the testatrix was a mature and intelligent woman of sound mind; that she was married to a man of wealth very much older than herself; that she was devotedly attached to her aunt, whom she regarded as her mother; that she had a little property of her own, given her by her husband, consisting almost entirely of stock in the corporation managed by her aunt's husband; that she was expecting a child, and was fearful of the result of her confinement; that she wished to make provision as to the disposition of her estate and the care of her possible child in case she should die; that under the circumstances she made a will after consultation with a lawyer, and when she and the aunt were away from their home together; and that the will provided for the division of her estate between the aunt and her child, if there should be one, and otherwise for its all going to the aunt, requested that the aunt be appointed guardian of the child, and stated that no provision was made for her husband, as he had ample means of his own.

It is doubtful if these circumstances would justly raise even a suspicion. Much less do they come up to the test prescribed in Re McDevitt, 95 Cal. 17, 30 Pac. 101, a test which has been reiterated and reapplied in numerous subsequent decisions by this court. It was there said at page 33 of 95 Cal. at page 106 of 30 Pac.:

"Evidence must be produced that pressure was brought to bear directly upon the testamentary act; but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. I think there is nothing beyond suspicion shown here."

[4, 5] Applying this test, What one of the circumstances in this case is there which is "inconsistent with the claim that the will was the spontaneous act of the alleged testatrix?" The only one upon which stress is laid is the provisions of the will itself, and in particular that it should give the estate to the decedent's aunt instead of to her husband, from whom she had received it all. But when we consider the small amount of the estate she was disposing of, consisting as it did when she made the will only of personal belongings and stock in the store corporation to the amount of $6,000, and the fact that her husband, as she says, had ample means, it was not unnatural that she should wish her little to go to her aunt and foster mother. This situation was considerably changed by the subsequent very substantial gifts to her of the home and farm at Santa Rosa, and it may well be that it was due in some part to this that she subsequently desired to revoke the will. But the validity of the will must be determined by the situation as it existed at the very time it was executed, and the situation then was that she was disposing of a comparatively small amount. Stress is also laid on the provision of the will requesting that the aunt be made guardian of her child. This also is a not unnatural provision, when we consider the ages and sexes of the parties. The husband was 69, and a man, and the aunt was 47 and a woman. It was not unnatural that the testatrix should expect and hope that it would be the latter who would have the bringing up of her infant child in case she herself should pass away. The only feature of the will whose naturalness can be at all justly questioned is not that it gives the testatrix's estate to her aunt instead of to her husband, but that it gives one-half to her aunt if the child survives, instead of giving it all to the child. But here again, when we consider the small amount that would be left to the aunt in such a case, some $3,000, and the burden that would be assumed by the aunt, if the raising of the child were intrusted to her, any unnaturalness of the will in this respect largely, if not entirely, disappears.

[6] The circumstances of this case are not dissimilar from those in numerous other cases which have from time to time been presented to this court, and so far as we are aware it has been held without exception that such circumstances are insufficient to justify a finding of undue influence. In the very case from which we have just quoted of In re McDevitt, the facts were that the testator was an old man, an invalid suffering from cancer, from which he finally died, a bachelor living with a brother, that his will was executed at the house of this brother, and left everything to him and to his children to the exclusion of the children of two deceased brothers living in the same city, and with whom the testator was on friendly terms. There was also evidence that the brother, who was the beneficiary, had abused the testator, and that the latter was very much afraid of him. The only particular in which the facts in the case differ from those before us in a respect favorable to the contestant here is that the brother was not present, even outside the room, when the testator was consulting his lawyer and the will was executed. The jury found that the will was executed under the undue influence of the brother, and on appeal the verdict was set aside as not supported by the evidence. Among other things pertinent to the present discussion contained in the opinion is the following:

"General influence, not brought to bear upon the testamentary act, however strong or controlling, is not undue influence. There must be proof that the influence was used directly

to procure the will, except in those cases where the beneficiaries or parties instrumental in having the will executed sustained a confidential relation to the testator. This case is not within the exception."

In Re Langford, 108 Cal. 608, 41 Pac. 701, the testator left the bulk of his estate to a second wife to the practical exclusion of his children by a former marriage. The jury found that the will was executed under the undue influence of the wife, and on appeal the verdict was set aside as not supported by the evidence. There was evidence that the testator habitually deferred to the wishes of his wife, that he appeared to be afraid of her, and that he declared on several occasions that his children should have his property when he died. The court said of the case, as might be said of the present one:

"This is not the case where a man makes a will upon his deathbed, surrounded by those who turn out to be his devisees; nor is it a case where a weak person at the time of the execution of his will is teased and tormented by the importunities of relatives who do not allow him to be out of their sight, or to have any opportunity for quiet thought or independent advice."

The single particular in which the facts were less favorable to the contestant than those appearing here is that the will was executed at the office of the testator's lawyer, where he had gone alone. This, of course, is an important feature, but its importance is much reduced in the present case by the fact that for the whole period of three months between the execution of the will and the confinement of the testatrix she was, except for a few days, with her husband and away from her aunt, and was not even intending to return to live near her aunt. Any element of undue influence must have been removed; she had ample time to change the disposition she had made, and yet there is no suggestion that such change was desired by her until after her confinement. As was said in the Langford Case:

"He had ample opportunity to fully and freely think out what he wanted to do, and to change any conclusion he might have arrived at, if he so desired."

In Estate of Calef, 139 Cal. 673, 73 Pac. 539, the testatrix had made a will giving a substantial legacy to the contestant and making only a small contingent provision for one Mabel Tickell. Thereafter she made a codicil, giving Mrs. Tickell a substantial amount and correspondingly reducing the legacy to the contestant. Both will and codicil were offered for probate, and the contestant contested the validity of the codicil on the grounds that it had been executed under the undue influence of Mrs. Tickell, and that the testatrix was of unsound mind at the time. The jury found against the codicil on both grounds. It appeared that the testatrix was a widow without children. Her husband, however, had had three children by a former marriage, one of whom was the mother of Mrs. Tickell. The testatrix always had great affection for this stepdaughter and her daughter, and called them her daughter and granddaughter, and treated them as such. About 2 years after making the will she suffered an attack of paralysis, from which she finally died. Immediately after suffering this attack she went to live at the home of her stepdaughter, the mother of Mrs. Tickell, and remained there until her death. Shortly before going there she had told her lawyer to prepare a draft of the codicil in question and send it to her at her stepdaughter's home. This the lawyer did, and upon receipt of the draft the testatrix made a copy of it in her own hand as an olographic instrument. At the time she did this Mrs. Tickell was with her, and, the eyesight of the testatrix being bad, read the draft to her. There was also evidence of unsoundness of mind, although how substantial the evidence was does not appear. About a year after the making of this codicil the testatrix died. It must be evident that in nearly every particular the circumstances of this case were more favorable to the contestant than those of the present case, but, nevertheless, the court held that they were insufficient to justify the verdict of undue influence.

In Estate of Higgins, 156 Cal. 257, 104 Pac. 6, the testator had made a will substantially preferring one son to his other children. The evidence for the contestants showed that the will was executed on the day preceding the testator's death, that he was a man of advanced years, in poor health, and greatly weakened mentally, and that the testator reposed great confidence in the son who was preferred, and the latter had from time to time importuned his father to settle his affairs. The will was executed by the testator at his home after consultation with a lawyer. The son accompanied the lawyer to the house when he went there for the purpose of having the will executed, but was not in the room either at the preliminary consultation or at the time of execution. It was held that the evidence did not justify a finding that the will had been executed under the undue influence of the son.

In Estate of Lavinburg, 161 Cal. 536, 119 Pac. 915, the testator, a man of advanced years, had made a will leaving the bulk of his estate to two daughters to the exclusion of a son to whom he was much attached and of two other daughters. The will was attacked as made under the undue influence of one of the daughters benefited, and the jury found against the will. It appeared that the testator had made a second and very unhappy marriage; that the will was made when he was in serious trouble with his wife and greatly perturbed because of it; that he plac-

ed the utmost confidence in the daughter who was claimed to have unduly influenced him; that immediately prior to the making of the will he had transferred to her a large part, if not practically all, of his estate, to hold as trustee for him; that she suggested at the time of this transfer that he should make a will, and he immediately consulted a lawyer for that purpose and did so, and that the daughter exerted great influence over her father and boasted of it. It was held that the evidence was no more than sufficient to raise a suspicion, and did not amount to proof of undue influence, and the verdict of the jury was set aside. It is to be noted that in the particular that the daughter not only occupied a relation of affection and great confidence toward her father, but was as well an actual trustee for him for a considerable portion of his estate, the facts were stronger in favor of the contestant than in the present case. On the other hand, it should be said that the will was executed wholly without the presence of the daughter, and importance is attached in the opinion of the court to that fact. It did appear, however, that the daughter had gone with him to the trust company, whose attorney prepared the will on the occasion when he consulted that attorney in regard to making a will.

In Estate of Morcel, 162 Cal. 188, 121 Pac. 733, the testatrix left her entire estate to her husband to the exclusion of her daughter by another man. The jury found that the will had been executed under the undue influence of the husband, who not only lived with the testatrix on terms of affection and confidence, but who had been intrusted by her with her business affairs, she being ignorant and illiterate. Of the details of the case in general, it is necessary to say only that they were no less favorable to the contestant than the circumstances of the present case. There is one particular, however, that is worthy of note, and that is the important particular of the circumstances immediately surrounding the execution of the will. It is worthy of note because those circumstances closely resemble those surrounding the execution of the present will and to the extent to which they differ are more favorable to the contestant. The circumstances were that the testatrix's husband not only went with her when she went to the office of their lawyer for the purpose of making a will, but, unlike the aunt in this case, he actually remained in the room with her when she gave instructions as to the provisions she desired, and executed the will drawn in accord with those instructions. The court, nevertheless, set aside the verdict of undue influence as not justified by the evidence.

In this immediate connection, the decision in Estate of Purcell, 164 Cal. 300, 128 Pac. 932, should be noted. There a widow of advanced years, ill and about to undergo a severe operation, made a will in favor of her husband's brother and sister and her housekeeper to the exclusion of her heirs. The estate was large, and the will was contested on the grounds of unsoundness of mind and of undue influence on the part of the three beneficiaries, particularly on the part of the brother-in-law. The contestants were nonsuited, and on appeal the order of nonsuit was upheld. The physician of the testatrix testified that her mind was somewhat impaired by age, and there was also the evidence of acquaintances that in their opinion she was of unsound mind. It also appeared that the brother-in-law had been her business adviser and manager ever since the death of her husband, so that a fiduciary relation was involved as well. The circumstances surrounding the execution of the will closely resemble those now before us. A lawyer was summoned to the house of the testatrix by the brother-in-law, and, going there, was taken to the room of the testatrix, where there was also present one of the other beneficiaries. The lawyer and the testatrix were, however, left alone while she gave him instructions about the will she desired. The next morning she went to the lawyer's office to execute the will, accompanied by the brother-in-law, who, however, was not present in the inner office when the will was executed. If a nonsuit were proper in the case of a will executed under these circumstances in favor of a fiduciary agent by an ill woman of advanced years, whose mind was somewhat impaired by age, certainly a nonsuit would have been proper in the present case.

In Estate of Gleason, 164 Cal. 756, 130 Pac. 872, the will involved was one whereby the testator left his entire estate to his wife to the exclusion of his sister. It appeared that the testator at the time of his marriage was a man of 60, while his wife was only 22, and even at that youthful age had had such a varied matrimonial career that the testator was her third husband; that he had been married before, and had been devotedly attached to his first wife, with whom he had lived happily for 30 years, and had married the second wife within a year after her death and upon a short acquaintance; that he had numerous sick spells, for relief from which he was accustomed to take morphine; that the second wife secured the will within a few hours after its execution, inquired of one of the witnesses to it if he had in fact witnessed it, and then placed it in her safe deposit box, and that within seven weeks after the execution of the will the testator died. It also appeared that while the will had been executed without the presence of the wife and at the office of a notary public where the testator had gone for the purpose, the testator returned to the office of the notary within a few minutes in a state approaching nervous collapse, and, referring to the will and to the

fact that he had required the notary to acknowledge its execution as well as to witness it, said:

"But I had to do it. I had to do it right or hell would pop at home; I could not stay there."

Certainly these circumstances and such evidence go much further to justify a suspicion at least of undue influence than those of the present case, but it was held that they were insufficient to have justified a finding of undue influence by the second wife.

It would serve no useful purpose to discuss the comparatively few decisions of this court in which an order setting aside a will for undue influence has been upheld. Suffice it to say that in practically all of them there entered either the element of a weak, unsound, or impaired mind, including a mind impaired by great physical weakness, or the element of a will procured by one who occupied a fiduciary relation to the decedent, who was not a natural object of the decedent's testamentary bounty, and who yet benefited substantially by the will. Examples of the first class of cases are Estate of Snowball, 157 Cal. 301, 107 Pac. 598; Estate of De Laveaga, 165 Cal. 607, 133 Pac. 307, and Estate of Jones, 166 Cal. 108, 135 Pac. 288. An example of the second class is Ross v. Conway, 92 Cal. 632, 28 Pac. 785. Not infrequently both elements are present, as was true in Estate of Nutt, 181 Cal. 522, 185 Pac. 393. Not infrequently there enters also the element of some fraud or deceit practiced by one occupying a confidential relation. None of these elements is present in the case at bar.

[7] The contestant contends that because of the intimate and affectionate relation which existed between the decedent and her aunt there arises a presumption of undue influence. This feature was present in most, if not all, of the cases which we have just reviewed at length, and it is apparent that if there be such a presumption here and it is controlling, it was likewise present in those cases, and should have been there held to be controlling, and a different result reached. In many of them, furthermore, the same contention as to a presumption was made and was discussed and overruled. See, for example, Estate of Langford, 108 Cal. 608, 622, 41 Pac. 701. It has also been presented in a number of cases we have not referred to. Estate of Ricks, 160 Cal. 450, 117 Pac. 532, is an example. There, a mother made a will giving her property to two sons to the exclusion of a third. The relation between one of the sons who was a beneficiary and his widowed mother was not only the close relation which naturally exists between mother and son, but the son had also had charge for years of all her business affairs. There was no evidence whatever as to the circumstances under which the will was executed and the contestant, the disinherited son, contended that because of the relations between his mother and his brother a presumption of undue influence arose which the latter had to overcome. The jury found against the will, and on appeal the verdict was set aside, the court saying, at page 461 of 160 Cal., at page 536 of 117 Pac., in regard to the claim that a presumption of undue influence existed:

"But no warrant is given to a jury to find that undue influence was exerted at the time the will was made from proof merely of such relation alone. Undoubtedly the relation between respondent and his mother was affectionate and confidential and that [sic] he would have a general influence over his mother proceeding from such relation. But the existence of such relation and this general influence raises no presumption that undue advantage was taken of it by respondent. There is no legal suspicion of undue influence arising from the existence of such a relationship, which imposes upon the son the necessity, when a will in his favor is attacked, of assuming the burden of proof that he had not unduly influenced his mother in making the will. The confidential relation and the opportunity afforded therefrom to exercise undue influence may, of course, always be taken into consideration with other evidence, when the question of undue influence is in issue. But the relation itself, and opportunity, are not sufficient alone to warrant a finding that undue influence was actually exerted. Proof, merely, that confidential relations existed between a testator and the main beneficiary under his will is not sufficient to destroy its validity, but there must be some proof, in addition to the relation, of facts or circumstances showing the use of that relation, at the time the will was made, overcoming the free will and desire of the testator, in order to invalidate the testament."

See, also, Estate of Baird, 176 Cal. 381, 168 Pac. 561.

[8] It is also claimed, however, that there was present in the case at bar the element of activity on the part of the aunt in the procurement of the will. The only evidence of such activity is that she obtained a letter of introduction to the lawyer who prepared the draft of the will, and went with the testatrix to his office and there remained in an outer room during the interview between the testatrix and the lawyer. But this is not the activity in the procurement of the will which is necessary in order to give rise to a presumption of undue influence. The activity must be in the use of the relation for the overcoming of the will of the testator. As was said in Estate of Ricks (to quote again):

"There must be some proof, in addition to the relation, of facts or circumstances showing the use of that relation at the time the will was made overcoming the free will and desire of the testator, in order to invalidate the testament."

It is also worthy of note in this connection that in Estate of Morcel, 162 Cal. 188, 121

Pac. 733, heretofore referred to, where the husband was accused of procuring the will of his wife by undue influence, the same activity as that shown here appeared, that is, the husband went with the wife to the lawyer's office when the will was drawn and executed (in fact he remained in the room during the whole time), the same contention as to a presumption arising was made as is made here, and the contention is directly overruled. Other cases of well-nigh identical facts where the same contention was made are Estate of Latour, 140 Cal. 414, 423, 73 Pac. 1070, 74 Pac. 441; Estate of Calef, 139 Cal. 673, 73 Pac. 539; and Estate of Purcell, 164 Cal. 300, 128 Pac. 932.

Our conclusion then is that the evidence is insufficient to sustain the verdict of undue influence.

[9] As to the declarations of the decedent admitted over the objection of the proponent, the contention that their admission was error must also be sustained as to some. Such declarations were hearsay, pure and simple. The only exception to the rule against hearsay within which they could come is the exception which admits declarations indicative of the declarant's intention, feeling, or other mental state, including his bodily feelings. But such declarations are competent only when they are indicative of the declarant's mental state at the very time of their utterance, and only for the purpose of showing that mental state. It follows from this that unless his mental state at that time is material to the issue under investigation, the declarations are not admissible, even though they do show his mental state at that time, not because they are not competent for that purpose, but because that purpose is not germane to the issue. These general propositions are settled by a multitude of authorities, including some where the issue was one as to undue influence in the making of a will. See In re Calkins, 112 Cal. 296, 44 Pac. 577; In re Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; Estate of Snowball, 157 Cal. 301, 107 Pac. 598; Estate of Ricks, 160 Cal. 450, 117 Pac. 532; Estate of Gleason, 164 Cal. 756, 130 Pac. 872; Estate of Jones, 166 Cal. 108, 135 Pac. 288. Now the declarations of the testatrix admitted in the present case were admitted on the theory that they were competent only to show her state of mind when uttered, and the jury were so charged. But although admitted for this purpose alone, most of the declarations do not come within the exception to the hearsay rule. As may be seen from the foregoing statement of the exception, in order that a declaration be within it, two things are requisite: (a) The declaration must be indicative of the mental state of the declarant at the very time of utterance, and (b) his or her mental state at that time must be material to an issue in the cause, i. e., have a reasonable evidentiary bearing upon such issue.

[10] The declarations in the present case are of three sorts: First, there are the declarations indicative simply of the fact that at the time they were made, some three months after the execution of the will, the testatrix had changed her mind in regard to the disposition she wished to make of her property, and regretted the will she had made. If that change of mind and regret had been material, evidence of the declarations would have been competent. The point is that the fact that she had changed her mind and regretted what she had done was not material. It made no difference whether she had or not. The only evidentiary bearing of the fact on the issue before the jury, that of undue influence at the time of the execution of the will, lay in the possibility of reasoning from the fact that the testatrix had changed her mind and regretted what she had done that she had possibly acted only under undue pressure in the first instance. But this bearing is exceedingly slight and remote, or, in other words, the probative value of the fact that she had changed her mind as showing that she had not acted freely in the first instance, is almost, if not quite, nil. On the other hand, the fact that the testatrix had changed her mind was one which, if put before the jury, would almost certainly affect them greatly, and would in and of itself be given great weight by them, regardless of what its bearing on the real issue before them might or might not be. Under such circumstances, where the true evidentiary bearing of the evidence is at best slight and remote, and yet the evidence is of a nature such as to make it very prejudicial to the party against whom it is offered, the evidence should be excluded. See Adkins v. Brett, 193 Pac. 251.

[11] The second sort of declaration is the one contained in the letter by the testatrix to her aunt to the effect that the will had been made at the latter's request. This was not properly admissible for a reason just the converse of that applicable to declarations of the first sort. The fact declared, that the will was made at the request of the aunt, did have a very direct bearing on the issue in the case, and was quite material. But the declaration of this fact was not admissible because it was merely a declaration as to a past event, and was not indicative of the condition of mind of the testatrix at the time she made it. It was therefore not within the exception to the hearsay rule. Estate of Jones, 166 Cal. 108, 117, 135 Pac. 288.

[12] The third sort of declaration is the request by the testatrix of her husband that if they returned to Reno he protect her against her aunt and uncle, as they would be cruel toward her. This is the only declaration

which meets both requirements necessary in order to bring a declaration within the exception. It (a) indicated her then state of mind toward her aunt, and (b) her then state of mind as so indicated was material, since the fact that she then feared her aunt had a reasonably direct bearing on what her mental attitude toward her aunt may have been at a previous and not far distant time, when she executed the will. Order reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; LAWLOR, J.

5z Cal. App. 207

BOOLE v. UNION MARINE INS. CO., Limited, et al. (Civ. 3784.)

(District Court of Appeal, First District, Division 1, California. April 11, 1921. Hearing Denied by Supreme Court June 9, 1921.)

1. Insurance ⟸147(4)—Policy may incorporate law of foreign state.

A contract by an insurance company made in one state and executed elsewhere may, by its terms, incorporate the law of another state and make its provisions controlling upon both the insurer and the insured.

2. Insurance ⟸147(4)—Policy may stipulate that it be governed by foreign law.

The general rule is that, in the absence of statutory prohibition, the parties may stipulate that the policy shall be construed and governed by the laws, usages, and customs of a foreign state, and such laws, usages, and customs as are applicable shall be deemed to be a part of the written contract.

3. Insurance ⟸147(4) — Stipulation making marine policy subject to English law not contrary to public policy.

A marine policy stipulation that the English law should govern in determining what should constitute a constructive total loss under the policy *held* not violative of public policy, notwithstanding the provisions of Civ. Code, §§ 2705, 2717, as to what constitutes a constructive total loss, such provisions not being mandatory upon the parties.

4. Contracts ⟸167—Provisions of Code as to contract rights may be waived.

Generally, under Civ. Code, § 3268, except where otherwise declared, the provisions of the Civil Code, with respect to the rights and obligations under contracts, are subordinate to the parties' expressed intention, and the benefit of such provision may be waived by any party entitled thereto, unless such waiver would contravene public policy.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by W. A. Boole against the Union Marine Insurance Company, Limited, and another. From judgment for less relief than demanded, and an order denying plaintiff's motion for new trial, plaintiff appeals. Appeal from order denying new trial dismissed, and judgment affirmed.

Samuel Knight, F. Eldred Boland, and C. Irving Wright, all of San Francisco, for appellant.

Farnham P. Griffiths and McCutchen, Willard, Mannon & Greene, all of San Francisco, for respondents.

WASTE, P. J. Plaintiff sought to recover under two policies of insurance issued by the defendants, covering chartered freight on the oil barge Pinta, which was sunk in San Francisco Bay. The jury found that the barge was not such a constructive total loss as to entitle the plaintiff to recover under the terms of the policies, and returned a verdict in his favor for expenses incurred by him in raising the barge, but against him for the other sums asked. Judgment was duly entered. A motion for a new trial was made by plaintiff, and denied.

The judgment on the verdict was entered June 19, 1914. Appeal therefrom was not taken until October 15, 1919. On the same day there was taken an appeal from the order denying the motion for a new trial, which was made on September 15, 1919.

In this court the parties have proceeded upon the theory that the proper appeal to be considered is that taken from the order denying the motion for a new trial. We think not. The case falls squarely within the ruling of a recent decision of the Supreme Court, wherein it was held on facts identical with those presented in the case at bar that the only appeal to be considered was the appeal from the judgment. On the authority of that case, the appeal from the order denying the motion for a new trial is dismissed. Wilcox v. Hardisty, 177 Cal. 752, 171 Pac. 947.

The policies of insurance issued by the defendants to the plaintiff provide that all claims for loss shall be adjusted according to the English law and practice, and that the settlement thereof shall be made in conformity with the laws and customs of England. Conceiving these clauses of the policies to govern the adjustment of the loss in this case, the court instructed the jury that the question of plaintiff's right to recover under his claim of a constructive total loss must be determined by the laws and customs of England, and that under such law there is a constructive total loss of a ship only when the cost of repairs exceeds the value of the vessel when repaired. It was stipulated that this was a correct statement of the English law, which differs from the California law, which provides that a constructive total loss of a vessel occurs when the cost of repairs would exceed one-half the

value of the vessel. Sections 2705 and 2717, Civ. Code. It was admitted at the trial that the Pinta was not a constructive total loss under the English law, which was the basis of the court's instruction, and the resulting judgment for the defendants.

Appellant contends, in the first place, that the clauses of the insurance policies requiring that all claims for loss shall be adjusted in conformity with the English law and practice, and that all settlements thereof must be made in conformity with the laws and customs of England, do not, either expressly or by implication, exclude the California Code provisions as to what constitutes a constructive total loss; but that the claims arising under such policies shall be settled in accordance with the laws and customs of England only when such laws and customs are not in conflict with the provisions of the Code sections, which, he contends, are part of the insurance contracts. If the court shall conclude that, upon a fair construction of the contracts of insurance, the clauses of the policies referred to exclude the California statute law, it is appellant's contention in the second place that these clauses are void, as being in contravention of the domestic policy of the state expressed in the Code sections.

[1, 2] Contracts of insurance are not different from other contracts. In the absence of statutory provisions to the contrary, insurance companies have the same right as an individual to limit their liability, and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. 14 R. C. L. pp. 928–930. In cases of contract, it is well settled that the parties, by their own act and will, may agree to be bound by the law of a foreign jurisdiction, and such law will be enforced in the forum where the parties reside. Pritchard v. Norton, 106 U. S. 124, 129, 1 Sup. Ct. 102, 27 L. Ed. 104. A contract by an insurance company made in one state and executed elsewhere may, by its terms, incorporate the law of another state and make its provisions controlling upon both the insurer and the insured. Mutual Life Insurance Co. of New York v. Cohen, 179 U. S. 262, 267, 21 Sup. Ct. 106, 45 L. Ed. 181.

The general rule is that, in the absence of statutory prohibition, the parties may stipulate that the policy shall be construed and governed by the laws, usages, and customs of a foreign state, and such laws, usages, and customs as are applicable shall be deemed to be a part of the written contract. 1 Joyce on Insurance, § 231d, p. 617; New York Life Ins. Co. v. Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336; 6 Cooley's Briefs on the Law of Insurance, pars. 652, 653.

[3, 4] We do not think the authorities relied upon by the appellant removed this case from the application of the general rule. Progresso S. S. Co. v. Marine Ins. Co., 146 Cal. 279, 79 Pac. 967, has no application, for the facts are different. In other cases the courts were construing the terms of insurance policies prohibited by express legislative enactments. In New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116, and in Equitable Life Ins. Soc. v. Pettus, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497, the statute of the state of Missouri was being considered, which provided that no policy of insurance issued by any life insurance company authorized to do business in that state, should, after the payment of two full annual premiums, be forfeited or become void by reason of the nonpayment of such premiums, but should be subject to certain rules of commutation. As pointed out by the Supreme Court of the United States in the case last cited, the Missouri statute was mandatory and controlling. We find nothing in our own laws making the provisions of the Code defining a constructive total loss, in the case of marine insurance, mandatory upon the parties. Appellant has cited no cases so holding. We are not aware of any legislative declaration that would prohibit the parties to such an insurance policy from contracting that the law of England shall govern in the determination of what shall constitute a constructive total loss under such policy. It is the general rule in this state that, except where it is otherwise declared, the provisions of the Civil Code, with respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties when ascertained in the manner prescribed by the laws relating to the interpretation of contracts. The benefit of such provision may be waived by any party entitled thereto, unless such waiver would be contrary to public policy. Section 3268, Civ. Code; Griffith v. N. Y. Life Ins. Co., 101 Cal. 627, 640, 36 Pac. 113, 40 Am. St. Rep. 96.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

52 Cal. App. 278

PEOPLE v. STOCK. (Cr. 747.)

(District Court of Appeal, Second District, Division 2, California. April 15, 1921.)

Criminal law ⊂=850—Mere leaving of jury by bailiff not ground for new trial.

It is not ground for new trial that the bailiff, in whose charge the jury were placed on retiring, left them for a moment in another's charge, neither he nor any one else conversing with nor approaching them in such time, so that no injury resulted to defendant.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

P. R. Stock was convicted of forgery, denied a new trial, and appeals. Affirmed.

Dick Foye Harding, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch and John W. Maltman, both of Los Angeles, for the People.

FINLAYSON, P. J. Defendant was convicted of forgery. From a judgment upon such conviction and an order denying a new trial he has appealed.

Upon retiring to deliberate upon their verdict, which was at the noon hour, the jurors were taken to lunch by the bailiff, into whose custody they had been ordered by the court. The bailiff was duly sworn to keep the jurors together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself unless ordered by the court, or to ask them whether they had agreed upon a verdict. The jurors, in charge of the bailiff, together with defendant, who also was in custody of the bailiff, descended the stairs leading from the courtroom to the lobby of the courthouse. When they reached the courthouse lobby the bailiff, wishing to deliver his prisoner to the jailer at the county jail, asked a deputy county clerk, who was near by, to watch the jurors and see that no one talked to them while he took his prisoner to the county jail. The bailiff and his prisoner were gone about a minute and a half, when the former, returning, again assumed personal charge of the jurors at or near the corner of the courthouse grounds. Meanwhile, as shown by the testimony of both the deputy clerk and the bafliff, the jurors marched in double file from the lobby of the courthouse to the place where the bailiff rejoined them. The deputy clerk stood off at one side during all this time, watching the jurors, but holding no conversation with them. Not for an instant were the jurors separated; no one approached them; no one spoke to or conversed with them. They were in plain sight of the bailiff from the time he came out of the county jail after delivering the prisoner to the jailer.

Though there doubtless was a technical violation of the court's instruction to the bailiff to take charge of the jury, we cannot say that there was such misconduct as to justify setting aside the verdict. The ultimate purpose of the court's instruction to an officer to take charge of the jurors is to prevent them from having improper intercourse with others. Their being placed in charge of the officer is merely a means of accomplishing that purpose. Therefore the mere fact that the direction of the court is violated does not of itself give the defendant the right to have the verdict set aside, for it is possible that the jurors may not be affected by the irregularity. And though the officer who disregards his oath, or the court's instruction to take charge of the jury, fails in performance of his duty, and his conduct, if not explained so as to show that the defendant was not prejudiced thereby, is an irregularity that may be ground for a new trial, nevertheless, where, as here, it appears that no injury to the prisoner has followed from the irregularity, the verdict will not be disturbed. People v. Symonds, 22 Cal. 352; People v. Bemmerly, 98 Cal. 299, 33 Pac. 263; People v. Cord, 157 Cal. 562, 571, 108 Pac. 511. It was clearly and affirmatively shown, by the very witnesses whom defendant called to prove the conduct of which he complains, that the jurors were not affected thereby.

We do not think it necessary to discuss the claim that the uncorroborated testimony given by the complaining witness was not sufficient to identify appellant as the one who committed the crime. The credibility of the witness and the weight of his testimony were questions for the jury, and its decision thereon is final.

Upon a review of the whole case we find no error or irregularity entitling defendant to a new trial.

The judgment and order are affirmed.

We concur: WORKS, J.; CRAIG, J.

52 Cal. App. 181

WEAVERING v. SCHNEIDER. (Civ. 3664.)

(District Court of Appeal, First District, Division 1, California. April 6, 1921.)

1. Judgment ⊂=271—May not be entered by clerk on report of referee where reference is only for court's information.

While under Code Civ. Proc. §§ 639, 644, if reference be to try the whole issue, the clerk, on the filing of the referee's finding, may thereon enter judgment, not so where referee is to merely examine and report for the court's information on an issue.

2. Appeal and error ⊂=873(1)—Complaint may not be made of judgment other than that appealed from.

The appeal being solely from an unauthorized judgment entered by the clerk on a ref-

eree's report, appellant is not in a position to raise the point of a subsequent judgment of the court having been entered prematurely.

3. Appeal and error ⊂⊃781(6)—Settlement by parties ground for dismissal of appeal.

It is ground for dismissal of appeal in action for dissolution of partnership and an accounting that it appears that the parties have agreed on an adjustment and settlement of the accounts and assets.

Appeal from Superior Court, City and County of San Franciso; George H. Cabaniss, Judge.

Action by Frederick Weavering against Fred Schneider. From an adverse judgment, defendant appeals. Appeal dismissed.

W. H. Barrows, of San Francisco, for appellant.

A. M. More, of San Francisco (E. B. Mering, of San Francisco, of counsel), for respondent.

KERRIGAN, J. This is an action brought to dissolve a copartnership, and to obtain a settlement of the partnership accounts.

The record is in a confused condition. Briefly, it appears that the case was tried upon issues framed by the complaint and the answer and counterclaim of the defendant. On those issues, with one or two unimportant exceptions, the court found in favor of the plaintiff. One of its findings was to the effect that before a final judgment could be entered in the action it was necessary, for the information of the court, that an account be taken of the dealings and transactions between the parties, and a referee was appointed for that purpose. Thereafter, the referee, being in doubt—or assuming that the reference was general—prepared and filed findings of fact and conclusions of law, according to which the clerk of the court entered judgment in favor of the plaintiff and against the defendant in the sum of $4,012.79; but the next day the court itself adopted the findings and conclusions of the referee and rendered judgment thereon, which also was duly entered. Several months thereafter the defendant appealed from the judgment entered by the clerk upon the report of the referee, claiming that the court had no power to vest the referee with authority to make findings of fact and conclusions of law upon which a judgment might be entered by the clerk, and, secondly, that, if it can be said that the judgment in question was in fact rendered by the court, nevertheless, the court itself at the time of its rendition was without jurisdiction to render a final judgment, for the reason that at that stage the partnership property had not been sold, or the assets marshaled and applied as the law directs.

[1] There is no merit in either of these contentions. If the order appointing the referee may be regarded as general, and unlimited, vesting him with power to try the whole issue as to the accounts, then it was the plain duty of the referee to make and file findings of fact and conclusions of law, upon which judgment would follow immediately, and the decision would stand as that of the court, subject to exception and review as if the action had been tried by the court. Code Civ. Proc. §§ 639, 644; Peabody v. Phelps, 9 Cal. 213; Terpening v. Holton, 9 Colo. 306, 12 Pac. 189. But here the order of reference merely authorized the referee to examine and report for the information of the court on the issue as to the account between the parties, so as to enable the court to pass on that issue, and so regarding the report a judgment was rendered by the court, which judgment we think was the only proper one in the case.

[2] The second objection of the appellant is directed to the jurisdiction of the court to enter a final judgment before the property of the copartnership has been sold and the assets marshaled; but he is in no position to raise this point, since his appeal is taken from the so-called judgment entered by the clerk in the first instance without the direction of the court. This is not the judgment in the case, and the appeal taken by the defendant is directed exclusively to it.

[3] Finally, it appears from an authenticated copy of a stipulation filed in this court that the parties have agreed upon an adjustment and settlement of the account and assets of the copartnership. From all of the foregoing, it follows that the appeal should be dismissed. It is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

52 Cal. App. 219

THRESHER v. LOPEZ. (Civ. 3104.)

(District Court of Appeal, Second District, Division 2, California. April 12, 1921. Rehearing Denied May 1, 1921. Hearing Denied by Supreme Court June 9, 1921.)

1. Appeal and error ⊂⊃1010(1)—Findings supported by evidence not disturbed.

Fact findings of the trial court supported by the evidence will not be disturbed.

2. Payment ⊂⊃89(1)—Money paid upon mistake of fact may be recovered under count of money received.

Money paid upon mistake of fact may be recovered under the common count as money had and received.

3. Payment ⊂⊃85(7)—Negligence of plaintiff is no defense unless it altered defendant's position.

Where plaintiff overpaid defendant, he may recover in an action for money received, regardless of his negligence, where defendant did not alter his position to his prejudice.

4. Payment ⟸85(1)—Overpayment under mistake of fact not voluntary.

Where plaintiff overpaid defendant under mistake of fact, recovery of the payment cannot be defeated on the theory that such payment was voluntary; it further appearing that defendant did not as a result of overpayment, change his position to his detriment.

5. Payment ⟸89(4)—Averment held a sufficient allegation of demand for repayment.

In an action for money had and received, it appearing that as a result of mistake plaintiff overpaid defendant, an averment that, although often requested so to do, defendant neglected and refused to pay plaintiff, is a sufficient allegation of demand for repayment.

6. Appeal and error ⟸1071(1)—Judgment will not be reversed for insufficiency of finding where if made it must have been adverse to appellant.

A judgment will not be reversed for an insufficiency in the finding, where, if a sufficient finding had been made, it would have been adverse to the appellant.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by George P. Thresher against P. L. Lopez. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles H. Mattingly, of Los Angeles, for appellant.

H. W. Kidd, of Los Angeles, for respondent.

CRAIG, J. This is an appeal from a judgment against the defendant for the sum of $780.44 and plaintiff's costs.

[1] The complaint alleges three causes of action. One is for money had and received, one for a balance due on a mutual open and current account, and one for the recovery of an alleged overpayment of money upon the ground that it was obtained upon false and fraudulent representations. The findings are applicable to support the first cause of action, and the evidence sustains those findings which concern the first cause of action. It is true that there is a substantial conflict in the evidence, but, under such circumstances, it is elementary that the judgment of the trial court will not be reversed.

[2] The plaintiff employed the defendant to perform certain work, and paid therefor $3,126.85. The trial court found this to be an overpayment of $780.44. Finding 4 is to the effect that the plaintiff believed that the amount which he paid was owing and payable from him to the defendant, and that he did not know that he was overpaying the defendant—

"but that on or about July 17, 1918, plaintiff learned for the first time that he had overpaid defendant by mistake for the doing of said work and labor; that within a short time after so learning for the first time of said overpayment, plaintiff demanded of defendant that he repay to plaintiff the sums so overpaid by the latter, but that defendant refused, and has ever since refused, to repay said overpayment to plaintiff, or any part thereof."

The evidence amply supports this finding. Money paid upon a mistake of fact may be recovered under the common count of money had and received. West v. Houston, 4 Har. (Del.) 170; West Frankfort Bank & Trust Co. v. Baretti et al., 206 Ill. App. 261; Soderberg v. King County, 15 Wash. 194, 45 Pac. 785, 33 L. R. A. 670, 55 Am. St. Rep. 878; Holst v. Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442.

[3] The plaintiff, however negligent he may have been, may recover if his conduct has not altered the position of the defendant to his detriment. National Bank of California v. Miner, 167 Cal. 532, 140 Pac. 27.

[4] The cases cited by appellant to support his contention "that money voluntarily paid with full knowledge of all the facts and without fraud or coercion, cannot be recovered" support that position, but are not in point here because the court found, and the evidence shows, that the plaintiff acted without knowledge of the facts and through a mistake. There is nothing to indicate that the act of Thresher in having overpaid Lopez has placed the latter in a position where a detriment would result by reason of his being required to refund. Under such circumstances it is inequitable and dishonest for defendant to retain the money.

[5] Appellant makes the claim that there is neither an allegation or finding that a demand was made for repayment before the commencement of the suit. The complaint alleges that element of the cause of action in the ordinary language of an action upon the common count of money had and received, "that although often requested so to do, the said defendant has neglected, failed, and refused to pay the plaintiff the said sum," etc. We think this is a sufficient allegation of demand. The finding reads:

"Within a short time after so learning for the first time of said overpayment, plaintiff demanded of defendant that he repay to plaintiff the sums so overpaid by the latter, but that defendant refused, and has ever since refused to repay said overpayment to plaintiff, or any part thereof."

[6] Conceding that this is somewhat indefinite as to the date on which demand was made, the evidence shows that demand was made before the action was commenced, and the judgment will not be reversed for an insufficient finding, where, if a finding had been made, it must have been adverse to the appellant. Haight v. Costanich, 31 Cal. App. Dec. 237.[1] Counsel for appellant persists in the assertion that the findings were to the

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] For opinion of Supreme Court, see 194 Pac. 26.

effect "that respondent, on March 4, 1918, knew the exact status of his account with appellant." There is no finding to this effect.

Judgment is affirmed.

We concur: FINLAYSON, P. J., and McCORMICK, Judge pro tem.

(52 Cal. App. 188)

DANIELS v. McGUIRE. (Civ. 3781.)

(District Court of Appeal, First District, Division 1, California. April 7, 1921, as Amended April 25, 1921.)

1. Appeal and error ⊂⊃1068(1, 5)—Errors in instructions prejudicial to defendant are cured by a verdict for him.

Errors in the giving and refusing of instructions to the prejudice of defendant are cured by the verdict for defendant, and do not entitle him to a reversal of an order granting plaintiff a new trial.

2. Appeal and error ⊂⊃933(4)—Presumed to have been granted for insufficiency of the evidence.

Where the motion for new trial was made and granted before Code Civ. Proc. § 657, was amended, in 1919 (St. 1919, p. 141), the appellate court may presume that the motion, which was based upon insufficiency of the evidence to sustain the verdict for defendant and on alleged errors occurring during the trial, was granted on the insufficiency of the evidence, in the absence of any other cause appearing in the record, especially where defendant on appeal asserted it was granted on that ground.

3. Appeal and error ⊂⊃979(1)—New trial for insufficiency of evidence conclusive, unless discretion abused.

The trial court has a wide discretion in granting or denying a new trial on the sufficiency of the evidence, and its action in that regard is conclusive in the appellate court unless there has been an abuse of discretion.

4. Appeal and error ⊂⊃979(2)—Abuse of discretion in granting new trial not shown, where there is substantial conflict in the evidence.

If there is substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion in granting a new trial because the verdict is against the weight of the evidence.

5. Malicious prosecution ⊂⊃21(2)—Advice of counsel after full disclosure defense.

In an action for malicious prosecution, defendant can rely on advice of counsel as establishing probable cause for the prosecution only where he shows that, before receiving the advice of counsel, he made a full, fair, and honest statement of the facts then known to him.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by Roderick V. Daniels against Thomas F. McGuire. From an order granting plaintiff's motion for a new trial after verdict for defendant, defendant appeals. Affirmed.

Arthur L. Shannon, of San Francisco, for appellant.

Aitken, Glensor, Clewe & Van Dine and Aitken & Aitken, all of San Francisco, for respondent.

WASTE, P. J. Plaintiff brought this action to recover damages from the defendant on account of alleged malicious prosecution. He averred that he was wrongfully accused by the defendant of opening, secreting, and embezzling letters transmitted through the United States mail, in violation of certain federal statutes. Two trials with jury have been had. The first resulted in a disagreement. On the second trial, the present case, the jury returned a verdict for the defendant. Plaintiff made a motion for a new trial, which was granted, and from which order the defendant appeals.

The motion for a new trial was made on three grounds: Insufficiency of the evidence to justify the verdict; that the verdict was against law; and errors in law occurring at the trial and excepted to by plaintiff. While counsel for appellant asserts that the first of these grounds was the only one urged and considered at the hearing of the motion, the order granting the motion was general in its terms. It must therefore be affirmed if it could properly have been granted on any one of the grounds assigned.

[1] Alleged errors on the part of the trial court in giving instructions prejudicial to the appellant, and its refusal to give others requested by appellant, were cured by the verdict in appellant's favor, as he admits, and do not avail on this appeal.

[2] The motion was made and granted before section 657 of the Code of Civil Procedure, relating to new trials, was amended in 1919 (St. 1919, p. 141). Therefore, aside from appellant's assertion that the insufficiency of the evidence to justify the verdict was the only matter urged in support of the motion for a new trial, we may presume it was granted on that ground in the absence of any other cause appearing in the record. Gordon v. Roberts, 162 Cal. 506, 508, 123 Pac. 288.

[3] The courts have frequently commented upon the wide extent of discretion of the trial court in granting or denying a new trial on sufficiency of the evidence. Its action in this regard is conclusive in the appellate court, unless there has been an abuse of discretion.

[4] And, if there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict or the find-

ings are against the weight of the evidence, and that there should be a new trial. Gordon v. Roberts, supra, 162 Cal. 509, 123 Pac. 288; Morgan v. Los Angeles Pacific Co., 13 Cal. App. 12, 14, 108 Pac. 735.

[5] We think that on the main questions in controversy in this case there was sufficient conflict in the evidence to justify the court in concluding, as it must be deemed to have concluded, that justice would be promoted by a new trial. The decisive issues relate to the questions, whether defendant had probable cause for making the charge against plaintiff in the first instance, and whether defendant was guilty of malice in making the charge in the next. The appellant sought to maintain the existence of probable cause in law in making the charges against the respondent by proving that he acted on the advice of counsel. From our reading of the testimony we can well understand how the trial court may have entertained a doubt as to whether appellant made to his counsel, before receiving his advice, a full, fair, and honest statement of the facts then known to him, bearing upon the alleged guilt of the respondent. If he did not do so, he was not entitled to rely upon the defense of probable cause. Stone v. Wolfe, 168 Cal. 261, 262, 141 Pac. 1190. There is other evidence from which the trial court may well have concluded that appellant was not free from malice in making the charges against the respondent.

The order granting the motion for a new trial is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

52 Cal. App. 190

BESSING v. PRINCE. (Civ. 3496.)

(District Court of Appeal, Second District, Division 1, California. April 8, 1921.)

1. Sales ⟹7—Contract held a sales, and not an agency contract.

A contract whereby one party appointed the second party his "direct and exclusive representative and agent" for certain territory for the sale of the first party's goods therein, and whereby the second party agreed to pay first party a specified royalty for each article manufactured by first party and sold by second party within such territory, *held* a contract whereby the first party agreed to sell goods to second party at specified price, and not a contract of agency.

2. Principal and agent ⟹89(5)—Complaint held insufficient to state cause of action for reimbursement for expenses incurred in endeavoring to make sales as agent.

In dealer's action against manufacturer for breach of contract to deliver to dealer articles to be sold by him in certain territory, complaint *held* insufficient to state cause of action for reimbursement for expenses incurred in endeavoring to make sales, in that it did not show that the contract was one of agency, not of sale.

3. Sales ⟹411—Complaint held insufficient to warrant recovery of profits for future sales.

In an action against a manufacturer for breach of a contract to sell vibrators to plaintiff to be sold by plaintiff in certain territory, complaint *held* insufficient for recovery of profits of future sales, in that it did not state what number of vibrators plaintiff could have sold, or the price at which they could have been sold by him, or that plaintiff ever ordered or demanded delivery of any vibrators other than those delivered.

4. Sales ⟹411—Complaint against manufacturer of defective goods held to state cause of action for profits plaintiff would have realized if vibrators had been fit for resale.

In dealer's action against manufacturer for breach of contract to deliver to dealer vibrators of merchantable quality to be sold by the dealer in certain territory, the complaint alleging that the manufacturer delivered a certain number of vibrators that could not be sold because of defects in the manufacture thereof, and that plaintiff had complied with the terms of the contract to be performed on his part, *held* to state a cause of action for recovery of profits which plaintiff would have realized by selling the vibrators if they had been fit for resale.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Theodore Bessing against James Prince. Judgment of dismissal, and plaintiff appeals. Reversed.

Duke Stone, of Los Angeles, for appellant.

Griffith Jones and John J. Craig, both of Los Angeles, for respondent.

CONREY, P. J. On the 26th day of July, 1918, a contract in writing was entered into between Bessing, as party of the first part, and Prince, as party of the second part, which contained the following terms: It was stated therein that Prince appointed Bessing as his "direct and exclusive representative and agent" for certain western states for a period of one year from the date of the contract. In consideration of Bessing's selling the Prince vibrator for printing presses, and all improvements thereon, during the period of 12 months from that date, "according to price agreed upon by both parties hereinafter mentioned the gross amount of $10,000.00" for the described territory, the contract was to renew itself automatically. Prince agreed to furnish to Bessing "each of the three sizes of the Prince vibrator for printing presses at $10 per vibrator complete for service and shipment in Los Angeles, California." It was further agreed that "should party of the second part fail to produce the vibrators in sufficient quantity to fill his orders, then the party of the first part shall have the right

to manufacture in sufficient quantity to fill the contract made, and paying the party of the second part five dollars ($5.00) as royalty for each vibrator so made and sold." Bessing brought this action to recover damages for breach of the contract.

The second amended complaint alleged:

"That at no time has the defendant furnished to the plaintiff any vibrator or vibrators complete for service and shipment in Los Angeles, though plaintiff has continuously since the execution of said contract demanded them, but, on the other hand, has furnished to this plaintiff about 50 vibrators which were not complete for service or shipment, and which were not merchantable or usable or salable, and which would not perform the purpose for which they were made, and for which they were to be sold by the plaintiff, in that the same were defectively manufactured and would not perform the work required of them on a printing press, by reason of all of which the vibrators sold by the plaintiff and which were furnished to the plaintiff by the defendant under said contract were wholly unfit for the purpose for which they were sold; and that defendant has at all times since the execution of said contract failed and refused after demand to furnish to plaintiff vibrators complete for service and shipment; that in endeavoring to sell said vibrators under the agreement hereinbefore mentioned, the plaintiff was put to the actual and reasonable expense of $316.70, the same being the actual expenses reasonably and necessarily incurred by plaintiff in an effort to sell said vibrators; and that the profit on the 50 vibrators furnished to the plaintiff by the defendant, and which could have been sold, and plaintiff's profit thereon realized, if the said vibrators had been usable, merchantable, or salable, would have been at least the sum of $500; that by reason of defendant's failure to furnish plaintiff vibrators complete for service and shipment as aforesaid, the plaintiff was unable to sell any of said vibrators, and unable to realize any profit on the same, or on any of the said 50 vibrators so furnished, and was deprived of the profits of future sales; and that in truth and in fact, if said vibrators had been complete for service and shipment as required by said contract, the plaintiff 'would have realized at least $2,500 on sales'; that the defendant at all times knew that the plaintiff was incurring said expense, which was reasonable and necessary, in an honest effort to sell said vibrators; and, further, that the profits to the plaintiff if the vibrators had been complete for service and delivery would have been at least the sum of $2,500, and that solely for said reasons plaintiff was unable to make and complete sales thereof to the damage of the plaintiff in the sum of $2,500, all of which was known to the defendant; and that it was well known to the defendant at the time of the execution of said contract and at all times since, that the purpose of said vibrators so to be furnished the plaintiff was for sale to persons operating printing presses; and that the quality of the vibrators so furnished was not such as to make them merchantable or usable in any way; and that defendant has at all times since the making of said contract refused to furnish to this plaintiff any vibrators except those that were not merchantable or usable as above specified."

To this complaint the defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained. The plaintiff, having failed to further amend, judgment was entered, dismissing the action. From this judgment the plaintiff appeals.

[1-3] Although the contract began with the statement that respondent appointed appellant as his agent, the contract as a whole shows that it was not a contract of agency, but, on the contrary, was a contract whereby respondent agreed to sell the vibrators to appellant at the price of $10 for each vibrator. It was specified in the terms, which we have quoted, that appellant should sell the articles at a price agreed upon by both parties. The complaint does not state what this agreed price was, or that the parties ever arrived at an agreement fixing the price at which the articles were to be sold. The complaint nowhere states the price at which they could have been sold by appellant if they had been furnished by respondent of a kind and quality fit for sale. Since the contract was not a contract of agency, the facts alleged in the complaint are not sufficient to establish the existence of any obligation on the part of respondent to reimburse appellant for the expenses incurred by appellant in endeavoring to make sales. The complaint does not state what number of vibrators appellant could have sold, or at what price they could have been sold by him, or that appellant ever ordered or demanded delivery of any number of vibrators other than the 50 which were delivered. Therefore, no basis is shown for the recovery of "profits of future sales."

[4] From the facts above stated it seems clear that no cause of action for any damages has been stated, unless it be for loss of profits on the 50 vibrators which were ordered and delivered, and which, as stated in the complaint, were not complete for service and were not merchantable or usable, and which would not "perform the purpose" for which they were made, in that they were defectively manufactured and would not perform the work required of them on the printing press. Since appellant, in his complaint, has not sought to recover any money paid by him for these vibrators, it might be inferred that he has never paid for them, although apparently they are still in his possession. But this inference is prevented by the general allegation that the plaintiff has complied with each and all of the terms of the contract on his part to be performed. This being true, he has a valid claim against respondent to recover damages equivalent to the amount of profits which he would have realized by selling the vibrators if they had been fit for resale.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

52 Cal. App. 194

HARLAN v. WILLARD et al. (Civ. 3489.)

(District Court of Appeal, Second District, Division 1, California. April 8, 1921.)

1. Equity ⊂⊃65(2)—Doctrine that one guilty of attempt to consummate a fraud will not be heard in equity held not applicable to plaintiff.

Where plaintiff, seeking to recover on a contract whereby decedent was to will her one-half of his estate in return for her being his housekeeper, had previously applied for letters of administration, and sought, as decedent's wife, to acquire one-half of his property at suggestion of decedent's son that it would keep down scandal, and the court found that she did not have any intent to defraud the estate, the doctrine that one guilty of attempt to consummate a fraud will not be heard in court of equity is not applicable to her.

2. Frauds, statute of ⊂⊃75—Oral contract to become decedent's housekeeper, in return for which he was to will her property; held not obnoxious to statute.

Oral contract made in 1901, by which plaintiff was to become decedent's housekeeper, in return for which he was to will her one-half of his property, *held* not obnoxious to the statute as then existing.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Mamie E. Harlan against Edgar H. Willard and another individually and against the Title Insurance & Trust Company, as administrator of the estate of C. A. Willard, deceased. Judgment for plaintiff, and defendants appeal. Affirmed.

Turnbull, Heffron & Kelley and R. W. Pontious, all of Los Angeles, for appellants.

Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

JAMES, J. Plaintiff by the judgment herein was determined to be the owner of one-half of the property of the estate of C. A. Willard, deceased. It was decreed that defendants held the same in trust for her benefit. From that judgment this appeal is taken.

In 1901 the plaintiff was employed as a waitress in a restaurant, and was then 20 years of age. C. A. Willard was then of the age of 41 years. Prior to his acquaintanceship with the plaintiff he had been married and divorced, and there were two children of that marriage, to wit, Edgar H. Willard and Dorothea Laura Blodgett, appellants here. According to a statement made by Willard to the plaintiff (as to the correctness of which no dispute is shown in the record), Willard's first wife had remarried, and Laura Blodgett, the daughter, had been adopted by her stepfather when about the age of 10 years. After forming the acquaintance with the plaintiff, Willard began to pay particular attention to her and frequently took her to places of amusement Sometimes a married sister of the plaintiff accompanied the two; at other times they went alone. About a month after the acquaintanceship began, Willard, according to the testimony of the plaintiff, made a proposal to the plaintiff which is best shown by presenting a narrative of her testimony on that point:

"Q. Did you ever have a conversation with Mr. Willard about becoming his housekeeper? A. I did. We were dining out, but I do not remember where. He wanted to know if I would be willing to come and keep house for him; be his housekeeper. He told me if I would come and be his housekeeper and help him and stay as long as he lived; that he would furnish me a home and my clothing, and take care of me in case of illness, and at his death he would leave me half of anything that he had. Q. What did you say at that time, if anything? A. Well, I would not give any definite answer. I wanted to think it over. Q. Did you ever discuss the matter at a further time? A. Often after that. Q. Give as nearly as possible these conversations and your replies. A. Well, they were all practically the same. He wanted that I should keep house for him and do what any housekeeper would do. There was nothing more than I told you. He wanted me to do what any housekeeper is supposed to do in keeping house; to cook, wash dishes, sweep and dust, and take care of him, if he was sick, but there was nothing else mentioned."

Plaintiff testified further that, after considering the proposal for some time, she accepted the offer. For a while the three, Willard, plaintiff, and her sister, jointly occupied a set of apartments, Willard making use of one bedroom, the two women another, and all having their meals together. The housework was attended to by plaintiff and her sister. Later on, the plaintiff resided with Willard in one of a set of flats owned by him, and continued to perform the household duties agreed upon, and continued to so perform them for 17 years and up to the time of Willard's death; she bestowed much personal attention and painstaking care upon the latter, who was at times addicted to the excessive use of intoxicating liquors. Willard's business was that of a saloonkeeper. From about the year 1910 on the couple lived in a house toward the building of which plaintiff contributed some money which she had received from the sale of a lot. Plaintiff testified to repeated statements made by Willard of his intention to fulfill his agreement to divide his property equally between her and his son Edgar. She testified that he had said because his daughter Dorothea had been adopted by her stepfather, she was no longer his child, and that he did not want her to have anything of his. Other witnesses testified to having heard Willard assert that he intended to

leave to the plaintiff one-half of his property, and Mrs. Scott, the sister of the plaintiff, testified to having been present when Willard made the original proposal to her sister in the terms already stated. It is not argued, and upon the evidence the case admits of no such contention, that the finding of the court as to the making of the contract in the manner and upon the conditions described by the plaintiff is not abundantly supported. The fact that plaintiff admitted that she had during the years mentioned lived with Willard as his wife is made the ground for the claim that the contract as made was against good morals, and therefore illegal. The contract, as found by the court to have been made and as testified to by the plaintiff, contained no condition that the agreement of Willard depended upon the relation of a mistress being assumed by the plaintiff. Under such a condition of the evidence and findings, the question suggested is entitled to little consideration. It is proper to state, however, as pertinent to the consideration of certain later acts of the plaintiff, that she had during the 17 years been introduced by Willard as his wife, and had been understood by friends and acquaintances to occupy that relation toward him. As a matter of fact, at the time plaintiff accepted the proposal of Willard she was married to a man named Harlan, and, so far as we are able to determine from the record presented, was never divorced from the latter. At the time first referred to, however, she was living apart from her husband, and never thereafter resumed marital relations with him. After the death of C. A. Willard, the son Edgar went to an attorney at law (this according to the testimony of the attorney), where he represented that plaintiff was the widow of his father, and that he and the widow were the only heirs. He also made the statement to the attorney of his knowledge as to his father's intention to leave one-half of his estate to the plaintiff, and that he (Edgar) intended to carry out those wishes. It was upon the statement of alleged facts as given by the son Edgar that the attorney drew an application for letters of administration on behalf of the plaintiff and later an application for an allowance to be made to the plaintiff as widow. Both of these applications were presented to the court with the knowledge of the plaintiff, and she testified in verification of the alleged facts therein set forth. Later, however, upon the facts being presented as to plaintiff not being the legal wife of Willard, these proceedings in her behalf were abandoned, and no money or property was appropriated by her under any order made therein. Plaintiff testified that she had allowed these proceedings to be taken, affirming her alleged status as the widow of Willard, because of the solicitations of the son Edgar, who persuaded her that everything was all right, that she had always been known as his father's wife, and that it would save any scandal to have the proceedings gone through with in that way; that she was influenced further in so doing because of Willard's statement to her that Dorothea was not to receive any part of his property, and that she was innocent of any intent to secure anything from the estate to which she was not entitled. The court made findings upon this matter favorable to the plaintiff in the following terms:

"She believed that she and Edgar H. Willard were the sole persons entitled to share in the estate of Charles A. Willard, and believed that by doing said acts and things in said estate she would receive only that portion of the estate to which she was entitled under the contract set forth in plaintiff's complaint; that the defendant Edgar H. Willard, for a long period of time prior to the death of said Charles A. Willard, had known * * * of the existence of the contract alleged in plaintiff's complaint between plaintiff and said Charles A. Willard; that the said Edgar H. Willard advised the plaintiff to apply for letters of administration in said estate, and assisted her in making said application, and advised plaintiff that it was proper and for the best interests of said estate that she apply for letters of administration as the widow of said Charles A. Willard, and that such action by said plaintiff would prevent unnecessary scandal; that this plaintiff had no intention of deceiving the court in the matter of said estate, and had no intention of defrauding said estate or securing a wrong or unlawful advantage against said estate or the heirs of said Charles A. Willard; that plaintiff at no time attempted to secure a larger portion of said estate than one-half thereof, and believed that in said proceedings in relation to the probate of said estate she was securing only that part or portion of the estate to which she was legally entitled; that no money was paid to this plaintiff under the order for family allowance; and that she at no time received any money or value under said order for family allowance; that it is not true that the said Mamie E. Harlan was the widow of the said Charles A. Willard, but that this court find that the said representations were not made by the said plaintiff with the express or any purpose or intention of imposing upon the court or for the purpose of gaining for herself an interest in the estate or the assets thereof."

[1, 2] Appellants cite a number of cases to the point of their contention, to wit, that where a party has been guilty of an attempt to consummate a fraud, he will not be heard in a court of equity in any matter concerning the same subject to secure relief favorable to himself. Without taking up these cases for the purpose of particular analysis, it may be conceded that they all hold in agreement with a sound doctrine of equitable practice. The distinction important to be drawn between these cases and this is that here, as the evidence showed and the court found, the plaintiff in filing the petition for

letters of administration and her application for a family allowance, based upon the claim that she was the widow of Willard, did so without the intent to defraud the estate, or the heirs, of anything. The excuse perhaps showed no legal justification, but even though that be true, the lack of a fraudulent purpose to get something to which she was not legally entitled takes the case without the rule as insisted for by appellant. The contract of 1901 was not obnoxious to the statute of frauds as then existing. The trial judge made a particular finding regarding the agreement under which plaintiff advanced money with which to purchase the lot or build the house occupied by the plaintiff and Willard, in 1910, but we cannot see how that finding affects the judgment, which is based upon the contract asserted by the plaintiff, to wit, that made in the year 1901. The findings of the court as to the material matters involved in the pleadings seem to be within the issues and to sufficiently determine all of these. No error appears requiring that the judgment should be reversed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 211

LEWIS v. FARMERS' GRAIN & MILLING CO. (Civ. 3000.)

(District Court of Appeal, Second District, Division 2, California. April 12, 1921.)

1. Sales ⟹201(4)—Delivery through carrier not complete until vendor gives notice shipment is ready.

Where shipment is made by common carrier, delivery is not completed until the seller has relinquished his control over the car which he is loading, and given notice to the carrier that it is ready for shipment.

2. Sales ⟹201(4)—On sale f. o. b. point of shipment, title remains in seller until goods placed on car.

Where goods are sold f. o. b. point of shipment, title does not pass from the seller until goods are placed on the cars by the seller.

3. Sales ⟹218½—When title passes by delivery to carrier held for court.

While the question whether the parties intended delivery to the carrier to vest title in the purchaser is one of fact, if the facts are not in dispute, it is a question of law for the court.

4. Sales ⟹187 — Seller entitled to interest from time of delivery.

Seller *held* entitled to interest from the date purchaser received delivery of grain.

Appeal from Superior Court, Los Angeles County; H. T. Dewhirst, Judge.

Action by George E. Lewis against the Farmers' Grain & Milling Company. From judgment for plaintiff, defendant appeals. Modified and affirmed.

Benjamin W. Shipman, of Los Angeles (Henry O. Wackerbarth, Jos. A. Adair, and Henry E. Carter, all of Los Angeles, of counsel), for appellant.

Haas & Dunnigan, of Los Angeles, for respondent.

CRAIG, J. This is an appeal from a judgment in favor of the plaintiff and against the defendant for the sum of $1,326.55 and costs. Defendant admits a principal indebtedness of $569.11. The action is upon an express contract for the purchase of quantity of grain. On the 28th day of August, 1914, the plaintiff granted the defendant the following option:

"Los Angeles, Cal. Aug. 28, 1914. In consideration for one (1) dollar to me in hand paid, I hereby give an option to the Farmers' Grain & Milling Co. to buy my crop of Light Seed oats, consisting of about 1,600 sacks at a price of $1,25 per hundred pounds, free on board cars at Owensmouth. This option is to be in force until Sept. 6, 1914, and if not exercised by the Farmers' Grain & Milling Co. before noon of that date it shall be null and void. Geo. Lewis."

On the 31st day of August the defendant exercised the option by letter and asked confirmation by return mail. Instead of writing, plaintiff went to the office of the defendant, and confirmed the exercise of the option verbally. Thereafter the plaintiff ordered a car from the Southern Pacific Railway Company at Owensmouth for the purpose of loading it with the oats. The railway company's agent spotted the car, and the plaintiff placed therein 541 or 542 sacks of oats as contracted. While the car was not completely loaded it, together with the oats, burned. No bill of lading had been issued by the railroad company, and no notice had been given to the agent of the railroad company that the car was ready for shipment.

[1-3] The defendant insists that at the time the oats were burned they still remained the property of Lewis. Both sides agree that the risk of loss followed title. Upon this appeal it is necessary to determine who owned the oats at the time they were destroyed. The answer to this question involves a construction of the contract composed of the option agreement and the letter exercising the option with the view to determining whether this entire contract thus constituted was executory or executed. If it be regarded as an executory contract, title could not be said to have passed, for where shipment is made by common carrier it is held that delivery is not completed until the vendor has relinquished his control over

the car and given notice to the carrier that it is ready for shipment. Hutchinson on Carriers, c. 4 (3d Ed.) § 125; Basnight v. Atlantic Ry. Co., 111 N. C. 593, 16 S. E. 323; Schouler on Bailments and Carriers, c. 3; Tate v. Yazoo, etc., Ry. Co., 78 Miss. 842, 29 South. 392, 84 Am. St. Rep. 649; Ill. Cent. Ry. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301. If delivery to the railway company were to be regarded as constituting delivery to the defendant, it must be upon the theory that the railway company became the agent of the consignee. Therefore, if no delivery was made to the railway company, none was made to the defendant. The contract in the case at bar contains a provision not found in any of the cases cited by the respondent, for in none of them did the vendor agree to deliver the property on board the means of transportation at the point named in the contract. It is true that in the great majority of cases where litigation has arisen concerning the contracts providing for f. o. b. delivery of goods no question has existed as to risks. Such cases usually involve a dispute concerning expenses of delivery, and in cases of that character it is held that the term f. o. b. means "free on board." The question is frequently raised as to whether under a provision for delivery of goods "f. o. b." such a delivery is one sufficient to pass the title and risk of transportation to the vendee. If the point specified for delivery f. o. b. is the initial point of shipment, title is passed to the vendee, and he assumes the risks of transportation by delivery at that point. If the provision is for delivery, f. o. b. at the final point of destination, the vendor retains the title and also the risk of transportation to the point named in the contract (note to Lawder & Sons. v. Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 798, and cases there cited), and title passes upon such delivery to the vendee, who thereupon assumes risks of loss or destruction. Lord v. Edward, 148 Mass. 476, 20 N. E. 161, 2 L. R. A. 519, 12 Am. St. Rep. 581. But in no case of which we are aware has it been held that under a contract for delivery of goods free on board cars title passed to the vendee before delivery at some point. In Vogt v. Schienebeck, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 289, it is said that authorities generally hold that "a sale f. o. b. cars means that the subject of the sale is to be placed on cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass absolutely to the buyer, and the property be wholly at his risk, in the absence of any circumstances indicating a retention of such control by the seller as security for purchase money, by preserving the right of stoppage in transitu." The necessary implication from this and other similar decisions is that until so placed title remains in the seller, and the property is wholly at his risk. Williston on Sales, § 280, states the rule to be that where the contract provides for the delivery of goods f. o. b. at the point of shipment it is presumed that the title then passes, but if required to be delivered at the point of destination the property does not pass until such delivery. In the case at bar there is nothing in the contract or the record outside of it to overcome this presumption. While the question as to whether or not the parties intended delivery to the carrier to vest title in the purchaser is one of fact (Dannemiller et al. v. Kirkpatrick et al., 201 Pa. 218, 50 Atl. 928), if, as in this case, the facts are not in dispute, it is a question of law for the court.

[4] The judgment is modified by reducing it to the sum of $569.11, with interest thereon at the rate of 7 per cent. per annum from the 21st day of October, 1914, this being the date on which the defendant received the delivery of the grain, etc., not in dispute upon this appeal, and as so modified it is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

52 Cal. App. 184

McNEELY v. HILL. (Civ. 3486.)

(District Court of Appeal, Second District, Division 1, California. April 7, 1921. Hearing Denied by Supreme Court June 6, 1921.)

1. New trial ⊂137—Notice stating motion will be made on the records equivalent to saying it will be on the minutes.

Requirement of Code Civ. Proc. § 659, that notice state whether motion for new trial will be on affidavits or the minutes of the court or both, is substantially complied with by statement that it will be on the records; the minutes being part of the records.

2. New trial ⊂163(2)—Order on ground of contributory negligence in effect for insufficient evidence.

An order granting, on the ground of plaintiff's contributory negligence, defendant's motion for new trial, in effect grants it on the ground of insufficiency of evidence to justify the implied finding of plaintiff's freedom from contributory negligence.

3. Appeal and error ⊂854(6)—Order granting new trial if general sustained if authorized by facts in record on any of the grounds of motion.

If the statement in the court's minutes that motion for new trial was granted on the ground alone of plaintiff's contributory negligence be excluded, there remains a general order granting the motion, entitling defendant to the benefit of it, if the facts in the record would authorize it on any of the grounds of the motion.

4. New trial ⊂68—On motion for insufficiency of evidence court may draw inferences different from those on the trial.

The trial court, on a motion for new trial for insufficiency of the evidence, may draw in-

ferences from the evidence opposed to those drawn by it on the trial, provided they are not unreasonable.

5. Appeal and error ⊂⊃1015(2)—Interference with granting of new trial for insufficiency of evidence held justified by conflicting evidence as to contributory negligence.

Evidence as to contributory negligence of motorcycle rider who rode into excavation on having his light too low *held* conflicting, so that granting of new trial on the ground of insufficiency of evidence to sustain an implied finding of absence of contributory negligence cannot be interfered with; it being impossible to say that there was a clear abuse of discretion, and that the trial court was not reasonably justified in granting the motion.

6. Appeal and error ⊂⊃1144—On affirmance of general order for new trial, trial will not be limited to a single issue.

New trial having been granted generally, though on the ground of insufficiency of evidence to show absence of contributory negligence, the court on affirmance of the order will not interfere with its terms, so as to limit the trial to the single issue of contributory negligence.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Robert McNeely against James Hill. Verdict and judgment for plaintiff. From an order granting a new trial to defendant, plaintiff appeals. Affirmed.

W. A. Alderson and K. A. Miller, both of Los Angeles, for appellant.

G. F. McCulloch, of Los Angeles, for respondent.

CONREY, P. J. The defendant was employed by one Connell, the owner of a lot in the city of Los Angeles, to make an excavation therein preliminary to the erection of a building. The lot was located at the north end of Santee street. For a long time prior to the time when the excavation was made there had been a roadway across this lot by which the public had commonly and usually traveled between Santee street and other lands leading to Los Angeles street. Of this the plaintiff and the defendant had full knowledge. The defendant at the time stated maintained said excavation and an incline running into the north end thereof, without any barriers, lights, or other warning to prevent persons from falling into said incline or excavation. On the night of April 15, 1917, the plaintiff, while traveling to his place of employment, and while attempting to pass from the north end of Santee street across said lot, fell into the excavation and was injured thereby. He brought this action to recover damages for said injuries alleged to have been suffered by defendant's negligence. The defendant, in addition to denying any negligence on his own part, pleaded the affirmative defense of contributory negligence on the part of the plaintiff. A verdict and judgment having been entered in favor of the plaintiff, the defendant moved for a new trial, which motion, according to the minutes of the court, was granted "on the ground alone of plaintiff's contributory negligence." The plaintiff appeals from that order.

[1] The notice of intention to move for a new trial stated that the motion would be made upon certain stated grounds "and upon the records, papers, and files in said action." Appellant contends that the notice was insufficient to authorize the court to hear the motion, because it did not comply with the requirements of section 659 of the Code of Civil Procedure, which provides that the notice shall designate the grounds upon which the motion shall be made "and whether the same will be made upon affidavits or the minutes of the court or both." We think that the statement, although formally defective, did in substance comply with the rule. This is so because the minutes of the court are a part of the records of the court. Therefore a motion made upon the records is a motion made upon the minutes of the court.

[2, 3] Appellant next contends that the order purports to have been made for one sole reason which is not among the statutory grounds upon which a motion for a new trial may be granted. The grounds for the motion as presented to the court included that of insufficiency of the evidence to justify the verdict. When, upon the foundation of such motion, the court granted it on account of plaintiff's contributory negligence, this in effect was an order granting the motion upon the ground that the evidence was insufficient to justify the implied finding of the jury that the plaintiff was not guilty of negligence which caused or contributed proximately to the accident and injury. It may further be suggested that, if this limitation of the reasons for the order be excluded, there still remains a general order granting the motion, and respondent would be entitled to the benefit thereof if the facts contained in the record would authorize the motion to be granted upon any ground upon which he relied in presenting his motion. However, it is our opinion that the motion was granted upon the ground of insufficiency of the evidence to justify the verdict, and for the particular reason above stated.

[4, 5] We come now to the principal question in the case. It is claimed by appellant that the evidence as to the alleged contributory negligence of plaintiff is not conflicting, and affirmatively shows that the plaintiff was not guilty of such negligence. The rule is conceded that an order granting a motion for a new trial on the ground of insufficiency of the evidence will not be reversed on appeal unless

an abuse of discretion appears. In considering the evidence upon such motion, the trial court "has power to draw inferences from the evidence opposed to those which were drawn by it upon the trial, provided they are not unreasonable." Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 451, 456, 168 Pac. 1033, 1035. The accident in question here occurred at about 2 o'clock in the morning. The plaintiff testified that he was riding on a motorcycle at a speed of about 15 or 20 miles an hour; that his motorcycle had a headlight; that he first saw the excavation when he was about 20 feet from it; that it was because of the headlight that he saw the excavation. He further stated:

"When I have got my light on the motorcycle I generally turn it down, so I can keep out of tacks and glass and so on. When I have got it up I can see better. When you have got it down, you can't see over 20 or 25 feet."

Describing what he did when he saw the excavation he said:

"I turned to my right, shut off my engine, shut off my gas, and of course I worked my brake with my foot. I done all that at the same time."

From this evidence the jury might have determined that the plaintiff, by turning down his light, had voluntarily shortened the distance wherein he could see objects in front of him to such an extent that he was unable to stop his machine within the lighted area while moving at the speed at which he was traveling, and that in so doing he was guilty of negligence which was the direct and proximate cause of his fall into the excavation. Conceding that there was some evidence tending to exonerate the plaintiff from the charge of negligence, it results that the evidence upon that point was conflicting to such a degree that on appeal the decision of the lower court, either in granting or in refusing a new trial, should not be reversed. Where the evidence is thus conflicting, a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound legal discretion of the trial court. With its decision thereof interference is unwarranted unless there clearly appears an abuse of such discretion. We cannot say that the court was not reasonably justified in granting the motion in this case.

[6] Finally, it is suggested by appellant that, if this action is to be tried a third time, the trial should be limited to the single issue of plaintiff's contributory negligence. It has long been settled that a court of appeal, in reversing and remanding a cause, may direct on what issues it shall be retried. Robinson v. Muir, 151 Cal. 118, 125, 90 Pac. 521. In this instance, however, since the order is to be affirmed, we deem it inappropriate to interfere with its terms as entered by the court below.

The order is affirmed.

We concur: SHAW, J.; JAMES, J.

52 Cal. App. 200

ILFELD v. PORTER. (Civ. 3398.)

(District Court of Appeal, Second District, Division 1, California. April 9, 1921.)

Bills and notes ⟸94(2)—Settlement of disputed claim held good consideration for check.

Where there was basis for the claim of lessor of sheep at the expiration of the lease that the lessee was then obligated to return to lessor the full number of sheep received, and could not account for the admitted deficiency merely by paying $5 per head, and the lessee threatened to have such number of sheep seized from lessee's flock, there was a bona fide dispute, the compromise of which was good consideration for lessee's check to lessor.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Louis Ilfeld against Burr W. Porter. From a judgment for defendant, plaintiff appeals. Reversed.

Chas. L. Childers, of El Centro, and Marron & Wood, of Albuquerque, N. M., for appellant.

Clarence H. Jordan, and Julia M. Braam, both of Los Angeles, and J. S. Larew, of El Centro, for respondent.

CONREY, P. J. On the 19th day of November, 1914, by agreement in writing, appellant, Louis Ilfeld, leased to respondent, Burr W. Porter, and to J. E. Porter 2,500 "well-improved white ewes" for a period of 4 years from that date. The lessees agreed, among other things:

"That they will, at the expiration, or sooner termination, of this contract, return and deliver to the party of the first part a like number of sheep of the same class of improved quality and description as hereinbefore described, of the following ages and numbers of each, as follows, to wit: 625 ewe lambs; 625 ewes of 1½ years; 625 ewes of 2½ years; 625 ewes of 3½ years; same to be delivered at or near the ranch of Burr W. Porter near Navajo, Ariz.; that they will mark and brand all the increase of said sheep during the existence of this contract in the same mark and brand of the parties of the second part."

On the first day of July of each year the lessees were to pay to the lessor as rent the sum of $1,250, with interest at the rate of 8 per cent. per annum from maturity, if not paid when due. It was further agreed that—

"The parties of the second part hereby agree and bind themselves to return and deliver to

the party of the first part, between the 1st day of November and the 19th day of November, 1918, the full number of sheep herein acknowledged to be received, and of like quality and ages as follows. to wit: 625 ewe lambs; 625 ewes 1½ years; 625 ewes of 2½ years; 625 ewes of 3½ years, to be of the raising of the sheep of the parties of the second part in as good condition, and with as much wool thereon, as the sheep they herein acknowledge to have received."

It was further agreed that—

"If the said parties of the second part shall neglect or refuse to keep or perform any of the provisions and covenants of this contract on their part to be performed, then and in that event the party of the first part may, at his option, retake possession of all of the said sheep and the increase thereof, and declare this contract terminated; and there shall be a settlement by the parties hereto in the same manner and with the same effect as if this contract had been terminated by the expiration of its term. The title of said sheep, however, to remain in the name of the party of the first part."

It was further agreed:

"It is expressly agreed between the parties hereto that the said parties of the second part may have the right to sell the wool and all wether lambs, wethers, and old ewes which are not fit for further breeding."

It was further agreed:

"If by reason of any unavoidable accident or circumstance not due to the act or fault of the parties of the second part, they should be unable to return the entire number of sheep, or of the ages or condition above stated, then, in that event, they covenant and agree to pay to the party of the first part the sum of $5 per head for each sheep that shall be lacking to make up the said full number of 2,500 as hereinabove specified, and the parties agree that the said sum of $5 per head is hereby fixed upon and agreed between them as the value of said sheep in the event of their failure to return the same to the first party as herein specified, and that the value of any sheep not so returned or redelivered to the first party shall be as herein specified, and shall bear interest at the rate of 8 per cent. per annum from the time when such delivery shall be due."

It was further agreed:

"Said parties of the second part shall retain enough ewe lambs each year during the term of this contract out of the increase of the sheep herein acknowledged to be received, so as to be able to deliver the full number of sheep of the ages hereinbefore specified, at the termination of this contract."

On the 13th day of November, 1918, respondent made and delivered to the plaintiff his check on the Holbrook State Bank of Holbrook, Ariz., drawn in favor of appellant for the sum of $1,859.63. This check was duly presented to the bank for payment, but payment was refused for the reason that respondent had directed said bank not to pay same. Appellant brought this action to recover judgment for the amount of the check, with interest from its date. Answering the complaint, respondent alleged that he received no consideration for the check (except as later stated in the answer), and that the same was procured by fraud and misrepresentation on the part of the plaintiff and by reason of mistake on the part of defendant; and denied that the whole amount of said check, or any part thereof, remained due from the defendant to plaintiff except the sum of $51.96. The answer then set out the agreement of lease first hereinabove mentioned, and alleged:

1. That, pursuant to said agreement, the lessees took charge of the sheep and properly cared for them during the entire term of the agreement, and fully and faithfully performed all of the conditions of the agreement on their part.

2. That at the expiration of the term, the lessees returned to the plaintiff all of the sheep delivered to them under the agreement, together with all of the increase thereof then living, but that, by reason of unavoidable circumstances not due to the act or fault of the lessees, they were unable to return the entire number of sheep received by them from the plaintiff pursuant to said agreement at the termination thereof, 307 ewes and 304 lambs of said flock having died.

The answer further alleged that, pursuant to said agreement, the defendant paid to the plaintiff the sum of $3,000 in cash, and the sum of $3.04 in services in weighing sheep—a total of $3,003.04—leaving a balance due plaintiff on account of the loss of aid 307 ewes and 304 lambs at $5 per head, in the sum of $51.96; that, at the time the said sheep were returned to plaintiff, and the said payment made, the defendant owned a flock of sheep in the same vicinity exceeding in number the aggregate of the sheep and lambs lost from the flock that had been delivered to the lessees under said agreement, said sheep so owned by defendant being of a value at least equal to that of the sheep of said flock received from the plaintiff under said agreement; that, at the time of the return of said sheep to the plaintiff, as aforesaid, he represented that he had a contract to sell the ewes of said flock for the sum of $10 per head, and the lambs for the sum of $5.90 per head, and thereupon plaintiff demanded of said defendant that he pay the sum of $10 per head for all of said ewes lost as aforesaid, being the further sum of $5 per head, and also that defendant pay the sum of $5.90 per head for all lambs lost as aforesaid, being the further sum of $.90 per head, and represented to defendant that, unless he acceded to said demand and paid to plaintiff the further sum of $1,859.63, the plaintiff could and would

seize from defendant's said flock a number of ewes and lambs, respectively, equal to the number lost from said flock as aforesaid, and threatened so to do; that at the time defendant did not have said contract before him, and was without legal advice, and believed that unless he made the payment demanded by plaintiff the said plaintiff could and would carry into execution his threat to seize defendant's sheep as aforesaid, and under such belief defendant executed and delivered to plaintiff the check herein sued upon; that thereafter, on the same day that said check was executed and delivered as aforesaid, defendant examined said contract, and received advice from counsel, and thereupon became convinced that he did not owe plaintiff the said sum of $1,859.63, or any sum in excess of $51.96, and was under no obligation to pay the same, and defendant thereupon notified the said Holbrook State Bank not to pay said check; that defendant admits an indebtedness to plaintiff in the sum of $51.96, said amount being included in the said check for $1,859.63 herein sued upon, and defendant hereby offers to allow plaintiff to take judgment for the said sum of $51.96 and the costs of this action heretofore accrued.

The action having been tried upon the issues thus presented, the court made findings of fact which are in agreement with the averments of the answer, and further found that the flock of sheep owned by respondent in the same vicinity were "not of the descendants of the said sheep delivered to the defendant and the said J. E. Porter by plaintiff, and not principally of the raising of said defendant and said J. E. Porter." Judgment was rendered for the amount admitted by the answer, to wit, $51.96, with costs incurred by plaintiff up to the date of filing said answer; defendant being awarded his costs thereafter incurred. From this judgment the plaintiff appeals.

The finding to the effect that, in connection with plaintiff's demand for a final payment of $1,859.63, he represented to the defendant that he could and would seize from defendant's flock the number of ewes and lambs mentioned in the findings, and threatened so to do, if construed as referring to any intended seizure without process of law, is not sustained by the evidence. The finding that the defendant did not have said agreement before him at the time when said demand was made and the check given, if construed as meaning that defendant did not have the contract in his possession or that he did not know the contents thereof, is not sustained by the evidence. Before the check was given, appellant's agent made two visits to respondent, about two weeks apart, in connection with the return of the sheep. The question concerning appellant's right to get sheep from respondent, whether raised out of the sheep delivered by appellant or out of other sheep owned by respondent, was discussed at the time of the first interview. Respondent admitted in his testimony that, before the agent came the second time, he was advised that appellant was making the contention that he was entitled under the contract to sheep out of respondent's flock; that he had the contract there; that there was a dispute between them as to the construction of the contract; that he had read the contract after this contention was made, and was not deceived as to the language contained therein. Respondent further testified that from the representation made to him by appellant's agent that he could and would seize respondent's sheep, he understood that it would be by law.

It does not appear from the evidence that there was any threat to use any force other than that incidental to process of law. Respondent admitted that in their discussion the dispute related to the construction of the contract solely on the question whether respondent had the right to return such of the descendants of appellant's sheep as he had, and pay him $5 a head for those deficient, or whether he was under obligation to supply the sheep from his other flock. The compromise which resulted in the giving of the check occurred after appellant's agent had been there two or three days, and just as the sheep were being loaded on the cars. Appellant testified that, while he was not entirely satisfied with the construction of the contract, he understood that he had settled the matter on the terms which resulted in his giving the check. We agree with appellant that neither the findings nor the evidence establish the fact that defendant did not have sheep of his own raising out of which he could have returned to the plaintiff the full number of sheep of the classes required by his contract. Respondent gave the following testimony:

"Q. What was the class and grade of sheep you bought from Mr. Clark? A. They are Rambouillet-Merino sheep.

"Q. Would they also be described as well-improved white ewes? A. Yes, sir; they would be classed as that.

"Q. They were free from blemish, and recently dipped, according to the other provisions of the contract? Those that you got from Mr. Ilfeld were quite largely also of the Rambouillet blood? A. They sheared a little more than half as much as the other sheep.

"Q. But they were apparently Rambouillet blood? A. Yes, sir; they were fair."

He further testified:

"Q. You had other sheep of your own raising; other lambs? A. Yes, sir.

"Q. You had them at the time and place of delivery, a sufficient number of sheep and of the proper ages, of your own raising, to have complied with this contract? A. I had on the range, but not at the place of delivery.

"Q. It was near or adjacent to the place of delivery? A. Yes, sir."

The increase from both flocks were from the same bucks.

[1] From the undisputed facts of the case, which we think have now been sufficiently stated, it reasonably may be concluded that respondent was under obligation to return to appellant the full number of sheep received by him, of the specified ages and classes, and was not entitled to account for the admitted deficiency merely by paying the sum of $5 per head. At all events, these facts fully sustain the contention of appellant that the transaction between the parties which resulted in the delivery of the check was a voluntary compromise and settlement of a bona fide dispute, and was not induced by fraud or duress. There was therefore a valid and binding consideration of the check.

"It cannot, of course, be successfully disputed that the compromise of a doubtful claim asserted and maintained in good faith constitutes a sufficient consideration for a new promise, even though it may ultimately be found that the claimant could not have prevailed. This is true whether the claim be in suit or not. * * *" Union Collection Co. v. Buckman, 150 Cal. 159, 163, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609.

The case here presented is wholly outside the scope of those decisions which hold that a compromise of a claim is without consideration for a new promise where the claim is wholly without foundation, and known to the claimant to be so. Appellant's claim was made in good faith, and on probable cause.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

185 Cal. 731

WELCH v. ALCOTT et al. (L. A. 4897.)

(Supreme Court of California. May 27, 1921. Rehearing Denied June 23, 1921.)

1. Partnership ⟸53—Evidence held to establish partnership between parties.

In an action for dissolution of partnership and an accounting, evidence *held* sufficient to establish partnership between plaintiff and defendant as to real estate business and other operations.

2. Appeal and error ⟸1011(1)—Finding by the trial court on conflicting evidence will be deferred to on appeal.

Finding by the trial court on conflicting evidence will be deferred to on appeal.

3. Partnership ⟸53 — Admissions sufficient to establish.

Repeated admissions by defendant that he and plaintiff were partners, together with conduct as to purchases for firm account, etc., *held*, in view of Code Civ. Proc. § 1832, to warrant a finding that a partnership existed between them.

4. Partnership ⟸44 — Party asserting existence of partnership has burden of proof.

The party asserting the existence of partnership has the burden of proving the same.

5. Evidence ⟸588—It is for the trial court to reconcile inconsistencies or contradictions.

It is for the trial court in an action tried without a jury to reconcile inconsistencies or contradictions in the evidence.

6. Partnership ⟸328(1) — Presumption that transactions within scope of firm business were for benefit thereof.

A partnership engaged in the real estate business having been formed, there is a presumption that all transactions within the scope of the agreement between the parties were for the benefit of such partnership.

7. Pleading ⟸129(1) — Allegations not controverted must be taken as true.

Every material allegation of the complaint not controverted by the answer must under Code Civ. Proc. § 462, for the purposes of the action, be taken as true.

8. Trial ⟸396(7) — Findings should be confined to the facts in issue.

Findings should be confined to the facts in issue, and it is improper for the court to make finding on allegations in the complaint admitted by failure to deny.

9. Partnership ⟸10 — Agreement to divide gross earnings will not constitute partnership.

An agreement to divide gross earnings will not of itself constitute a partnership.

10. Partnership ⟸5 — Agreement to divide profits prima facie establishes "partnership."

In view of Civ. Code, §§ 2395, 2404, defining partnership as the association of two or more persons for the purpose of dividing profits, and that an agreement to divide the profits implies an agreement to divide the losses, an agreement between the parties to divide the profits of a business prima facie establishes the existence of a partnership between them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership.]

11. Partnership ⟸329—Findings on an issue of partnership may be made before or after an accounting in the court's discretion.

In a suit for dissolution and accounting wherein existence of the partnership was in issue, failure of the court to make findings prior to taking the account within the meaning of Code Civ. Proc. § 632, requiring the court to file its decision on the trial of a question of fact within 30 days after the cause is submitted, was not error; findings on the issue of partnership before or after the accounting being clearly within its discretion.

12. Appeal and error ⟸1033(10)—Party not heard to complain of modification of judgment when in his favor.

A party will not be heard to complain of modification of a judgment after its entry while motion for new trial was pending when the modification was in his favor.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Edmund Welch for dissolution of partnership and for an accounting against Edward H. Alcott and others. From a judgment for plaintiff, the named defendant appeals. Reversed and remanded for trial of particular issue; otherwise affirmed.

See, also, 173 Cal. 530, 174 Pac. 34.

James P. Clark, of Los Angeles, and F. W. Gail, of Covina, for appellant.

Frank C. Prescott and Prescott & Prescott, all of Los Angeles, for respondent Welch.

James P. Clark, of Los Angeles, for respondent California Land & Water Co.

L. C. Gates, Chas. H. Brock, and W S. Allen, all of Los Angeles, for respondent Title Insurance & Trust Co.

Luther Brown, of Los Angeles, for respondent Imperial Valley Farm Lands Ass'n.

LAWLOR, J. This is an action brought by plaintiff, Edmund Welch, against the defendant Edward H. Alcott for the dissolution and accounting of an alleged partnership between them. The connection of the corporation defendants—Imperial Valley Farm Lands Association, California Land & Water Company, Title Insurance & Trust Company, and the First National Bank of Los Angeles, which we shall refer to as the "agent," "sales agent," "trustee," and the "bank," respectively—will hereafter appear.

It is alleged in the complaint that on or about October 1, 1912, the parties entered into a parol agreement of partnership to engage in a general real estate business in the city of Los Angeles and in the Imperial Valley; that the expenses "of the Los Angeles office of partnership" for stenographer, telephone, rent, advertising, and fixtures, and the expenses of the partnership at Brawley for telephone, automobile hire, advertising, improving or purchasing lands, were to be borne, and the losses and profits shared, equally between them; the defendant to attend to the Los Angeles office, keep proper books of account, and render monthly statements of expenses and profits of the partnership; plaintiff to attend to the duties thereof in the Imperial Valley in finding lands to list for sale or improvement, and to show intending purchasers lands held for sale by the partnership; that the partnership has been conducted from the formation thereof until March 1, 1914, except for the failure of the defendant to perform his duties thereunder; and that in certain specific instances he was "guilty of serious misconduct."

It is further alleged that certain real estate deals were had by the partnership, in some of which the commissions were divided equally, and in others were retained by the partner collecting them; that in the Libby Yokum to Chauncey W., Lillian E., and Mabel F. Owen deal, and in the Hans A. Johnson and Mrs. Gena O. Ringer to Chauncey W., Lillian E., and Mabel F. Owen deal, in which the commission was $3,200, defendant received two promissory notes made to his individual order for $1,600 and $1,700, respectively ($100 of the latter note representing a personal loan to Libby Yokum by defendant), which notes were delivered to and are held by the bank, and that the defendant and the bank refused to recognize plaintiff's interest therein, and that "defendant has been guilty of serious misconduct."

It is further alleged that after the partnership established a town site on the southeast one-quarter of section 4, township 11 south, range 14 east, San Bernardino meridian, at Imperial Junction (subsequently named "Niland"), defendant was guilty of serious misconduct in that he began advertising the property as his own and held out to the public falsely that he was its sole proprietor; that, after a consultation with plaintiff, it was agreed a contract of agency or sale should be entered into between the partnership and the agent whereby the partners should get 50 per cent. of the proceeds of the sales, but that defendant on his personal account entered into a contract with the agent by the terms of which it was given for seven years the exclusive right to handle, sell, and dispose of the town site upon the conditions that the agent receive 25 per cent. of the first proceeds of all sales for commissions, advertising, and the general expenses of handling and selling the property; that an additional 10 per cent. be then allowed to be expended on improvements; that of the balance the agent receive 60 per cent. and defendant 40 per cent.; that the agent thereupon appointed the sales agent its exclusive selling agent for the same period, agreeing to divide equally the net proceeds to which the agent became entitled under its agreement with defendant; that the defendant deeded the town site property to the trustee and it made a declaration of trust setting forth the respective rights in the town site, and acknowledging the receipt from defendant of the deed of conveyance of the town site property; that the trustee would hold it in trust for defendant, the agent, and the sales agent for the purposes indicated in the contracts between the respective parties; that it would sell lots, convey all titles, receive and disburse all moneys in connection with the town-site property, and pay the parties their proper portions after the expenses of making the sales and its commissions had been deducted.

Plaintiff prayed for a dissolution of the partnership; that an accounting of the affairs thereof be had; that a receiver be appointed pendente lite; for an order that the agent, the sales agent, the trustee, and the bank be enjoined and restrained from in any way disposing of or paying out and yielding up possession of any of the moneys or property of the partnership until the further order of the court, and for a decree enjoining defendants or their agents or representatives from interfering with the plaintiff in participating in the management of the partnership business and affairs.

The defendant and the four corporation de-

fendants interposed separate demurrers to the complaint, which were overruled.

The defendant's answer is a specific denial of the allegations of the complaint, and while admitting that the deals set forth in the complaint were made, and that commissions were divided in certain of them, denies that he and plaintiff ever entered into an agreement of partnership, or that any of the transactions between them were based upon a partnership.

The defendant also alleges that the deal in which he was given the two promissory notes of $1,600 and $1,700, respectively, was one in which plaintiff had no interest whatever, admits the execution of the town-site contracts heretofore described, and alleges that he was not to receive less than $36,000, that he should retain all moneys which he had collected upon sales of 34 town-site lots which he had disposed of up to January 1, 1914, and that those contracts should be assigned to the agent. The answer denies that plaintiff ever at any time had any interest in the town site.

The answer also contains certain affirmative allegations, which are negatived by the findings.

The case was tried by the court, a jury having been waived by the parties. The trial commenced on December 3, 1914, and on February 26, 1915, when the evidence was closed, the court orally announced that the evidence introduced established a partnership between plaintiff and defendant. The court thereupon proceeded to take an accounting. The testimony, oral and documentary, having been introduced, the accounting continued until March 25, 1915, when the court stated the account, which was filed on July 29, 1915, the action having been dismissed as to the parties sued under fictitious names. On October 13, 1915, the court made its findings of fact and conclusions of law. Judgment was entered on October 28, 1915, decreeing that the partnership be dissolved; that plaintiff and defendant are the owners of the town site, "subject to the trust agreement and declaration of trust," and of the sum of $5,158.19, cash proceeds of said trust now in the possession of the trustee, and of certain personal property and the two promissory notes for $1,600 and $1,700, respectively, which are in the possession of the bank and are to be collected by demand, if possible, and, if not, then by suit. It is further decreed that the personal property of the partnership be sold; that the proceeds of the two promissory notes and the above sum of $5,158.19, belonging to the partnership, be divided as follows: That after the above adjustment the notes, interest, property rights, and equity heretofore standing in the name of the defendant as owner, beneficiary, or otherwise shall belong to and be the property of plaintiff and defendant in equal parts, and that the trustee render and account to plaintiff for an equal one-half of all rights heretofore vested in the defendant; that the bank hold the two notes less payments received for account of the partnership, and pay $230 to the account of plaintiff alone; and that the trustee thereafter fulfill the duties of the trust, rendering to the creditors of plaintiff and of the partnership, respectively, their respective demands, and thereafter to plaintiff one-half of the share provided therein for defendant.

On November 8, 1915, the defendant interposed a motion for a new trial, which was denied on January 17, 1916. The appeal is from the judgment and is taken by the defendant alone.

[1] 1. Appellant's principal contention is that the evidence is insufficient to support the findings of a partnership between the parties. The findings in the main follow the allegations of the complaint. Appellant's position is thus stated:

> "None of the indicia of a partnership are to be found in the surroundings of the parties, either at the time of the alleged formation of the partnership, or afterwards. * * * The evidence clearly shows that each of these parties did business in his own name, and not jointly, and that business was several, and not joint."

In support of his claim that he and appellant entered into an oral agreement of partnership on or about October 1, 1912, and conducted it as such until March 1, 1914, respondent offered a great variety of evidence, including correspondence, telegrams, advertisements, printed sales forms for the alleged partnership, documents, exhibits, and conversations with, the conduct of, and admissions by, the appellant,

It appears in the evidence that for some years prior to meeting appellant respondent was engaged in the grading business with a partner named Sexsmith in the Imperial Valley; that he met appellant in the early part of 1912, having been introduced to him by one Frank C. Prescott, Jr., an attorney, who suggested they ought to be able to do some business together. On June 26, 1912, an agreement in writing was entered into between appellant and respondent whereby respondent appointed appellant his agent to secure "contracts for all kinds of reclamation work" on a 15 per cent. commission basis, the parties to employ Prescott to assist in the preparation of all papers necessary in securing such contracts and filing of yearly proofs therein. For his compensation Prescott was to receive 25 per cent. of the profits. Just before October 1, 1912, appellant suggested to respondent "that we ought to make some other arrangement besides paying Frank C. Prescott part of the profits"; that the three met on October 1st and appellant

advised Prescott that for the amount of work they did not think they ought to pay him so much. Prescott agreed to withdraw and retired from the arrangement the following morning. It is not claimed this written agreement has any connection with the issues herein, and we only refer to it as indicating the sequence of events after the parties first met.

Respondent testified that the business in Los Angeles was to be in charge of appellant, and in the Imperial Valley of himself; that he was to attend to the duties of the partnership in the Imperial Valley in finding lots to list for sale or improvement, and to show intending purchasers lands held for sale by the partnership; that appellant secured for the use of respondent room 440 in the Chamber of Commerce Building, Los Angeles, adjoining room 441, where appellant had conducted his real estate business during the preceding three or four years, and it was arranged respondent might dictate his correspondence to the stenographer and pay one-half of her salary and of the general office expenses, including rent and telephone service; that advertisements appeared in the newspapers in Los Angeles and in the Imperial Valley in the joint names of "Alcott and Welch"; that the cost of this advertising was one of the partnership expenses, one-half thereof being charged to respondent; that the appellant had printed and furnished respondent blank forms authorizing "Alcott and Welch" to make sales for the owners of real estate; that respondent in January, 1913, took out a real estate license in the Imperial Valley in the name of "Alcott and Welch," the amount of the license—$36—being charged to his account; that appellant took no exception to respondent's action in taking the license out in their joint names; that, when respondent saw cards in the Los Angeles office in which his name did not appear with appellant's, he spoke to the latter about it, and appellant said "he would attend to that later"; that a great many letters were written to respondent by appellant and many conversations took place between them concerning the real estate business; that, when respondent spoke to appellant about the advertisements which appeared in the Los Angeles papers in appellant's name alone, the latter explained that he advertised the partnership business in that way because he was well known in that part of the country, and it was to the advantage of the partnership.

Miss Kate Gatzman, a stenographer in the Los Angeles office, testified she was employed from November, 1912, to May, 1913; that appellant directed her to keep a book account of the expenses of the Los Angeles office and to charge respondent with one-half of the expenses entered therein; that abstracts of the account book were made in triplicate—one to be furnished respondent, another to appellant, and the third to be retained as an office copy; that in the latter part of 1912 and during 1913 certain sums of money passed between the parties aside from the commissions derived from the proceeds of sales of real estate negotiated by them. Herman Layer testified that appellant told him, "Welch and I are partners." H. E. Williams, one of the respondent's creditors, said appellant assured him "we needn't worry, that as soon as the town site was closed out he [respondent] would have plenty of money to settle his debts; that the town site was in the appellant's name, but that respondent had an interest in it." Richard H. Hobgood testified that early in 1913 appellant told him respondent claimed a partnership, and that he spoke of "Ed and I," "me and Ed," and "us". Miss Louise Barker, another stenographer, testified she started to work for respondent and appellant in October, 1912; that when she asked appellant for a raise of salary he told her he would have to submit the matter to respondent, and that after respondent had been consulted she was given the advance; that appellant said, " 'There is a gentleman in business with me who is out of town practically all the time.' He said that Mr. Welch took care of the business in the Imperial Valley and he took care of this end of the business."

Miss Cressie Mitchell, a stenographer for Frank C. Prescott, Jr., whose telephone was on the same extension as appellant's, testified that, when she told the latter there were calls for respondent, he replied, "Welch and I are partners, and when he is called, you can buzz me. * * * Mr. Welch is in the Valley, but I am his partner. Mr. Welch is in the Valley, and we are opening a town site." John Garvey and John Welch (respondent's brother), both foremen for respondent on the high-line ditch, testified that on one occasion when respondent's teams were idle appellant came along and said he did not want the teams loafing because he was standing half the expense. Clarence R. Conover testified that, when appellant became dissatisfied with respondent, he told the witness "he would have to cease his partnership business with him." Alexander M. Williams testified that in the latter part of 1912 appellant said in plaintiff's presence "they had just formed a partnership, * * * and Welch said the same. * * * Alcott then said that Welch was the best partner he ever had. He says, 'You know we are partners.' * * * As to an automobile Alcott told me they were going to buy one for the business." This refers to a Cadillac machine which respondent bought, as he claims and appellant denies, for the partnership. Mrs. Bonnybelle Welch, wife of respondent, testified at considerable length about conversations she had with appellant in which he stated he and respondent had gone in the real estate business together as partners

Calvin A. and Gertrude Terwilliger testified to conversations with appellant in which the latter spoke of respondent as his partner.

The testimony for appellant as to the character of the relationship is to the effect that he never entered into a parol or any other sort of agreement of partnership with respondent; that for a long time prior to October 1, 1912, he had been engaged in the real estate business with an office in room 441, Chamber of Commerce Building, Los Angeles; that "about October, 1912, I talked with Welch about changing his office to my place; * * *" that respondent said there were many people coming to him in connection with grading contracts "and there was a chance to do real estate, but that he had no time. He said it will be a good idea to make some arrangement with me to show the lands when I could not come down, and that the other man where he had his office was to move, and he wanted another office, and I told him room 440 was adjoining my office and I could secure the room. * * * My arrangement with Welch was nothing more than a division of commissions if I had a listing and he had a customer;" that they agreed on such an arrangement; that appellant told respondent he would pay all his own traveling expenses "when I went to Imperial Valley, and * * * I should expect him to do the same thing, which I have always done, and so has he as far as I know. We talked until 6 o'clock, coming to an agreement as to how or when the expenses should be paid. This was the winding up of the agreement. * * * He said he was a grading contractor and needed a stenographer in the office to meet customers, and I told him that it would cost $20 a month for the rent of the office, 440 and 441; that if he would pay half of the office rent he could have the privilege of using the stenographer and telephone if he would pay half of the expenses. * * * He was willing to do that;" that appellant rented room 440 and sublet it to respondent; that respondent moved into this room and maintained his office there as a grading contractor and devoted his time and attention to that business; that the grading business of respondent was independent of and separate from the real estate business of the appellant, and that the respondent had no interest in the business of the appellant except that where respondent found a customer for the property listed with appellant, or appellant found a customer where respondent had a listing of land for sale, they would make a division of the commission earned, or, where other agents were interested in the deal, the commission would be split up according to the circumstances in each particular case; that this arrangement continued between the parties, and respondent continued to occupy room 440 until October 1, 1913, when appellant terminated respondent's occupancy of room 440, rented the room to another, and withdrew from the arrangement for a division of commissions.

Appellant also testified that in some of the deals they had together an equal division of gross commissions was made, while in others they were retained by the one collecting them. The appellant denied that he promised to devote all of his time to the business or that he would keep books of account; "nothing was said by us * * * about entering into a partnership;" that he had no knowledge as to how or why half of the outside expenses were charged to respondent; that the intention was to charge only half the office expenses; that somebody struck balances in the account book without his permission; that his reason for telling respondent in a letter, which the latter testified to, "Be sure and have the old machine steamed up," was because he would prefer to patronize respondent's automobile. He explained his letter to respondent in which he said, "The trip was worth $2,000 to us," by stating the word "us" to be a mistake; it should have been "me"; that he was a party to many other trades in which plaintiff got no commission; denied respondent was consulted with reference to negotiations with the agent, contradicted the testimony already referred to of Herman Leyer, H. E. and Alexander M. Williams, Miss Cressie Mitchell, John Welch, and Mrs. Welch, and testified he did not know monthly statements were rendered respondent, nor that letters which referred to respondent as his partner were written. Appellant produced a card printed May, 1913, reading "Edward H. Alcott, sole owner." He flatly contradicted respondent's testimony as to a partnership relation ever having existed between them; denied that he introduced respondent to anyone as his partner; denied having knowledge of the advertisements signed "Alcott and Welch"; and continued: "I did not insert that in the paper. * * * I could barely see to get around at that time. * * * My eyesight had been bad for three years." He admitted, however, discussing with respondent at one time the advisability of advertising in both names, respondent being well known in the valley; and he contradicted respondent's witnesses that he admitted to them he was respondent's partner.

Miss Kate Gatzman testified the items in the account book were mere memorandums, and that the balance for September, 1913, was not carried over in the October accounts because appellant said he was going to quit respondent.

The court found that on or about the 1st day of October, 1912, respondent and appellant entered into a parol contract of copartnership to carry on a real estate business together, dividing the expenses and losses between them equally; that the expenses of the Los Angeles office and of the Brawley office

and the profits were to be shared equally; that said partnership has been conducted until March 1, 1914, except for the failure of appellant to perform his duties under the agreement of partnership; and that he is guilty of serious misconduct.

[2, 3] We are of the opinion that the foregoing summary abundantly shows the evidence is sufficient to support the findings of partnership. This summary does not assume to refer to all of the evidence, for the record of the trial covers some 1,300 pages of the printed transcript on appeal. We have, however, fully examined the evidence and think we have developed it sufficiently for the purposes of this opinion. While it presents contradictions and inconsistencies on both sides as to the relationship between the parties, it will be presumed the court took all such matters into account in arriving at its decision. The respective versions of the parties as to the character of the relationship present a sharp conflict in the evidence and we are bound by the determination of the question by the trial court. The evidence of appellant's conduct and his admissions (section 1832, Code Civ. Proc.) as to the existence of the partnership, which we must assume the court believed and acted upon, would alone support the findings.

[4] Many of the assignments of insufficiency are addressed to the weight of the evidence and the credibility of the witnesses, which were for the trial court to determine. Appellant cites a number of authorities to support the proposition that in the absence of a written agreement of partnership he who alleges its existence must assume the burden of establishing it with clear proof, which indisputably is the law. Certain phases of the evidence are emphasized in the argument: For instance, it is pointed out that in a number of deals each of the parties retained the commission he collected; that there is a variance between the allegations and proof—it is alleged appellant was to devote all of his time to the partnership business, and that he subscribed for telephone service after the partnership was formed, as to which matters respondent's testimony is silent. But it was not necessary to allege or prove that appellant was to give all his time to the business in order to constitute a partnership. Other illustrations are that each party had his own individual cards and stationery printed subsequently to October 1, 1912, giving the same office address; that on respondent's card the appellant's name appeared as his "sole agent," respondent claiming, however, that this referred to his grading, and not to his real estate business; that respondent's name was not put on the door of room 441 with appellant's, nor did he have it printed on room 440 after removing the name of the former occupant; that there was no partnership bank account; that the advertisements which respondent put in the Brawley News both for the grading and real estate business were in his individual name; that he had an individual rubber stamp made, the cost of which was charged to him personally, respondent testifying, however, that the stamp was used on his old stationery; that respondent presented for the first time at the trial a statement or claim purporting to show the expenses he incurred for the partnership to the extent of about $2,500 for the months of January, February, March, April, and May, 1913 (which is included in the accounting), and as to which appellant makes the point that, notwithstanding respondent now claims he is entitled to this credit, he said nothing to appellant about it when the latter was endeavoring to collect from him one-half of the office expenses; that during this time respondent was "hard up" and borrowed money of appellant. But in view of what we have already said it will not be necessary to further consider the arguments of appellant as to the sufficiency of the evidence to sustain the findings of partnership.

2. The court found that the Yokum-Owen and Johnson-Ringer-Owen deals were partnership transactions, and the money held by the bank partnership funds; that the contracts with the agent and the sales agent, and the trust agreement and declaration of trust, were for the benefit of the partnership. Respondent testified these were partnership transactions, and appellant denied respondent was in any manner connected with them. The findings must be upheld.

3. The appellant contends that findings III, VI, and XI relative to the town site are without support in the evidence. His position is that the town site was his own personal undertaking, that respondent had no interest in it, and that he paid no part of the consideration. In other words, appellant's claim is that respondent's connection with the town site was by virtue of a contract entered into between them whereby respondent agreed to level, grade, and lay out the property; that he did the work and was paid for it.

The testimony of the parties as to the town site is strictly at variance. Respondent testified that the partnership owned the town site; that in July, 1912, either appellant or Prescott gave him for investigation a list of United States government lands in the Imperial Valley that were to be thrown open for homestead entry on August 22d following; that he told appellant the quarter section would make an "elegant town site"; that appellant said he did not have sufficient money to "scrip" it, but to let W. I. Alcott (appellant's son) file on it, "and later on maybe we would have the money and we would buy it from him"; that W. I. Alcott came to the Imperial Valley on August 20th, and on the night of the 22d respondent let him have an equipment and he went on the

land "a few seconds after midnight"; respondent testified he had witnesses present to note the making of the location. W. I. Alcott filed on the land September 23d. Respondent testified that he agreed to grade and clear the land as an offset for the moneys expended by appellant for the relinquishment and "scripping" of the location. There is a variance in the complaint, the evidence, and the findings as to the cost of the work. The complaint alleged it to be $5,500; respondent testified that he and appellant figured it would cost $4,000; while the finding is $4,200. Respondent explained that "the $5,500 stated in the complaint, I understood, included some work on the high-line canal," and that the item is apportioned between the town site and the high-line ditch in the accounting. However this may be, appellant's answer alleged that respondent agreed to do the town site work for him for $4,200.

Respondent's testimony is corroborated by several of his witnesses. As already shown, H. E. Williams, Miss Cressie Mitchell, and Miss Louise Barker testified to admissions by appellant as to the town site. Miss Catherine Gatzman testified that she wrote letters to respondent at the dictation of appellant regarding lands in the Imperial Valley. Alexander M. Williams also testified appellant told him that he and respondent "should make at least $100,000 apiece out of it. * * * You know he has an interest in the town site, but if he isn't careful he won't get anything." Mrs. Welch also gave corroborating testimony as to the ownership of the town site by the partnership. Appellant testified that in August, 1912, respondent told him about this quarter section and an adjoining quarter section at Imperial Junction; that he employed respondent to put W. I. Alcott on the 320 acres and agreed to pay him $250 for his services—$100 when W. I. Alcott went into the Valley, and the other $150 on the making of the entry; that respondent put W. I. Alcott on the quarter section involved here on August 22d, where he remained until March, 1913; that appellant paid respondent $100; that in February, 1913, he purchased the relinquishment from W. I. Alcott for which he paid him $2,400, and secured scrip for the property at a cost of $2,020; that he contracted with respondent to level and grade the town site for $4,200; that the work was done by respondent and the contract price paid; and that respondent had nothing to do with the sale of any town-site lots or with platting the town.

Appellant produced a number of witnesses. Clarence J. Park testified he platted the town site under the appellant's direction. "I had a letter from Alcott to say as to how the work should be done. I located the center line on the streets, and Mr. Alcott and Mr. Welch and myself discussed the best manner of doing the work. * * * I had no conversation with Mr. Welch as to whether he was doing the work by contract or otherwise." J. E. Arnold testified respondent told him he did the town-site grading by contract for $4,000. "Nothing was said about Welch having any interest in the town site. Welch did say, however, 'If I had anything to do with Imperial Junction I would show them how to do it and stir things up.'" W. M. Boyle testified respondent told him he had graded the town site for appellant for $4,000. Myron D. Witter testified he was connected with a Brawley newspaper; that respondent did advertising in his own name; that appellant ran an advertisement for "scripping" Imperial Junction in his own name. L. O. Crummer testified that in his conversation with respondent, the latter never made any statement about having any interest in the town site, and W. I. Alcott testified he never had any conversation with his father about relinquishing the town site until March, 1913, and that he never discussed the subject with respondent. B. E. Colvin, F. G. Havens, and Hedge A. Havens testified they would not believe either respondent or Clarence R. Conover under oath.

The court further found that, pursuant to the agreement of partnership, respondent and appellant agreed to procure the relinquishment of the quarter section at Imperial Junction for the purpose of establishing a town site thereon, that appellant procured the relinquishment and paid to the homestead entryman (W. I. Alcott) $2,400, and for the same purpose procured soldiers' additional rights, called scrip, and subsequently a patent for the quarter section, and informed respondent that he had paid $1,715 ($1,790 is the amount alleged in the complaint) therefor on account of the partnership; that respondent should promptly level and grade the land for the necessary streets and lots of a town site for the partnership account, and as an offset for the cash paid out by appellant, the difference in amounts to be adjusted in the partnership accounts; that respondent did level and grade the town site at a cost of about $4,200 for the partnership account; "that appellant was guilty of serious misconduct in that he began advertising the said property as his sole estate and advertising himself as the sole owner and held out to the public falsely at times the claim that he was the sole owner of the said town site."

Upon this and other evidence it is plain that the findings touching the town site cannot be disturbed. As on the issue of the character of the relationship between the parties, the evidence of admissions by and the conduct of appellant would alone support a finding that the town site was a partnership affair. The evidence is involved in conflict on every material phase of this issue. It was for the trial court to determine whether the testimony of respondent or appellant as to this project was true, and, as their respective versions are diametrically opposed, it would

serve no purpose to state in detail the arguments of appellant. It is not questioned that respondent did the work, and according to the theory of appellant the contract price was $4,200, which the court found to be the cost. We have quoted from respondent's testimony that the difference between the amount charged ($5,500) and the amount found ($4,200) was on account of the high-line ditch. Moreover, the findings are to the effect that respondent was to improve the property an as offset to appellant's cash contribution, and there is no suggestion that the doing of the work was dependent on the cost thereof.

Appellant lays stress on what he describes as inconsistencies and contradictions in respondent's position. Our attention is directed to an affidavit which he made on July 22, 1913, wherein he averred that his "occupation is a teaming contractor and his principal work is that of doing assessment work on government land entries," and that during the four years he had known the quarter section it has been in its natural desert state except for the work done by appellant and his predecessor in interest, W. I. Alcott. This affidavit was made in connection with the application of Carmen F. Carlson for reinstatement on the land. Attorney George R. Wickham, whom appellant employed in that proceeding, testified respondent stated to him he was to do the work for appellant and never spoke about his, the attorney's, employment or paid him any part of his fee. Reference is made to the following testimony of Mrs. Sadie B. Hendricks, having regard to the Hendricks' deal:

"I * * * demanded the money back. * * * I said to him, 'You said you were working for Mr. Alcott. Why don't you get it from him?' and he said that he was overpaid already. He said that he had a contract to grade Imperial Junction and was getting over $4,000 for the work. * * *"

But, while this affidavit may appear inconsistent with respondent's claim that the town site was partnership property, it is conceivable the trial court concluded the parties were in collusion for the purposes of the contest.

[5] It may be said generally of appellant's contentions as to the town site that the evidence, considered together, is ample to support the findings. It was for the trial court to harmonize any inconsistencies or contradictions, and to consider the evidence of impeachment in arriving at its conclusion, and we must assume in favor of the judgment that this was done.

4. This is likewise true of appellant's contention in regard to a certain chattel mortgage for $3,500, dated March 14, 1913, given him by respondent, which the former asserts and the latter denies was for a consideration. This transaction was not pleaded, and no finding was made in regard to it. Appellant testified that in March or April, 1913, respondent executed the mortgage on his grading equipment (which was inventoried at $5,602.50) for $3,500; the consideration being made up of $1,500 which appellant claimed respondent had borrowed in different sums from him, and $2,000 for the R. M. Sipple tract—14—11—13—which respondent was to give to Mrs. Martin, his mother-in-law. Appellant had previously purchased the property from Sipple. This was the second mortgage respondent had executed on his grading equipment, one having been given to the First National Bank of Brawley for $900. Appellant claims he paid for the grading work by the release of the $3,500 mortgage and the payment to respondent of $700 in cash. Respondent's version is that he said to appellant:

"'I have got to get some money to keep things going and to get this thing straightened out.' He said, 'I thought we would make some money.' I said to him 'You told me you could raise money.' * * * He said, 'The bank has a first mortgage on your grading outfit; you give me a second mortgage and that will hold things together until we can sell some lots and take care of things. I will hold it until we get the town site fixed up and we can sell some lots. If we don't, we can't get the town site fixed up or get the water there either.'"

Respondent also testified that he received no consideration from appellant for the chattel mortgage; that it was given to protect respondent from his creditors while he was extending the high-line ditch to the town site; and that about a year after he completed that work appellant released the chattel mortgage, without any consideration.

Appellant argues that certain admissions and conduct of respondent preclude the idea that the mortgage was without consideration and was merely given to protect the equipment from the claims of respondent's creditors. Frank Birkhauser, attorney for the First National Bank of Brawley, testified that on or about July 31, 1913, in a conversation between himself and the parties, the respondent requested an extension of time, but that the bank wanted appellant to release certain of the mortgaged property so that it would have additional security before extending the time on the mortgage. The witness said:

"At a conversation in front of the Bungalow Hotel Welch said that Alcott's mortgage was paid by work, I think, on the town site."

Appellant also mentions the evidence that the stenographer wrote, "Bal. in full payment of chattel mortgage," on the check stub when, as he claims, the final $500 was paid, and other matters which he asserts tend to prove that there was a consideration for the mortgage. In support of respondent's position that there was no consideration he em-

phasizes the fact that in Plaintiff's Exhibit I appears the entry of March 4, 1913, "Relinq. R. M. Sipple $400," and on the same page of the book one-half of the total expenses for this month are charged to respondent, notwithstanding appellant's claim that he agreed to purchase this identical property a few days later for $2,000. Moreover, respondent contends appellant has not satisfactorily accounted for the remaining $1,500. Two items of $500 and $125, respectively, appear in schedule 10, and appellant makes the indefinite statement as to the payment of the remaining $875:

"The balance of the chattel mortgage consisted of several small items. * * * It was all figured up at the time."

A finding against appellant's contention must be implied from the omission of a credit in the account for the $875.

[6] Appellant makes the point that it is neither alleged nor found that respondent agreed with appellant to do the grading work, but merely that the appellant "urged and insisted" that it be done by respondent "as an offset for the cash paid out by defendant Alcott." The quoted language is from the complaint. We think this is equivalent to a formal allegation that the parties made an agreement to that effect. In any event the work was done. A partnership to engage in the real estate business having been found, the presumption is that all transactions within its scope would be for the benefit of such partnership.

5. Appellant also makes the point that respondent is entitled to no relief because by his own admissions the chattel mortgage was fraudulent. Respondent, in answer to this contention, relies on the testimony already quoted to show that appellant originally suggested the execution of the chattel mortgage. The presumption is that the court so resolved the evidence, and hence appellant is estopped to invoke the equitable doctrine.

6. Appellant contends that the evidence does not justify the implied finding that the work of bringing water to the town site through the high-line ditch was a partnership undertaking, and in debiting him with one-half of $2,033.87—the amount of the loss on high-line ditch No. 5. This project was not pleaded, but findings in favor of respondent are to be implied from the accounting wherein the debts and the above loss appear. Respondent's testimony as to the high-line ditch is that in the latter part of 1912 he suggested to appellant it would be advisable to secure water for the town site, and that the Imperial Water Company had offered him a contract to extend the high-line ditch to the property; that he told appellant the contract would entail a loss, and that the latter replied, " 'Well, anyway, we can manage to get the water up to the junction, and whatever it is when we sell the town site * * * we will balance it up.' He told me the loss whatever I would be put to, or we would be put to, on the high-line ditch, we would divide between us;" that he entered into a contract with J. W. Yokum, vice president and director of the Imperial Water Company, to extend high-line ditch No. 3 and high-line ditch No. 5, on a per diem basis for his teams; and that he made the extension and the water went through the ditch to the town site. The appellant testified he had no connection whatever with this undertaking, but that respondent did the work under a contract with J. W. Yokum. He stated further that about March 1, 1913, he learned for the first time that respondent was doing the work; that respondent "had gone in the hole on the high-line work"; came to him and wanted money "to pay his help on the high-line work." Appellant's position is that the extension of the high-line ditch was a matter between respondent and J. W. Yokum, and that he was in no way connected with it.

J. W. Yokum testified he had an oral agreement with respondent about work on high-line ditch No. 5; that he and respondent went to the Brawley Bank and signed up a contract whereby the latter was to get paid as he went along. Frank Birkhauser testified respondent and Yokum came in to arrange for some work on the high-line ditch, and that respondent was to get paid as he did the work. The evidence as to this work is such that the implied finding it was done for account of the partnership must be sustained. Respondent's testimony is flatly contradicted by appellant, but that only presents a conflict which the court resolved on the side of the former. In addition to the evidence already set forth, it appears, among other things, that in a letter to Mrs. Martin under date of August 15, 1913, appellant said:

"I am assured by the water company that they will furnish me water about November 1st, and, being one of the organizers of the water company No. 3, I am positive that the information is correct."

The court may have attached importance to this letter in view of appellant's testimony he was not aware the work was being done. We must conclude that respondent's version was accepted by the court. Moreover, the project was of great concern to the successful operation of the town site, and the trial court probably concluded the work was not done without the cognizance and co-operation of appellant.

7. Appellant next contends the evidence is insufficient to support findings III and VI, as to the Hall-Sutton, Bergon-Antes, Easton-Mitchell, and Flicker deals, and the accounting thereof, for the reason that they are contrary to the admissions of the pleadings and to the evidence. The method pursued by the court in the accounting was to credit each

of the parties with the money paid out by him for the benefit of the partnership, and to debit each with the commissions received by him; the difference between the relative contributions and expenses forming the basis of the money judgment in favor of respondent. The account appears in ten schedules and is presented in recapitulatory form in the findings as follows:

Credit.

Money paid out by Alcott for benefit of the partnership:		
Expenses of real estate business (Schedule 1)		$2,832 41
On account of town site of "Niland" (Schedule 2)		5,656 86
Traveling expenses account of town site (Schedule 3)		624 15
Total credit		$9,113 42

Debit.

Commissions from real estate business (Schedule 4)	$4,151 54	
Sale of town lots at "Niland" (Schedule 5)	2,045 00	
Total debit	$6,196 54	6,196 54
Partnership owes Alcott		$2,916 88

Credit.

Money paid out by Welch for benefit of partnership:		
Expenses of real estate business (Schedule 6)		$1,781 15
On account of town site (Schedule 7)		4,200 00
Loss, high-line ditch (Schedule 8)		2,033 87
Total credit		$8,015 02

Debit.

Welch received for use and benefit of partnership:		
Commissions from real estate business (Schedule 9)	$1,825 00	
Cash from Alcott (Schedule 10)	1,271 78	
Total debit	$3,096 78	3,096 78
Partnership owes Welch		$4,918 24
Welch credit	$4,918 24	
Alcott credit	2,916 88	
Welch over Alcott	$2,001 36	

The account then states the debts of the partnership:	
High-line ditch No. 5	$4,249 37
Debts in the real estate business	503 33
	$4,752 70

In the Hall-Sutton deal the testimony of both parties agrees with the complaint and answer that a commission of $900 was earned, received by appellant, and one-half thereof paid by him to respondent. The finding is that "the commission * * * was $900, * * * and * * * was paid to the said defendant Alcott and shown in the accounting taken herein." In the accounting the $900 is debited to appellant in schedule 4, but respondent is not debited with any part thereof in schedule 9. Appellant testified:

"That deal was all settled at the time it was made. It was settled by a division of the money; * * * there has never been any contention between us in regard to the Hall-Sutton money. * * * I turned over the money to Welch right there in my office in cash."

The following colloquy occurred:

"Mr. Alcott: The amount of the Hall-Sutton commission would be $900. That deal was all settled at the time it was made. It was settled by a division of the money; by a division of the Hall-Sutton money.

"Mr. Clark: That is the allegation of the complaint and the admission of the answer.

"The Court: If that is the admission of the answer, there is not much use in going into it.

"Mr. Prescott: Well, it ought to be included in this statement.

"The Court: I cannot make them put it in the statement. It would be included in the judgment.

"Mr. Prescott: That is all right, then.

"The Court: That left $818.03 to be divided.

"Mr. Clark: Your honor, of course, will have regard for the testimony of the plaintiff that it was divided between them.

"The Court: I know it was divided between them. Proceed, gentlemen."

Respondent testified:

"As a final result of the deal I believe Alcott drawed down the money, paid the expenses, and gave me my share of the commission."

Obviously, if the parties each received one-half of the commission each should be debited accordingly, or the transaction omitted from the accounting entirely. Respondent gives no satisfactory explanation in his brief as to why he was not debited with $450, and we do not find that appellant was anywhere given credit in the accounting for the payment of that sum to respondent.

It may be explained that Plaintiff's Exhibit 1 is the book of account referred to in the testimony of Miss Kate Gatzman as having been kept by appellant in which the expenses of the partnership paid by the Los Angeles office were entered. It was the practice of appellant at the close of each month during the first year to total the expenses, debit respondent with half thereof, together with any cash advanced to him, then credit him with half of the commissions of the particular month, and the difference, if any, between half of the commissions and half of the expenses, carried over to his credit or debit, as the case might be, in the succeeding month. Defendant's Exhibit 62A is a statement prepared by him of all commissions which he received. The Hall-Sutton deal does not appear in such monthly adjustments in Plaintiff's Exhibit 1, nor in Defendant's Exhibit 62A. The accounting is therefore erroneous in that, while appellant is charged with the entire commission, respondent was not debited with one-half thereof which the complaint alleges and he testified he received.

Respondent will be debited with $450 and the debit against appellant reduced correspondingly.

[7, 8] But, apart from the accounting, no issue was presented by the pleadings as to the disposition of the commission. "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true. * * *" Section 462, Code Civ. Proc. It was said in Burnett v. Stearns, 33 Cal. 468:

"The finding should be confined to the facts in issue. The province of the court in respect to facts is to determine but not to raise the issue."

See, also, Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80.

"Where a complaint in an action contains an allegation of fact which is distinctly and unqualifiedly admitted by the answer, there is no issue as to the fact. The allegation of fact being admitted it is conclusive. A finding against the admission is therefore outside the issues." White v. Douglass, 71 Cal. 115, 119, 11 Pac. 860.

It was declared in the Matter of Doyle, 73 Cal. 564, 570, 15 Pac. 125, 128:

"When a trial is had by the court without a jury, a fact admitted by the pleadings should be treated as 'found.' * * * If the court does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. * * * In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous."

See, also, Hutchison v. Barr, 190 Pac. 799; Sutherland on Code Pleading, § 1167.

"There can be no necessity of a finding as to a fact admitted by the pleadings. The finding is required only when an allegation of a material fact in the complaint is controverted by the answer, so as to raise an issue." Swift v. Muygridge, 8 Cal. 445.

The Easton-Mitchell deal comes under the same general rule. It is alleged in the pleadings and testified to by appellant and respondent that the commission of $400 was earned and divided equally between them. The court found that appellant received the entire amount, which is accordingly debited to him in schedule 4, with no corresponding debit to respondent in schedule 9. In the absence of any issue of fact as to the division of the commissions, there was no need of findings except on the issue of partnership. Respondent must therefore be debited with $200, and the $400 debited to appellant in the accounting reduced correspondingly.

In the Bergon-Antes deal the complaint alleged that "a commission of $233.20 was made and the same divided equally" between the parties. This seems to be the full amount of the commission in this deal. The answer, however, admits the sale and alleges "that the commission was split in three parts and divided" equally between the parties and Frank C. Prescott, Jr. The court found appellant received the commission, and the amount, therefore, is debited to him in schedule 4, and no part of it is debited to respondent in schedule 9. Respondent's direct testimony is: "I was not present when it was settled. I never understood that Frank C. Prescott, Jr., had anything to do with it. I had no talk with Alcott about the commission." On cross-examination respondent stated:

"I don't know that Prescott got one third of the commission. Alcott told me that he did and I asked Prescott and he said he didn't."

It is argued in respondent's brief that the finding is in no way inconsistent, but in referring to the accounting this statement is made:

"The monthly balances were ignored and a general balance struck; $116.60 went to Welch, $116.60 to Alcott, and $116.60 to Prescott, Jr."

Appellant's testimony is in line with his answer, but Plaintiff's Exhibit 1 shows that in making up the balance for December, 1912, respondent was credited with $116.60 against his share of the expenses for that month, while Defendant's Exhibit 62A credits him with $77.73, the same sum being debited to Prescott. The only issue calling for a finding as to this commission was whether it was divided into two or three parts. As the testimony in the two said exhibits presents a conflict, it must, in the face of the findings, be presumed the court concluded the parties alone were entitled to the commission, but, as the pleadings allege and admit the commission was divided, it follows it should not be debited to appellant alone. Respondent will therefore be debited one-half thereof—with $116.60—and appellant's debit reduced correspondingly.

In the Flicker deal the complaint alleged that the partnership earned a commission of $532, and that it was divided equally between the parties. The answer admits the commission was earned, but alleges it was split into three equal parts, the parties and one G. J. Reinert each receiving one-third. The court found appellant received and retained $533.34. The only variation in the testimony of the parties (Reinert did not testify) is that, while appellant testified Reinert received one-third, respondent stated he received "a part of it," and in view of the vague and indefinite character of respondent's testimony on the point it must be assumed the court found that by the quoted phrase was meant his share of the commission. Appellant is debited in schedule 4, but respondent is not debited with any portion of the com-

mission in schedule 9. It is evident from the record that the total commission was $800, and that the pleadings must be construed as alleging and admitting that one-third thereof was actually paid to Reinert. In other words, the only dispute between the parties concerning the commission was as to the two-thirds of the $800—$533.34 (stated, however, as $532 in the complaint and answer). There can be no question but that Reinert actually received one-third of the $800. This is borne out by Defendant's Exhibit 62A, for therein the amount of the commission is indicated as $800, $266.66 of which was paid to Reinert and $266.67 credited each to respondent and appellant. Giving this interpretation to the pleadings, no issue is presented as to the division of the commission—the complaint and answer alleging it was divided—and there was no occasion for findings. Respondent must therefore be debited with $266.67, and appellant's debit of $533.34 reduced correspondingly.

It is proper to mention that in respect to the question of fact whether respondent actually received his share of the Easton-Mitchell, Bergon-Antes, and Flicker deals, or was merely given book credit therefor by appellant, that Defendant's Exhibit 62A contains this admission:

"Credits due Edmund Welch on commissions on Easton-Mitchell, the Bergon-Antes, and Flicker deals amounting to $544.40 [$200, $77.73, and $266.67, respectively, or a total of $544.40] *credited on office expenses.*" (Italics ours.)

However, in the presence of appellant's contentions we have, where applicable, decided according to the state of the pleadings. But, whatever may be the fact as to these deals, respondent actually received his share of the Hall-Sutton commission.

Appellant attacks the finding in the Hendricks deal which is to the effect that a sale was attempted in the business of, but no commission was made for the partnership. The complaint alleged the deal was made in the business of the partnership, and a commission of $200 was earned "and the same accounted for in the partnership." The answer denies the deal was for the partnership, and alleges it was "made by the plaintiff alone and for his own account"; that appellant had nothing to do with it, nor did he claim or receive any part of the commission received by respondent. The commission does not appear in the accounting. Respondent testified the deal was made by him and Carroll Owen, and that he (respondent) got all the commission, and "it was never accounted for in the partnership." Appellant's testimony follows the answer. The finding is that the partnership did not earn the commission. All the evidence, however, shows respondent actually received the commission and retained it. The finding is therefore contrary to the complaint and the evidence. It was developed in the direct examination of respondent that an action brought by Hendricks against him alone for the recovery of the commission on the ground of fraud was then pending. It is not made to appear, however, whether this action is responsible for the finding. A new trial of this issue is necessary.

Appellant also questions the findings in the following deals, the first three of which were made by the respondent: It was alleged in the Hanson deal that the commission was $475, and this amount was debited to respondent in schedule 9. The Wills deal was not pleaded. The respondent was debited with the entire commission as being $150. Because respondent testified the commission was "$150 or $160" appellant claims the accounting was not correct. But the evidence would sustain a finding of either $150 or $160, and therefore cannot be disturbed. As we have sustained the findings of partnership, it follows that all deals after October 1, 1912, were partnership affairs, and, as appellant was credited with his share in the accounting, we shall not further consider the contentions as to these two deals. The Judd-Lewis deal was not pleaded. There was a conflict in the evidence as to whether the commission was "between $300 and $400" as respondent testified, or " $400" as L. O. Crummer, appellant's witness, testified. The court found it to be $320, and it was divided equally in the accounting. There was ample evidence to sustain the finding.

The point made by appellant in the Williams, Yokum-Owen, Johnson-Ringer-Owen, and Surfleuth deals, the commissions in which were received and retained by and debited to appellant, is that he made the deals independently of respondent. But this point is foreclosed by the findings of partnership. In the Terwilliger and Edgar-Andrews deals it was alleged they were conducted jointly by and the commissions divided equally between respondent and appellant. The latter's objections to these transactions is answered by the findings of partnership as is the point made in the Medberry deal.

Appellant also urges that respondent was improperly allowed a credit of $230 in the judgment. The record shows that this sum is for one-half of $460 which the court found was subsequently collected by appellant on account of principal and interest on the Yokum-Owen and Johnson-Ringer-Owen notes. The accounting shows that respondent's contribution to the partnership exceeded that of appellant's by $2,001.36. The judgment directs that respondent be allowed $230, as representing "one-half of defendant Alcott's subsequent collections on said notes of $460"—making a total money judgment of $2,231.36 in favor of respondent.

The first of these notes, dated March 20,

1913, was for $1,600, to run for two years, with interest at 7 per cent. payable semi-annually. A $168 interest debit appears in Defendant's Exhibit 62A and has been debited to appellant in schedule 4. When the judgment was entered on October 28, 1915, the fifth payment of interest was due, making a total of $280 (5 times $56), and, deducting therefrom the above $168, a balance of $112 remained. Four payments of $56 each were indorsed on the note (each representing six months' interest). Another payment of $56 appeared on the second note, evidently by mistake, as will be readily apparent from the difference in the respective interest payments. Here, then, was one of the "subsequent collections" of $112.

The second note, dated March 21, 1913, was for $1,700, to run for 90 days with interest at 7 per cent., payable quarterly. A payment of $300 was made on the principal of this note on July 18, 1913, leaving $1,400 due on the principal sum. Seven per cent. on $1,400 makes a quarterly payment of interest of $24.50, so that when the judgment was entered the total interest representing ten payments amounted to $245. In Defendant's Exhibit 62A, appellant debited himself with six payments of $24.50 each, or $147, which sum is also debited in schedule 4. Six interest indorsements of $24.50 each appear in this note. The difference between $147, six payments, and $245, ten payments, makes another of the "subsequent collections" of $98. Hence these two "subsequent collections" make a total of $210. Add to this $250, a partial payment on the principal on May 14, 1914, and a total of $460 results, one-half of which is credited to respondent in the judgment. In the computations of interest on this note no account is taken of the above $300 partial payment on the principal between June 21, 1913, the close of the first interest quarter, and July 18, 1913, the date of said payment, or between May 13, 1914, the date of the payment of $250 on the principal, and September 21, 1915, the end of the quarter immediately preceding the rendition of the judgment. But if the point is raised these items can be adjusted when the notes are liquidated.

8. Appellant's next contention is that the evidence is not sufficient to sustain the findings settling the account. We quote from the brief:

"The defendant's exceptions to the statement of the account by the court, which covers practically all of the items thereof."

One hundred thirty-four objections and exceptions were made and taken to the statement of account by the court, many of them relating to inconsequential items. We have considered these specifications, and do not think appellant could have been seriously prejudiced by any of the indicated rulings, even if erroneous, for there is an abundance of competent evidence to sustain the account. It will not be necessary, therefore, to describe these specifications.

9. In connection with appellant's contentions that the evidence is insufficient to support the findings of partnership it is urged that the complaint is insufficient. It is asserted that—

"The allegations of the complaint as to the partnership in the real estate business are not only insufficient, but the specific allegations therein as to deals made and division of commissions earned are sufficient to show that no partnership in fact existed between the parties."

This point was raised on demurrer. We submit that the specific allegations as to the real estate deals in the complaint must control the general allegations of partnership. The demurrer is not contained in the record. It is sufficient to state that this contention overlooks other allegations of the complaint which make it clear that a partnership, and not an agreement for a division of gross earnings, is pleaded.

10. Appellant has cited a great many authorities in support of his contentions, which contain correct statements of the rules of law to which they are addressed. None of them is opposed to the conclusion we have reached. For instance, it is urged that the parties must have formed a definite intention to become partners. We have already subscribed to the doctrine that the burden of establishing a partnership is on the one alleging its existence. Appellant cites Wheeler v. Farmer, 38 Cal. 203, 213, to the proposition that "an agreement to divide the gross earnings does not constitute the parties to it partners." But neither that authority nor any of the others relied upon by appellant sustains his contention that the relationship between these parties did not constitute a partnership.

[9, 10] It may be conceded that an agreement to divide the gross earnings would not of itself constitute a partnership, but, according to the pleadings, the evidence, and the findings, the parties did more than agree to divide the gross earnings; they agreed to divide the profits of the business.

"A right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim." Lord Cranworth in Cox v. Hickman, 8 H. L. Cas. 268; Gilmore on Partnership, p. 31.

It has also been declared that—

"Sharing profits is prima facie evidence of the existence of a partnership." Gilmore on Partnership, § 11, p. 31; Uniform Partnership Act, Rowley Modern Law of Partnership, § 84.

"Profits" is a relative term and contemplates losses. The Civil Code provides:

Section 2395:

"Partnership is the association of two or more persons, for the purpose of carrying on business together, *and dividing its profits between them.*" (Italics ours.)

Section 2404:

"An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated."

The appellant does not contend that the incidental expenses of the deals and the expenses of the Los Angeles office were not to be divided equally between them. Plaintiff's Exhibit 1 was kept under appellant's direction and shows that the expenses were entered therein and half of them charged to respondent. The evidence, including correspondence between the parties, the admissions and conduct of appellant, is sufficient to prove that the parties formed a definite intention to enter into a partnership relation, and that the business between them was carried on pursuant to this agreement and understanding. It is not claimed there was any stipulation between the parties that they should not divide the losses (section 2404, Civ. Code), and, as already stated, the court charged to each of the parties one-half of $2,033.87, the amount of the loss on high-line ditch No. 5.

[11] 11. There is no merit in appellant's next contention that the failure of the court to make findings within the meaning of section 632, Code of Civil Procedure, prior to the taking of the account, was error. We quote from the record:

"The court announced that it would find in favor of the plaintiff as to the existence of a partnership * * * as to the real estate business and also in the town site."

It was clearly within the discretion of the court to make the findings on the issue of partnership either before or after the accounting was made.

[12] 12. Appellant complains of the action of the court in modifying the judgment after the entry thereof and while the motion for a new trial was pending. The modification was made upon the offer of respondent to waive $2,033.87, the amount of the loss on the high-line ditch for which respondent was given credit in schedule 8, and which the court in the judgment also directed be paid out of the partnership funds. In other words, the double credit to respondent for the amount resulted in appellant having to stand his share of the loss twice. But, as the modification was in favor of appellant, he will not be heard to complain.

13. In the final paragraph of appellant's opening brief it is stated the exceptions to the rulings on the admission and rejection of evidence "are all urged and not waived." This refers to some 105 rulings, many of them relating to the issue of partnership, the evidence to establish which we have found to be sufficient. The rulings are not otherwise specified, but even if, in particular instances, they were erroneous, it cannot be maintained appellant was prejudiced thereby.

The judgment is reversed, and the cause remanded for a new trial upon the issues as to the Hendricks deal only. With respect to the issues as to the partnership and all the issues relative to the accounting except those relating to the Hendricks deal, the findings as heretofore made by the court below shall stand as made, and after a new finding upon the issues as to the Hendricks deal the court below, upon a consideration of all the findings, shall enter judgment thereon dissolving the partnership and settling the entire account as before, except that as to the Hall-Sutton, Bergon-Antes, Easton-Mitchell, and the Flicker items of the account the judgment be in accord with the views expressed in this opinion, and as to the Hendricks deal in accord with the new findings thereon. Appellant shall recover costs of this appeal.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.

185 Cal. 605

In re RELPH'S ESTATE.

BLACKWELL v. SUPERIOR COURT OF STANISLAUS COUNTY et al.

(Sac. 3257.)

(Supreme Court of California. May 2, 1921.)

Executors and administrators ⊂=29(5)—Order, granting letters of administration, adjudication of fact of residence of deceased.

The order of the superior court of San Joaquin county, granting letters of administration, was an adjudication of the fact of residence of the deceased in that county, binding upon the whole world, unless vacated or set aside on direct attack, for all the purposes of the administration of the estate of deceased, including the probate of any subsequently produced will.

In Bank.

Application for writ of mandate by Ida Blackwell against the Superior Court of Stanislaus County and others to compel the court to proceed in the matter of the probate of the will of Glenn C. Relph, deceased. Writ denied.

J. B. Curtin, of Sonora, for petitioner.

PER CURIAM. The court is of the opinion that under the well-settled law of this state the order of the superior court of San Joaquin county, granting letters of administration, was an adjudication of the fact of residence of the deceased in that county, binding upon the whole world, unless vacated or set aside on direct attack, for all the purposes of the administration of the estate of the deceased, including the probate of any subsequently produced will.

The application for a writ of mandate to compel the superior court of Stanislaus county to proceed in the matter of the alleged will of the deceased is therefore denied.

All concur.

52 Cal. App. 234

STONE v. GILL. (Civ. 3499.)

(District Court of Appeal, Second District, Division 1, California. April 14, 1921.)

1. Municipal corporations ⟸706(5)—Evidence held to warrant finding automobile driver was negligent in failing to see pedestrian.

In an action for injuries to pedestrian who was struck by automobile which came up behind him while he was walking in the street, evidence *held* to warrant the jury in finding the automobile driver negligent in failing to discover the presence of the pedestrian in time to avoid striking him.

2. Municipal corporations ⟸705(10) — Fact that pedestrian was walking on street and not looking behind does not show contributory negligence.

Evidence that pedestrian was walking on the street at night and that he did not keep lookout behind him for approaching vehicles does not compel the court to find him negligent.

3. Damages ⟸132(7)—$3,500 for broken leg and other injuries held not excessive.

An award of $3,700, of which $200 was for expenditures, leaving $3,500 as compensation for injuries, is not excessive, where the evidence showed plaintiff suffered a broken leg and severe injuries to his ribs, hip, and back muscles which confined him to his bed for four weeks and caused great pain and loss of sleep, and that at the trial one bone had not yet healed, is not excessive.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by George R. Stone against J. W. Gill to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter J. Hartzell, of Redlands, and McNabb & Hodge, of San Bernardino, for appellant.

Burton E. Hales, of Redlands, for respondent.

CONREY, P. J. Action to recover damages for personal injuries resulting from a collision between plaintiff and an automobile driven by the defendant. Judgment was entered in favor of the plaintiff for the sum of $3,700, of which $200 covered expenditures for medical attendance and nursing, and the remainder of the award was allowed as general damages for the injuries received. Defendant appeals from the judgment.

On the evening of February 20, 1919, between 6 and 7 o'clock, plaintiff was walking west on the public highway known as West Fern avenue, in the city of Redlands. The complaint alleged that while he was thus walking, the defendant negligently drove his automobile along the street in the same direction in which the plaintiff was walking and carelessly and negligently struck the plaintiff and ran over him, thereby causing the injuries for which recovery was sought. The grounds of appeal which are presented for consideration relate solely to the sufficiency of the evidence to sustain the findings. Appellant contends: (1) That the evidence is insufficient to prove actionable negligence on his part; (2) that the plaintiff was guilty of contributory negligence which constituted a proximate cause of the accident; (3) that the damages awarded are excessive.

[1] From the plaintiff's testimony it appears that he walked westerly near the middle of Fern avenue several hundred feet before he was struck by defendant's automobile; that it had been raining earlier in the evening, but was not raining during this walk on Fern avenue nor at the time of the accident; that at the time of the accident "it was not misting at all"; that the sidewalks were wet and slippery, and, on account of trees, were considerably darker than the street; that for this reason there was less danger of slipping on the street than while walking on the sidewalks; that while walking on Fern avenue at the time of and prior to the instant of the collision he was watching carefully for objects coming toward him from the front, but did not look behind; that he did not see appellant's machine or hear it (that there was no signal or horn blown); that there were street lights fixed to posts so that the greater part of the light was reflected onto the street. The plaintiff's wife testified that after the accident defendant told her that he ran into the plaintiff; that "his lights were very poor and he could not see him." The defendant testified that he could see an object about 75 or 100 feet ahead with the lights that were on his automobile. The accident occurred almost directly under one of the street lights. The defendant contended that by reason of the wetness of the street the reflections of light from the street interfered with his vision and that he was unable to see the plaintiff until too late to avoid a collision. On the other hand, the plaintiff testified that the

reflections from the street did not cause a glare and did not interfere with vision ahead. Defendant in his testimony said:

"I was going along, leaning out beyond my windshield to get a vision of the road, and he suddenly loomed up in the way of the car and I struck him."

Our attention has not been directed to any evidence showing the condition of the windshield except such condition as might be inferred from the preceding sentence as quoted. We are satisfied that the evidence is sufficient to justify the court's finding that by reason of negligence on the part of the defendant in driving and operating his automobile the plaintiff was struck and injured thereby. From the facts shown, and upon which that finding is based, the inference was fairly warranted that the defendant's failure to see the plaintiff in time to avoid striking him must have resulted from careless failure to use his opportunities for observation.

[2] The evidence was not sufficient to compel the court to find that the plaintiff was guilty of contributory negligence, resulting either from the fact that he was walking on the street or from the fact that he did not look backward to guard against objects approaching him from the rear. "It still remains the law that foot passengers have the right to use and traverse the highway at all its points, being chargeable only for the exercise of a due amount of care, which due amount of care, in its quantum, is governed by the circumstances attending the use which the pedestrian actually makes." Raymond v. Hill, 168 Cal. 473, 482, 143 Pac. 743, 747. The same rule was affirmed by this court in Blackwell v. Renwick, 21 Cal. App. 131, 131 Pac. 94. In Blackwell v. Renwick it was further held that while the plaintiff was walking along in the roadway of a street it was not his duty to turn constantly and repeatedly to observe the approach of possible vehicles from the rear, "where the drivers of such vehicles could plainly observe them in time to give warning or turn out and avoid a collision." The reason thus stated points to the distinction between the situation where a person is traveling along a highway in the line of direction of the highway, and the situation which exists where a pedestrian is about to cross a street and thereby suddenly places himself in the path of danger.

[3] No sufficient reason appears which would warrant this court in holding that the amount of damages awarded is unreasonably large. There is evidence to the effect that the plaintiff's left leg was broken, one foot sprained, some of his ribs torn loose, his hip seriously injured, and the muscles of his back and shoulder injured. The trial of the action took place one year after the date of the accident. One of the broken bones had not yet healed, and, according to medical testimony, there would be a permanent disability in plaintiff's ankle, affecting his ability to walk easily. After the accident, plaintiff was confined to his bed for four weeks and suffered a great deal of pain and loss of sleep.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

52 Cal. App. 290

ANDERSEN v. CHARLES et al. (Civ. 3502.)

(District Court of Appeal, Second District, Division 2, California. April 16, 1921.)

1. Pleading ⟸8(4)—Specific performance ⟸114(2)—Complaint held insufficient for failure to allege facts showing that a consideration received by defendants was adequate.

Civ. Code, § 3391, subds. 1, 2, make necessary in a complaint for specific performance the allegation of facts showing that the agreement was as to defendants just and reasonable, and that the consideration received by them for the agreement was adequate, and the allegation in terms that the agreement is just and reasonable as to defendants, and that he received adequate consideration is insufficient as stating a mere conclusion; and, although the complaint alleges the value of the land where it does not allege the period over which the mortgage notes to be delivered to the defendants were to run or how many notes there were or how they were payable or what was their value, it is insufficient.

2. Specific performance ⟸49(2)—Adequacy of consideration relates to time of formation of contract.

In an action for specific performance of a contract to sell land, where plaintiff was to give a mortgage securing notes for the price, the fact that plaintiffs have since made valuable improvements on the land, increasing its value as security, cannot be considered, since the question of adequacy of consideration relates to the time of the formation of the contract.

3. Appeal and error ⟸1176(1)—On appeal from dismissal of complaint, court cannot direct judgment precluding another action.

Upon an appeal from a judgment dismissing the complaint in an action for specific performance of a land sale agreement, this court cannot at the defendant's request direct a judgment which will preclude the possible maintenance of another action by appellant upon a different complaint showing a meritorious cause of action.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Action by A. S. Andersen against M. S. Charles and others for a specific performance. Judgment for the defendants, and the plaintiff appeals. Affirmed.

Turnbull, Heffron & Kelley, of Los Angeles, for appellant.

Frank G. Falloon, of Los Angeles, for respondents.

WORKS, J. This is an appeal by plaintiff from a judgment for defendants in an action for specific performance, after demurrer sustained to plaintiff's amended complaint with leave to amend, but the right to amend not being exercised.

It is alleged in the amended complaint, exhibiting only so much of it as is necessary to a consideration of the points presented to us, that the contract sought to be enforced was one by which appellant agreed to buy and respondents agreed to sell certain described real property, consisting of 19 city lots in a group, at an agreed price of $12,000; that respondents made a deed conveying the property to appellant, and delivered it to a certain abstract company; that at the same time appellant delivered to the abstract company a mortgage on the land mentioned, together with promissory notes secured by it, in the sum of $12,000, bearing interest at the rate of 7 per cent per annum; that respondents agreed to accept the notes and mortgage as the full purchase price of the lots; that respondents received adequate compensation for the agreement sought to be enforced and for the property agreed to be conveyed; that the agreement was fair, just, and reasonable; that the assent of respondents to it was not obtained by misrepresentation, concealments, circumvention, or unfair practice of appellant, or by any promise of appellant which has not been substantially fulfilled; that the assent of respondents was not given under the influence of mistake, misapprehension, or surprise; that the value of the property agreed to be conveyed, both at the date of the agreement and at the date of filing the amended complaint was without certain improvements placed thereon by appellant, $12,000; that the interest agreed to be conveyed was, at all times in the amended complaint mentioned, of the fair and reasonable aggregate value of $12,000; and that respondents have caused the abstract company to refuse to deliver the deed. The pleading also sets up a communication from respondents by which they notify appellant that the agreement is rescinded upon certain stated grounds. It is alleged that appellant has at all times been ready, able, and willing to perform, has performed, and offers to perform, all of the conditions of the agreement on his part to be performed.

[1] Respondents claim that the amended complaint is insufficient because no facts are alleged going to show that the agreement was, as to them, just and reasonable, and that the consideration received by them for the agreement was adequate. Such a statement of facts is of course necessary in every complaint for specific performance (Civ. Code, § 3391, subds. 1, 2; Joyce v. Tomasini, 168 Cal. 234, 142 Pac. 67), and the allegation, in terms, that an agreement is just and reasonable as to the defendant, and that he has received an adequate consideration for it, states merely a conclusion. Joyce v. Tomasini, supra. The pleading now before us satisfies one of the requirements of the authorities, for it alleges the value of the land agreed to be conveyed. Lynn v. Knob Hill Imp. Co., 177 Cal. 56, 169 Pac. 1009. Not only, however, does it not allege the period over which the notes were to run, nor how many notes were given, nor whether they were payable in installments, great or small, but there is no showing as to the ability of appellant to pay the notes, nor any allegation of any fact negativing the possibility that the instruments are so much waste paper. These notes, secured by a mortgage upon the very land agreed to be conveyed, were the only consideration for the transfer, and, short of a showing of some value behind the paper, respondents' agreement to convey was made solely upon their faith in the value of the land itself. Surely, under such a state of affairs, no adequate consideration was received by respondents, and the agreement was, as to them, unjust and unreasonable. Cummings v. Roeth, 10 Cal. App. 144, 101 Pac. 434; Klein v. Markarian, 175 Cal. 37, 165 Pac. 3.

[2] We have not overlooked the fact that appellant, while in possession, placed certain valuable improvements upon the land. That circumstance cannot be considered in this action (Windsor v. Miner, 124 Cal. 492, 57 Pac. 386), for the reason that "the point of time to which the question of adequacy [of consideration] must relate is the time of the formation of the contract" (Morrill v. Everson, 77 Cal. 114, 19 Pac. 190). Nothing is availed appellant by reason of the fact that equities arise in his favor because of his expenditures upon the improvements, as "inadequacy of consideration is, under the law of California, an independent and distinct ground for denying specific performance." Haddock v. Knapp, 171 Cal. 59, 151 Pac. 1140.

[3] The respondents ask us, in the event that we sustain them in their contention that the amended complaint is insufficient, to modify the judgment in such manner as to show a judgment in their favor on the merits, the judgment actually entered being for a dismissal; but we cannot direct a judgment in the cause which will preclude the possible maintenance of another action by appellant upon a different complaint, showing a meritorious cause of action. Robinson v. Howard, 5 Cal. 428; City of Los Angeles v. Mellus, 59 Cal. 444; Flood v. Templeton, 152 Cal. 148, 92 Pac. 78, 13 L. R. A. (N. S.) 579.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

52 Cal. App. 300

SOLOMON v. REDONA et al. (Civ. 3164.)

(District Court of Appeal, Second District, Division 2, California. April 18, 1921.)

1. Death ⟹2(2)—Presumption from absence.

The presumption recognized by Code Civ. Proc. § 1963, subd. 26, that one not heard from in seven years is dead, does not arise until the expiration of the seven years unless there are circumstances in evidence to quicken the time; and the party claiming that the death occurred before a particular time within the seven years has the burden of proving the precise time of death.

2. Descent and distribution ⟹71(4) — Presumption owner of interest presumed dead left heirs.

In an action for partition of real estate, wherein no conveyance was produced from the owner of an interest who had not been heard from for more than seven years, plaintiff failed to show title to such interest; the law presuming that, if such owner were dead, she left heirs.

3. Partition ⟹48—All cotenants not plaintiffs must be made parties defendant.

In a suit for partition, it is indispensable that all cotenants not united in the complaint be made parties defendant.

4. Partition ⟹50—Duty of court to require presence of co-owner not named as party.

In equity and under Code Civ. Proc. § 389, providing that, when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them brought in, it was the imperative duty of the court, even on its own motion, in a suit for partition, to require the presence of the owner of an interest not named as a party; the statute being mandatory.

5. Appeal and error ⟹187(3)—Judgment reversed for nonjoinder of co-owner, though not called to attention of trial court.

In a suit for partition, if a co-owner is not made a party plaintiff or defendant and a nonjoinder appears by the record, the appellate court will reverse the judgment whether the attention of the trial court was called to the defect or not.

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by Bernado J. Solomon, administrator of the estate of Helen R. Solomon, deceased, against Carlos Redona and another for partition of real property. From an interlocutory decree in favor of plaintiff, defendant Carlos Redona appeals. Reversed.

Haas & Dunnigan, of Los Angeles, for appellant.

Henry E. Carter, of Los Angeles, for respondent.

FINLAYSON, P. J. Helen R. Solomon, now deceased, brought this action for a petition of real property alleged to be owned by herself and two of the defendants as tenants in common. From an interlocutory decree in favor of plaintiff the defendant Carlos Redona appeals. Helen R. Solomon having died after the appeal was perfected, the administrator of her estate was duly substituted as plaintiff in her stead. Notwithstanding the substitution, we shall, for convenience, refer to Helen R. Solomon as the plaintiff and respondent, just as though she were still alive and prosecuting the appeal in her own name.

One of the points made by appellant is that the owner of an undivided one-tenth was not made a party to the action, and that therefore the decree does not determine the interests of all the various co-owners.

The complaint alleges that plaintiff is the owner of an undivided three-fifths of a lot in the city of Los Angeles; that the defendant and appellant Carlos Redona is the owner of an undivided one-fifth, and that Jose S. Redona, another defendant, is the owner of the remaining undivided one-fifth. Carlos Redona, answering, denied that plaintiff and Jose S. Redona own three-fifths and one-fifth, respectively, or any interest whatever, and alleged that, on the contrary, he is the sole owner of the lot. The court found the facts as alleged in the complaint, and thereupon entered the interlocutory decree from which the defendant Carlos Redona appeals.

The facts essential to an understanding of the question to be discussed are substantially these: Fermina S. de Redona, the mother of plaintiff and defendants Carlos Redona and Jose S. Redona, acquired the lot on April 13, 1859, as her sole and separate property. She died July 26, 1910. It seems that she survived her husband, and that she died intestate, leaving as her sole heirs three children who survived her and certain grandchildren, the lawful issue of two deceased daughters. Besides two children who died before reaching majority and without having been married, Fermina S. de Redona was the mother of five children, two of whom, married daughters, predeceased her. Of these five, the three who survived their mother are Helen R. Solomon, the plantiff in this action, and the two defendants Carlos Redona and Jose S. Redona. The two who departed this life before their mother's death were Sarah Redona Bryant and Virginia Redona Carpenter. Sarah Redona Bryant left one surviving child, Josefa Roberts, formerly Josefa Bryant. Virginia Redona Carpenter left surviving her two children, John and Rachel. Before the date of the trial, Rachel, who had attained her majority and had married before her grandmother's death, had not been heard of by her relatives in Los Angeles for more than seven years. When last heard of, which, according to one of plaintiff's witnesses, was "close to eight years ago," she was living in Globe,

Ariz. The case was tried in July, 1916. So that Rachel Carpenter was last heard of by her relatives in Los Angeles some time in the second half of 1908, or thereabouts. Her grandmother, it will be recalled, died July 26, 1910.

A deed to plaintiff from Josefa Roberts and John Carpenter was introduced in evidence. By this deed plaintiff acquired, in addition to the undivided one-fifth that she inherited from her mother, Fermina S. de Redona, the one-fifth that Josefa Roberts succeeded to as the sole surviving child of Sarah Redona Bryant, and the undivided one-tenth that John Carpenter succeeded to as one of the two children of Virginia Redona Carpenter. The remaining one-tenth was succeeded to by Rachel Carpenter if she survived her grandmother. Where that one-tenth is vested depends upon facts as to which the record is silent.

[1] There is no direct evidence of the death of Rachel Carpenter. Nor does the record disclose any fact from which her death may be inferred as an inference of fact. Except the presumption of law recognized by subdivision 26 of section 1963 of the Code of Civil Procedure—the presumption that a person not heard from in seven years is dead—there is nothing to sustain respondent's contention that Rachel Carpenter has departed this life. It is uniformly held that the presumption of death that the law deduces from the fact that a person has not been heard from in seven years does not arise until the expiration of the seven years, "unless," as was said in Burr v. Sim, 4 Whart. (Pa.) 150, 33 Am. Dec. 50, "there are circumstances in evidence to quicken the time." Here there was no evidence that Rachel Carpenter was subject to any special peril, such as plague, battle, earthquake, shipwreck, dangerous disease, or other circumstance that might "quicken the time" designated by the Code. Therefore, assuming, without deciding, that under the facts of this case there is any presumption that Rachel Carpenter is dead, still that presumption could not arise until some time in the year 1915, or about five years after the death of her grandmother, Fermina S. de Redona.

There are one or two decisions of the Supreme Court of this state that lend color to the view that the rule in this jurisdiction is that, in the absence of any evidence tending to fix the time of death during the seven years' absence, the person unheard of is presumed to be alive until the expiration of the seven years. Ashbury v. Sanders, 8 Cal. 62, 68 Am. Dec. 300; Western Grain, etc., Co. v. Pillsbury, 173 Cal. 135, 138, 159 Pac. 423. In some of the other jurisdictions the rule is that, while a presumption of death arises from the unexplained absence of a person unheard of for seven years, the presumption extends only to the fact of death at the end of the period, and does not include the date of death, leaving the precise time of death, whether at the end or at any other particular time within the period, to be determined as a question of fact, the burden of showing the time of death being upon the party who claims that it occurred on or before any particular date within the seven-year period. Ann. Cas. 1917A, p. 82 et seq., note to McLaughlin v. Sovereign Camp.

"Where a party has been absent seven years, without having been heard of, the only presumption arising is that he is then dead—there is none as to the time of the death. If it become important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury, besides the mere lapse of seven years since being last heard from." Spencer v. Roper, 35 N. C. 333.

Here, to maintain plaintiff's allegation that she is seized of an undivided three-fifths of the lot, the burden is on her to prove that Rachel Carpenter died before July 26, 1910, the date of her grandmother's death, assuming, for the purpose of this decision only, that if Rachel Carpenter did predecease her grandmother, her brother John Carpenter, plaintiff's grantor, became vested with the undivided one-tenth that otherwise would have descended to Rachel. But it was some time in 1908, at Globe, Ariz., or about two years before the grandmother died, that Rachel was last heard of. As there is no circumstance tending to show that she died prior to July 26, 1910, it follows that the result must be the same whether we adopt the rule that the person "unheard of" is presumed to be alive up to the end of seven years, or the rule that there is no presumption as to when the death occurred during the seven years' absence, but that the burden is upon the party claiming that it occurred on or before a particular time within the seven years to prove the precise time of death; for plaintiff, upon whom that burden rested, made no attempt to assume it by showing at what precise time, during the period of seven years' absence, Rachel Carpenter died.

If Rachel Carpenter and her brother, John, were both alive at the date of their grandmother's death, then, as the sole surviving children of Virginia Redona Carpenter, who was one of the five children of Fermina S. de Redona, each, Rachel and John, succeeded to an undivided one-tenth.

"If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation." Subdivision 1, § 1386, Civ. Code.

[2] Plaintiff has produced no conveyance from Rachel Carpenter. The deed to plaintiff from Rachel's brother, John, did not convey the undivided one-tenth that vested in Rachel on her grandmother's death. For even if, by reason of the disputable presumption declared by subdivision 26 of section 1963, it must be presumed that Rachel Carpenter died some time before the action was commenced, nevertheless there is no proof that her brother, John, is her sole heir. It was not shown that there was ever any administration of Rachel Carpenter's estate. In fact, no attempt has been made to show where the undivided one-tenth vested on the death of Rachel.

For these reasons we conclude that plaintiff has failed to show title to the undivided one-tenth that presumably vested in Rachel Carpenter on her grandmother's death. It can only be regarded as a title vested in some co-owner who has not been made a party to the action. Indeed, there is some evidence from which it may be inferred that Rachel Carpenter's father survived her and that he was alive at the time of the trial. A witness testified that the father telegraphed to Arizona to inquire of his daughter's whereabouts. We infer, from the few facts disclosed by the record, that Rachel Carpenter's husband—she married in 1900 a man of the name of Emmett—had obtained a divorce from her. We likewise infer from certain facts presented by the record that Rachel had no children. It is possible, therefore, that her father, who was not a party to the action, is her sole heir, and that he is vested with the undivided one-tenth. Subdivision 2, § 1386, Civ. Code. Though there may be no presumption that Rachel Carpenter, if dead, left any issue, the law does presume, if she be dead, that she left an heir or heirs capable of succeeding to her estate. Modern Woodmen v. Ghromley, 41 Okl. 532, 139 Pac. 306, L. R. A. 1915B, 728, Ann. Cas. 1915C, 1063. However this may be, it is quite clear that the owner of the undivided one-tenth, whoever he or she may be, is not a party to this action.

[3] In a suit for partition it is indispensable that all cotenants who have not united in the complaint be made parties defendant. De Uprey v. De Uprey, 27 Cal. 330, 87 Am. Dec. 81; Gates v. Salmon, 35 Cal. 576, 593, 95 Am. Dec. 139; Id., 46 Cal. 361, 373, 374; Sutter v. San Francisco, 36 Cal. 112; Hill v. Den, 54 Cal. 6; Ferris v. Montgomery L. & I. Co., 94 Ala. 557, 10 South. 607, 33 Am. St. Rep. 146, and note; Burchett v. Clark, 162 Ky. 586, 172 S. W. 1048; Freeman on Cotenancy and Partition, § 463. If one of the co-owners is not bound by the decree in partition, the purpose of the suit fails of accomplishment, for no one will then become a tenant in severalty. Appellant, whom plaintiff admits owns an undivided one-fifth, is entitled to have, in this proceeding, a title not subject to the possibility of the entire partition being opened up by parties not before the court.

[4] It is the general rule in equity, continued in force by our Code of Civil Procedure, that all who are interested in the subject-matter of a litigation should be made parties thereto, in order that complete justice may be done, and that there may be a final determination of the rights of all parties interested in the subject-matter of the controversy, It is provided by section 389 of the Code of Civil Procedure that—

"When a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in."

This provision of the statute is mandatory. When it appeared to the court, as, from the evidence, it necessarily must, that it was essential to a full and complete determination of the controversy before it that the owner of the undivided one-tenth should be made a party, it was the imperative judicial duty of the court to order that party brought in. It was not a matter of discretion, but of duty for the court, even upon its own motion, to require the presence of such co-owner. O'Connor v. Irvine, 74 Cal. 442, 16 Pac. 236. See, also, Mitau v. Roddan, 149 Cal. 1, 84 Pac. 145, 6 L. R. A. (N. S.) 275.

[5] In a suit for partition, if a co-owner is not made a party plaintiff or defendant, and the nonjoinder appears by the record so that an appellate court may take cognizance of it, it will reverse the judgment, whether the attention of the trial court was called to the defect or not. 30 Cyc. 201, 202; Russell v. Bell, 160 Ala. 480, 49 South. 314.

Because the ownership of the undivided one-tenth is not represented, the decree must be reversed.

Appellant has presented several other interesting questions—questions that necessarily must arise on a retrial of the action—but we do not think it proper to pass upon them in the absence of the owner of the undivided one-tenth that, on the record now before us, presumably vested in Rachel Carpenter upon her grandmother's death.

Judgment reversed.

We concur: WORKS, J.; CRAIG, J.

52 Cal. App. 312

CALIFORNIA PRODUCTS, INC., v. MITCHELL et al. (Civ. 3254.)

(District Court of Appeal, Second District, Division 2, California. April 19, 1921. Hearing Denied by Supreme Court June 16, 1921.)

1. Landlord and tenant ⊂=278—Landlord who entered premises in possession of tenant by removing lock from door guilty of "forcible entry."

Landlords who entered premises in possession of delinquent tenant by removing a lock from the door, and who removed the tenant's property therefrom and substituted own property in place thereof, and who thereafter remained in possession and excluded tenant therefrom, *held* guilty of forcible entry under Code Civ. Proc. § 1159, making every person who breaks open doors and windows or other parts of a house guilty of forcible entry.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Forcible Entry.]

2. Forcible entry and detainer ⊂=8, 10—Questions of title and right to possession immaterial in action for forcible entry.

Under Code Civ. Proc. § 1172, questions of title, of right to possession and of the defendant's good or bad faith in holding possession, are immaterial, since under the statute all entries on the actual possession of another are unlawful.

3. Landlord and tenant ⊂=278—Lease held not to give landlord right to make forcible entry.

Lease entitling lessor, on nonpayment of rent, "without previous notice or demand to re-enter the demised premises and the same peaceably to hold and enjoy thenceforth as if this lease had not been made," did not give the lessor the right to make a forcible entry by removing lock from door and removing lessee's personal property from premises and substituting their own therefor, and thereafter retaining possession excluding the lessee therefrom.

4. Landlord and tenant ⊂=179—Entire premises properly awarded to lessee of a part in forcible entry proceeding, where he had acquired other leases.

In lessee's action against lessor for forcible entry, the court did not err in ordering restoration of the entire premises to the lessor, where other portions of the premises had been leased to other parties, and where such other leases had been assigned to plaintiff.

5. Appeal and error ⊂=1079—Points conclusively answered in respondent's brief, and not pressed in appellant's reply brief, waived.

Points conclusively answered in respondent's brief, not pressed in appellant's reply brief, will be considered as having been waived.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by the California Products, Incorporated, against Anna Mitchell and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Glen M. Ely and Charles W. Hackler, both of Los Angeles, and Allen G. Mitchell, of Pomona, for appellants.

Kemp & Clewett, of Los Angeles, for respondent.

WORKS, J. This is an action under a complaint in two counts, one based upon a forcible entry, the other upon a forcible detainer. Judgment went for the plaintiff, and the defendants appeal.

The evidence shows, without dispute, that at a time when the agents of respondent were away from the premises in question, the appellants removed a certain lock from the door by means of which access was had to the place and to which lock respondent had the key. Appellants then effected an entrance to the premises and substituted a heavy padlock in place of the lock. Thereupon certain personal property of respondent was removed from the place, property of one of appellants was placed therein, and thereafter that appellant remained in possession of the premises, excluding respondent therefrom. At the time when appellants effected their entrance into the property, respondent was five months in arrears in the payment of its rent. Respondent was in possession, before the entry of appellants, under a lease from some of them, the instrument containing a provision that in case the rent reserved by it were at any time unpaid it should be lawful for the lessors, "without previous notice or demand, to re-enter the demised premises and the same peaceably to hold and enjoy thenceforth as if this lease had not been made."

The appellants contend that the evidence does not support several findings of the trial court, the point made being dependent upon the settlement of two questions of law. It is insisted by appellants: First, that the acts committed by them did not amount to a forcible entry; second, that they were permitted to retake possession of the premises, even in the manner in which they did, under the provision of the lease which we have quoted.

[1] The first question is not difficult of solution. The Code provides (Code Civ. Proc. § 1159) that every person is guilty of a forcible entry who breaks open doors, windows, or other parts of a house, and it has been held (Winchester v. Becker, 4 Cal. App. 382, 88 Pac. 296) that one who enters the house of another by the use of a false key, thus unlocking the door in the absence of the occupant, is within the language of the section. The court said, in deciding the question:

"The meaning of the provision is that any opening of a closed door or window involving the use of force is to be regarded as 'breaking open' the door or window or house."

The acts of the appellants in the present action clearly amounted to a forcibly entry.

[2, 3] Coming now to the second question, did the terms of the lease confer upon appellants the right to take possession of the property by means of a forcible entry, at the same time extending to them immunity from successful suit under the forcible entry statute? In such an action it is necessary for the plaintiff to show, only, in addition to the forcible entry, that at the time of the entry he was peaceably in the actual possession of the property entered. Code Civ. Proc. § 1172. Therefore questions of title cannot arise in such actions, nor can even questions as to the right of possession. Under the older state of the law the rule was different, but since the adoption of the Code "all entries on the actual possession of another are unlawful, and the question of good or bad faith on the part of defendant no longer affects the right of recovery in this form of action." Kerr v. O'Keefe, 138 Cal. 415, 71 Pac. 447; White v. Pfieffer, 165 Cal. 740, 134 Pac. 321. We see nothing in the lease which gave appellants leave to enter the demised premises in defiance of the provisions of the salutary statutes against forcible entries. The right was certainly not conferred through any principle of waiver. Considering the nature of the provisions of the statutes on the subject and the decisions construing them, some of which have been cited above, a lease must contain most direct and positive language in order to amount to a consent by a tenant that his possession may be invaded by a forcible entry. Such a consent would place him at the mercy of his landlord. In a given case a landlord might claim rent to be unpaid and the tenant dispute the claim. Such a question might easily arise. If it did arise, a landlord armed with a lease conferring the right to forcibly enter, upon nonpayment of rent, need but await the temporary absence of the tenant, then take possession by whatever means, thus settling the disputed question for himself, or placing the burden of its settlement upon the tenant. Not only so, but under the contention of appellants he might make entry in the face of the tenant, even to the breaking down of doors, so long as he committed no breach of the peace as to others. It would require the most positive language in a lease to allow such practices, and we find no such language in the instrument before us. Nor do we decide that such powers may be placed in the hands of a landlord by the terms of a lease. There are most decided considerations of public policy upon such a question. Forcible entries, made in the best of faith, may easily lead to brawls, affrays, and breaches of the peace.

Appellants were guilty of a forcible entry, the terms of the lease are no defense, and the findings inveighed against are supported by the evidence.

[4] The next question made by appellants is that the trial court erred in ordering restitution of the entire premises to respondent. This point is made in view of the fact that, at the time the lease was made to respondent, two certain other parties had leases to parts of the property; but the contention of appellants is completely answered by the fact that these two leases were assigned to respondent, and that, at the time of the forcible entry complained of, it was in possession of the whole premises. Respondent was clearly entitled to a restitution of the place in its entirety.

[5] Two other points are presented by appellants, but we do not deem them worthy of extended notice. They are conclusively answered in respondent's brief, and they are not pressed in appellants' reply brief. Under such conditions we may well consider them as waived.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

52 Cal. App. 286

FRANKLIN v. IRVINE. (Civ. 3487.)

(District Court of Appeal, Second District, Division 1, California. April 15, 1921.)

1. Malicious prosecution ⊂=72(2)—Instruction on probable cause erroneously refused.

In an action for malicious prosecution, an instruction that if the plaintiff had done acts such as to lead a reasonable man to believe that he would be in danger in resisting, and defendant, having reason to believe he was the owner of the property taken by plaintiff, fairly presented the facts to the district attorney, and acted upon his advice, defendant had probable cause for filing his complaint of robbery and larceny, and was not liable whether or not malice was proved, correctly stated the law, and should have been given; there being evidence to prove all the conditions set forth.

2. Malicious prosecution ⊂=72(2)—Instruction held incorrect in leaving question of probable cause to jury.

In an action for malicious prosecution, it is not sufficient to give to the jury a definition of probable cause and instruct them to find whether or not the facts are within the definition, but the court should instruct them that if certain facts are established, there was or was not probable cause; the question of probable cause being for the court.

3. Malicious prosecution ⊂=72(2)—Error in refusing defendant's instruction on probable cause not cured by refusal of plaintiff's request.

Error in refusing a correct instruction on facts constituting probable cause, requested by defendant, in an action for malicious prosecu-

tion, was not cured by a refusal to give another instruction on such facts requested by plaintiff.

4. Malicious prosecution ⟸72(2)—Instruction on probable cause erroneous.

In an action for malicious prosecution, an instruction that, unless plaintiff "intended to take from defendant meat belonging to defendant," there was no probable cause for the prosecution of plaintiff, was erroneous.

5. Malicious prosecution ⟸19—Innocence of accused insufficient to sustain action.

In an action for malicious prosecution, it was error to refuse an instruction that to justify an arrest on a criminal charge it is not necessary that the crime shall have been committed, plaintiff's innocence of the offense charged not being sufficient to entitle him to recover damages, if the facts were such as to induce in the mind of a reasonable man the honest belief that a crime was committed.

6. Malicious prosecution ⟸72(2)—Erroneous instruction on probable cause not neutralized by instruction on advice of counsel.

In an action for malicious prosecution, an erroneous instruction that unless plaintiff intended to rob defendant there was no probable cause for plaintiff's arrest and prosecution was not neutralized by an instruction that in seeking the advice of the district attorney defendant was required only to disclose all the facts which he had reasonable ground to believe existed, and not to investigate possible defenses, and that if he made a full, fair, and complete disclosure of all the material facts known to him, and acted on the advice of the district attorney in filing his complaint, it was a complete defense.

7. Malicious prosecution ⟸72(2)—Instruction omitting element of want of probable cause erroneous.

In an action for malicious prosecution, an instruction that if complaints issued, plaintiff was arrested, placed under bond, and the action dismissed, there was a sufficient prosecution, if coupled with malice, to constitute malicious prosecution, was erroneous, as omitting want of probable cause.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action for malicious prosecution by Cecil Franklin against Ben D. Irvine. Judgment for plaintiff, and defendant appeals. Reversed.

W. J. Ford, of Los Angeles, and Frank Birkhauser, of El Centro, for appellant.

Joseph F. Seymour, Jr., Wilbur W. Randall, and Walter B. Kibbey, all of El Centro, for respondent.

CONREY, P. J. Action to recover damages on account of malicious prosecution of two criminal charges against the plaintiff. The defendant appeals from the judgment.

The assignments of error are directed to certain instructions given by the court to the jury and to the refusal of other instructions requested by the defendant. Without passing on all of the points presented in support of the appeal, it will be sufficient to select for discussion those hereinafter mentioned.

[1] Appellant requested that the jury be instructed as follows:

"If from the evidence in this case you believe that prior to the 28th day of October, 1918, the plaintiff, Cecil Franklin, had done acts or had so conducted himself as to lead a reasonable man to believe that he would be in danger in resisting the acts of said Cecil Franklin under the circumstances disclosed by the evidence to have existed on the 28th day of October, 1918, and if you further believe from the evidence that the defendant on such date had reason to believe, and did believe, that he was the owner of certain property in the possession of him, the said defendant, and that said property was taken away from said defendant by the said plaintiff, and that the said defendant was then and there in fear of said plaintiff, which fear prevented him from resisting the acts of said plaintiff, and if you further believe that said defendant fairly presented the foregoing facts to the district attorney of Imperial county, and acted upon the advice of such district attorney in filing the criminal complaint of robbery set forth in count 1 of this complaint, or in filing the complaint of larceny set forth in count 2 of this complaint, then I instruct you as a matter of law that the defendant had under such circumstances probable cause for the filing of such complaint or complaints, as the case may be, and your verdict must be for the defendant, whether there be proof of malice or not."

[2] Evidence had been presented tending to prove all of the conditions set forth in the proposed instruction, and since the instruction correctly states the law it should have been given. In an action of this kind it is not sufficient for the court to give to the jury a definition of probable cause and instruct them to find for or against the defendant according as they may determine that the facts are within or without that definition.

"Such an instruction is only to leave to them in another form the function of determining whether there was probable cause. The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly." Ball v. Rawles, 93 Cal. 222, 228, 28 Pac. 937, 938, 27 Am. St. Rep. 174; Runo v. Williams, 162 Cal. 444, 454, 122 Pac. 1082.

[3] The error of the court in refusing this requested instruction is not cured by the fact that the court refused to give another in-

struction on facts constituting probable cause as requested by the plaintiff. Respondent insists that the subject-matter of the instruction requested by appellant was included in other instructions given by the court. We have examined these other instructions as set out in respondent's brief. They do not supply any sufficient substitute for the rejected instruction.

[4] The court instructed the jury as follows:

"I instruct that one of the elements of both of the crimes charged against the plaintiff is intent, unless you believe from the evidence that plaintiff intended to take from defendant meat belonging to defendant, or to which he was entitled to possession, and the defendant honestly believed that plaintiff intended to deprive defendant of the use of the same, there was no probable cause for the arrest and prosecution of plaintiff."

[5, 6] The contention of appellant must be sustained, that this instruction in effect informed the jury that, in addition to defendant's honest belief that plaintiff intended to deprive defendant of his property, the plaintiff must actually "have intended to take from defendant meat belonging to defendant," and that otherwise there was no probable cause for the arrest and prosecution of the plaintiff. The fact that a plaintiff who seeks to recover damages for malicious prosecution of a criminal charge against him was not guilty of the offense charged is not alone sufficient to entitle him to recover damages. If the facts within the knowledge of the defendant were of such a character as to induce in the mind of a reasonable man the honest belief that a crime was committed, he is justified in seeking to have such crime punished, even though the facts within his knowledge did not in point of law constitute a crime. Dunlap v. New Zealand, etc., Co., 109 Cal. 365, 370, 42 Pac. 29. In the case at bar, in addition to giving the instruction above noted, the court refused to give other instructions requested by appellant, correctly stating the rule that, to justify an arrest on a criminal charge, it is not necessary that in fact the crime shall have been committed. The error complained of in the instruction given may have been mitigated, but we are not satisfied that its effect upon the minds of the jurors would necessarily be neutralized, by the following instruction:

"In seeking the advice of the district attorney, you are instructed that the defendant is required only to disclose all the facts which are within his knowledge, or which he has reasonable grounds to believe do exist. He is not required to investigate possible defenses which might thereafter be made by the proposed defendant in a criminal case. If he does make a full, fair, and complete disclosure of all the material facts known to him, and acts upon the advice of the district attorney in filing such criminal complaint, it is a complete defense, and your verdict must be for the defendant."

[7] The court instructed the jury as follows:

"In order to constitute malicious prosecution it is not essential that there should have been a trial. If you find from the evidence that complaints issued, plaintiff was arrested, placed under bond, and thereafter the action was dismissed, there was sufficient prosecution which, coupled with malice, constituted malicious prosecution."

The defect in this instruction is that it informed the jury that upon proof of the facts stated, coupled with malice, these facts alone were sufficient to constitute malicious prosecution. The necessary element of want of probable cause was omitted. It is true, however, that the court elsewhere instructed the jury that both want of probable cause and malice must exist before the plaintiff would be entitled to a verdict in his favor. From our examination of the instructions, together with the evidence, it seems reasonably probable that the errors which we have found in the instructions were seriously prejudicial to appellant. It is not at all certain that under correct instructions the same verdict would have been rendered.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

52 Cal. App. 271

TROPLOWITZ v. SEIGLER. (Civ. 3786.)

(District Court of Appeal, First District, Division 1, California. April 15, 1921.)

Assault and battery ⊂=43(6)—Circumstances of provocation not to be considered in estimating actual damages.

Where no element of punitive damages was presented to the jury in an action for damages for assault and battery, it was error to instruct the jury that they might consider circumstances of provocation in estimating the amount of actual damages to which the plaintiff would otherwise be entitled.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by E. Troplowitz against Harry Seigler. From a judgment for nominal damages, the plaintiff appeals. Reversed.

James P. Sweeney and Frank J. Fontes, both of San Francisco, for appellant.

Joseph H. Mayer, of San Francisco, for respondent.

RICHARDS, J. This appeal is by the plaintiff from a judgment based upon a verdict in his favor for damages in the sum of

$1 in an action for damages for an alleged assault and battery.

The evidence in the case showed that the parties to the affray met in Lick alley, between Post and Sutter streets, in the city of San Francisco, and after a few words, came to blows. The evidence is in conflict as to which of the parties struck the first blow, but the evidence also shows without substantial conflict that the defendant struck the plaintiff in the face, knocking out three of his natural teeth which had theretofore supported other artificial teeth, necessitating considerable dental work and requiring him thereafter to wear a plate; and that he also suffered the consequential physical pain and mental anguish resulting from his compulsion to the wearing of a set of false teeth for the rest of his natural life.

Upon the trial of the case the plaintiff requested the following instruction:

"The court further instructs the jury that in this case if it believes from the evidence that the defendant committed the assault alleged in plaintiff's complaint, the jury cannot consider any alleged provocation in reduction of the actual damages accruing to plaintiff from his pain, physical injuries, loss of time and moneys expended, or any other element of actual damages, but only in reduction of or set-off against the exemplary damages."

This instruction the court refused to give, and also refused to give in terms any and all of the instructions asked by the plaintiff, but instead thereof gave the following brief oral instructions as its only instructions to the jury in the case:

"The Court: There is no law to give you; it is simply a question of whether or not this assault was committed. If you should find that it was committed with provocation on the part of the plaintiff, then you may consider that matter, in mitigation of damages. On the other hand, if you consider it was not justified by the circumstances and situation surrounding, and should find that this party sustained the injuries which he claims he sustained, and that it was an unprovoked assault, then the plaintiff would be entitled to recover such damages as, under all the circumstances of the case, you should deem just. If you should conclude to award damages, you are entitled to consider the nature of the injury and the extent of it, and whether there was any loss of time or bodily pain resulting therefrom.

"If, upon the other hand, as I have said before, you consider that there were circumstances to mitigate the assault, then you may take such circumstances into consideration in fixing the amount of damages, if any, that you may conclude to award. I think that is all that is necessary. I think the jury fully understand the issue."

The plaintiff, upon this appeal, contends that the verdict of the jury was grossly inadequate to what the undisputed proof showed to be his actual damages from defendant's assault and battery. He also contends that the trial court erred in refusing to give his requested instruction above set forth, and also erred in giving its own instructions touching the right of the jury to consider circumstances of provocation in mitigation of any actual damages which they might find plaintiff sustained. We deem it only necessary to consider the latter point, since if the jury were rightly instructed by the court that they might consider matters of provocation in mitigation of the actual damage sustained by the plaintiff, they doubtless could obey that instruction to the extent of awarding the plaintiff a merely nominal sum in damages for injuries which were, according to the undisputed evidence, much in excess of such sum. We are of the opinion that the trial court was in error in refusing to give the plaintiff's requested instruction, and was also in error in giving its own instruction of opposite tenor and effect. The Supreme Court has recently set this subject at rest in the case of Benjamin v. Walton, 181 Cal. 115, 183 Pac. 529, wherein it said:

"It is sufficient in this regard to say that, the question of punitive damages having been expressly withdrawn from the jury, no circumstances of provocation, whether accruing before or at the time of the assault, could in any way be considered in mitigation of the actual damages suffered by plaintiff by reason of the assault."

In the case at bar, as in that case, no element of punitive damages was presented to the jury, and it follows that they were erroneously instructed that they might consider circumstances of provocation in estimating the amount of actual damages to which the plaintiff would otherwise be entitled. We think this error was prejudicial, and was the direct cause of the verdict for only nominal damages which the plaintiff was awarded by the jury.

The judgment is reversed.

We concur: WASTE, P. J., KERRIGAN, J.

52 Cal. App. 307

PACIFIC GAS & ELECTRIC CO. v. TAYLOR et al. (Civ. 1815.)

(District Court of Appeal, Third District, California. April 19, 1921.)

1. Continuance ⟸12—Held improperly denied where chief defendant ill in another state.

In condemnation proceedings, continuance because of absence and illness in another state of the only defendant familiar with the facts of the defense and the whereabouts of witnesses *held* improperly denied.

2. Continuance ⟸46(10)—Counsel's affidavit reciting contents of telegram as to party's illness held not objectionable as recital of hearsay.

Objection would not be sustained on appeal to affidavit for continuance by defendants' counsel on the ground that the recital thereon of the illness detaining the chief defendant in another state was hearsay testimony, in that it was merely the statement by his attorney of the contents of a telegram, where no such objection was made below, as, where such showing is made without objection to the form in which it appears, it is competent and should be accorded legitimate probative force.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Condemnation action by the Pacific Gas & Electric Company against Harry W. Taylor and others. From judgment awarding defendants less than claimed, they appeal. Reversed.

Charles F. Hanlon, of San Francisco, for appellants.

Thos. J. Straub and Wm. B. Bosley, both of San Francisco, and Jones & Jones, of Oroville, for respondent.

BURNETT, J. The action was in condemnation, and judgment was in favor of plaintiff, condemning the property and awarding defendants the total sum of $51.50 for the various items of damage. It may be stated that in their answer the defendants claimed that the proposed improvement would result in their damage to the extent of $63,000. Notwithstanding this great disparity between what was awarded and what was claimed, there is abundant evidence to support the finding of the jury. However, the defendants were not present at the trial, and no showing was made on their behalf, and this suggests the only serious question in the case. That question is whether the trial court should not have granted the motion of defendants for a continuance of the trial. The motion was made on account of the absence of one of the defendants (the other defendant living outside of California), and was supported by the affidavit of his counsel, Charles F. Hanlon. From said affidavit it appears that said Taylor was in the city of Boston at the time of the trial; that he was detained there on account of a serious illness; that very important business required his attention at that place, and for that purpose he left California on or about May 14, 1917, before the case had been set for trial; that said Henry W. Taylor was the only person familiar with the facts constituting the defense, and the only person who knew the whereabouts of any of the witnesses that he desired to be called on his behalf; that it would be necessary to take witnesses upon the ground to enable them to give an intelligent estimate of the value of the property to be taken, and that the aid of Taylor was needed for this purpose; that affiant did not know what witnesses could be procured by said Taylor; that he had "no means whatever of getting said witnesses and has none now, and has consulted with no witness or witnesses, except plaintiff's officers." Other considerations are set forth in the affidavit that emphasize the importance of the presence of said defendant; in fact, its necessity for the proper trial of the case.

The situation is thus made similar to that characterizing Jaffe v. Lilienthal, 101 Cal. 175, 35 Pac. 636; Morehouse v. Morehouse, 136 Cal. 332, 68 Pac. 976; Betts Spring Co. v. Jardine M. Co., 23 Cal. App. 705, 139 Pac. 657.

In the first of these it appears that—

"On the 21st of December, 1891, this cause was set for trial for January 6, 1892. On that day plaintiff's attorney moved for a continuance upon affidavits of the plaintiff and his physician showing in substance that the plaintiff, who then and for about a year prior thereto resided in Seattle, Wash., was confined to his room by an attack of acute rheumatism, to which he was subject, and was wholly unable to move or leave his room, and in the opinion of his physician would not be able to leave his room in less than two months. The affidavit of plaintiff further stated that his presence at the trial was indispensably necessary; that he was the only person who knew the whereabouts of the witnesses necessary to be called on his behalf; that their names had not been communicated to his attorney, nor the matters to which they would testify. D. M. Delmas, Esq., attorney for plaintiff, also presented his own affidavit that plaintiff's presence was necessary; that he did not know the names of plaintiff's witnesses, nor the details of the case."

There were no counter affidavits, but the motion for a continuance of the trial was denied, and plaintiff's attorney left the courtroom. It was held that the due administration of justice required the reversal of said order.

In the Morehouse Case it was held that—

"A showing of the continued illness of the defendant of such a nature that he could neither attend the trial of an action brought against him to quiet title to real estate, nor have his deposition taken without serious in-

jury and great risk of life, is sufficient to entitle the defendant to a continuance of the cause; and when there is nothing to contradict the showing, or to raise a suspicion as to the good faith of the application, it was error to refuse the continuance."

In Betts Spring Co. v. Jardine M. Co., supra, it appeared that the defendant was ill; that in search of health he had journeyed to Europe, whence he would return in two months; he was the only witness to prove the defense; there was no intimation that the motion was not made in good faith nor was there any showing that the plaintiff would be injured or prejudiced by the delay. The appellate court for the First district held that it was an abuse of discretion for the trial court to refuse the continuance. Among the cases cited therein is Storer v. Heitfeld, 17 Idaho, 113, 105 Pac. 55. Therein it appeared that one of the defendants was in another state for the purpose of attending the funeral of his brother and looking after his estate, and the Supreme Court of Idaho held that this reason was sufficient to excuse his failure to attend at the time set for the trial. It was declared that the defendant had the right, unless he absented himself without reason, to be present to advise and assist his counsel, as well as to testify on his own behalf, and accordingly, under the showing made, the Supreme Court concluded that the continuance should have been granted.

[1] The showing made by appellants herein seems to be as potential and persuasive as that appearing in any of said citations, and we may add that we find in the record no evidence of the want of diligence or of good faith on the part of the moving defendant. The trial court, no doubt, was impressed with the importance of an expeditious trial of the action and believed that the motion for postponement was for delay, but attributing full significance to the rule that clothes the trial court with a large discretion in matters of this kind, we are of the opinion that defendants should have an opportunity to present fully their defense to the action. We cannot be unmindful of the fact that, while the public interest is subserved by the rightful exercise of the power of eminent domain, yet the property is taken against the will of the owner, and he should be extended every legal consideration to enable him to show the extent of the damage that he may suffer.

Certain specific reasons are advanced by respondent why the action of the lower court should be upheld, to which we may briefly direct our attention.

[2] Objection is made to the affidavit that the recital therein as to the illness of Mr. Taylor was hearsay testimony; it being merely the statement by his attorney of the contents of a telegram. Manifestly it would be more satisfactory if there had been an affidavit from Mr. Taylor himself or from his physician in reference to the illness, but it is fair to say that appellants had no opportunity to obtain such evidence. Moreover, the rule is that, where such showing is made without any objection to the form in which it appears, it should be considered as though it were competent; and legitimate probative force should be accorded to it. In this connection we must remember that there was no controversy in the court below as to Taylor's illness, nor was any objection made to the form of the affidavit or to the failure to produce a physician's certificate.

This and other features involved in the controversy are covered by the following quotation from 9 Cyc. p. 96:

"The illness of a party is not ipso facto a cause for continuance of the cause; but where a party's presence at the trial is indispensable and the character of his illness is such as to render his presence at the time impossible a continuance should be granted, if it appears that he has been guilty of no negligence. * * * The fact of illness must be established by some satisfactory sworn statements, either in the shape of an affidavit, or the certificate of a physician that satisfies the court of the inability of the party to be present. From the very nature of the relief asked the decision of the question must necessarily rest almost entirely within the discretion of the trial court, and such discretion will not be interfered with unless the same has been abused to the extent of prejudicing the applicant's right to a fair trial of the cause."

It is quite plain from the facts recited in said affidavit that defendants could not have a fair trial in the absence of said Taylor, and therefore, legally speaking, the denial of the motion prejudiced their substantial rights.

Respondent's contention that said Taylor acted without due circumspection in leaving the state is, we think, without merit. It appears that, before leaving the state, Taylor had attended court at Oroville with his counsel on April 16, when a motion to set the case for trial was heard and denied, the court stating "that it would not set the case for trial until the pleadings were settled." When he left for Boston on May 14, the pleadings were still unsettled, and he had reason to believe that he would have ample time to return after the case was in condition to be tried. We need not recite all the facts, but we think it sufficiently appears that the said Taylor manifested due caution and diligence, and that he made an honest attempt to return to the state to protect his interest, but was prevented by an unavoidable illness.

As to the delay in setting the case for trial we cannot see that appellants should be charged with any remissness. From the record, indeed, we conclude that both parties proceeded with the usual expedition to frame the issues, and exercised ordinary diligence in preparing the cause for trial. In this connection it may be observed, moreover, that

the various motions made by plaintiff to strike out parts of defendants' answer would indicate a purpose to proceed deliberately and to give due care and attention to the settlement of the pleadings before a trial was had. It may be mentioned also that plaintiff on the day of the trial filed an important amendment to the complaint, thus injecting a new issue into the case.

There are some verbal criticisms of said affidavit, but we think they demand no special notice. We are satisfied that, considered in its entirety, it is not vitally defective, and it constitutes sufficient support for the motion of appellants.

We have carefully examined the record and read the cases cited by both parties, but we deem it inadvisable to pursue the discussion further.

It appears to us that a just regard for the rights of the defendants demands a new trial, and the judgment is therefore reversed.

We concur: PREWETT Presiding Justice pro tem.; HART, J.

52 Cal. App. 225

ROSE et al. v. CONLIN et al. (Civ. 3760.)

(District Court of Appeal, First District, Division 1, California. April 13, 1921. Hearing Denied by Supreme Court June 9, 1921.)

1. Mortgages ⟸497(2)—Mortgagor and successor in interest concluded by description in judgment in foreclosure.

Mortgagor and his successor in interest are concluded by a description in a foreclosure decree of the land covered by the mortgage where no appeal was ever taken.

2. Eminent domain ⟸154—Judgment obtained in action to recover compensation for taking and use of land stands in place of land.

A judgment for mortgagor in an action against a railroad to recover compensation for the taking and use of land by the railroad stands in the place of the land condemned, and the lien of a mortgage on the land is transferred to the judgment.

3. Eminent domain ⟸158—Mortgagee held entitled to have it determined she was equitably entitled to benefits of judgment obtained against railroad for land taken.

A mortgagee, who was not made a party to an action by mortgagor against railroad to recover compensation for the taking and use of land by railroad company pending proceedings to foreclose the mortgage, is entitled to commence and maintain an action against a successor of the mortgagor to have it determined that she was equitably entitled to the benefits obtained by such mortgagor against the railroad, there being a deficiency judgment in the foreclosure proceeding.

4. Mortgages ⟸586—Commissioner's deed held to relate back to date of mortgage.

A commissioner's deed under a decree of foreclosure of purchase-money mortgage related back to the date of the mortgage, and reinvested the mortgagee, who was the grantee under such deed, with all the right to and interest in the land for the purchase money for which the mortgage was given.

5. Estoppel ⟸68(2)—Mortgagor could not set up adverse possession of railroad in action by mortgagee to obtain benefits of judgment obtained by mortgagor against railroad.

Where mortgagor obtained a judgment against a railroad for compensation for the taking and use of land in an action wherein railroad contended it had acquired by long possession a permanent title or right of occupancy, he was in no position to assert the existence in the railroad company of a paramount right to the use of the land in an action by mortgagee to have it determined that she was equitably entitled to the benefits of the judgment obtained against the railroad.

6. Limitation of actions ⟸43—Statute held not to start to run until there was a res to which remedy could be applied.

The right of mortgagee to commence and maintain an action for the purpose of having it determined that she was equitably entitled to the benefits of a judgment obtained by mortgagor against a railroad for compensation for the taking and use of the land did not arise until there was a res to which the remedy could be applied in the form of a final judgment in the defendant's favor for compensation against the railroad company.

Appeal from Superior Court, San Mateo County; John L. Hudner, Judge.

Action by Emma Rose and others against Henry Conlin and others. Judgment for plaintiffs, and the named defendant appeals. Affirmed.

Charles W. Cobb and Henry Conlin, both of San Francisco (E. C. Chapman, of San Francisco, of counsel), for appellant.

Garret W. McEnerney, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff Emma Rose in an action wherein the plaintiffs sought to have it determined that the said Emma Rose was the equitable owner of a certain judgment for the sum of $15,560 which had been recovered by the defendant Henry Conlin in the case of Conlin v. Southern Pacific Railroad Co., 40 Cal. App. 743, 182 Pac. 71.

The facts out of which that case, and also the present case, arose may be summarized as follows: The San Francisco & San Jose Railroad Company was incorporated under the laws of the state of California on August 18, 1860, for the term of 50 years, and for the purpose of constructing, maintaining,

and operating a railroad between San Francisco and San Jose. On June 6, 1862, Alvinza Hayward, who was then the owner in fee simple of a tract of land at or near the city of San Mateo, conveyed to said San Francisco & San Jose Railroad Company an estate in a portion of said land which this court, in construing the deed of conveyance thereof, determined to be an estate for years therein, or, to be specific, 50 years, in the case of East San Mateo Land Co. v. Southern Pacific Railroad Co., 30 Cal. App. 223, 157 Pac. 634. This estate for years was transferred to several successive railroad corporations until it vested in the Southern Pacific Railroad Company, the defendant in the two cases above referred to, and was adjudged in the case of Conlin v. Southern Pacific Railroad Co., supra, to have expired on August 18, 1910.

After the expiration of said term of years the said Southern Pacific Railroad Company continued in the possession of the tract of land affected by said former estate for years, and is still in possession of the same in the course of the maintenance and operation of its railroad system from San Francisco to San Jose and beyond. In the meantime Alvinza Hayward died, and his daughter, Emma Rose, one of the plaintiffs herein, succeeded to and became the owner of the estate of her deceased father in the lands out of which said estate for years had been carved, and of the reversionary rights in and to said lands after the termination of said estate for years. On September 8, 1908, said Emma Rose conveyed certain of the said lands which she had thus succeeded to as the daughter and heir of Alvinza Hayward, deceased, to East San Mateo Land Company, a corporation, and in such conveyance she included her reversionary interest in the lands (which may be designated as the railroad parcel) so determined by this court in the case of East San Mateo Co. v. Southern Pacific Co., supra, and is, therefore, no longer susceptible of dispute—and least of all by those who have succeeded to whatever interest the said East San Mateo Land Company acquired, and in that case asserted by virtue of said conveyance from Emma Rose to it.

On said September 8, 1908, and as a part of the same transaction by which it acquired said lands and interest from said Emma Rose the said East San Mateo Land Company executed a mortgage back to her for a considerable portion of the purchase price of said properties. Some question has been raised in this case as to whether said mortgage, in its description of said properties, embraced the reversionary interest in said railroad parcel, and, while it is true that there are certain differences in the wording of the conveyance to said corporation of this particular portion of said properties, and of the mortgage given back by it to Emma Rose, we are not only satisfied that these differences in verbiage did not suffice to show an intent in the parties to the entire transaction to exclude the reversionary interest in said railroad parcel from the effect of said mortgage, but we are further satisfied that this question is no longer open to consideration, for other reasons which will be presently made to appear.

On November 29, 1912, an action was commenced for the foreclosure of the mortgage last above referred to, the nominal plaintiff in said action being Andrew F. Burke, who purported to be acting in said matter as the assignee of Emma Rose, but who, it is conceded, was acting in the premises merely as her agent and trustee. The defendants in said foreclosure suit were the East San Mateo Land Company, the Southern Pacific Company, and other persons. The complaint in said foreclosure suit expressly averred that the said railroad parcel and the respective rights of the defendants therein were among the properties affected by said mortgage, the foreclosure of which was sought in said action, and the lis pendens in said action also expressly referred to said railroad as affected by said foreclosure suit. The said defendant East San Mateo Land Company was duly served with summons in said action, and entered its appearance therein, raising certain issues which were heard and determined in said suit. The said Southern Pacific Company was also served with summons in said action, and it also appeared and answered therein. One of the issues which the last-named defendant presented in its said answer consisted in its claim that the plaintiff therein, Emma Rose, had no interest in the said railroad parcel, basing its said claim upon the ground that paramount title had been acquired by the railroad company prior to August 20, 1908, growing out of its occupation and use of said premises for railroad purposes. With respect to this issue the trial court, upon the hearing of said foreclosure suit, expressly refused to determine it, and so declared in its finding, and provided in its decree that nothing therein contained should be deemed to be an adjudication upon the question of the paramount title of the railroad company to that particular parcel of land.

[1] The decree of foreclosure, in said action was made and entered on June 2, 1917, but was so made and entered nunc pro tunc as of December 5, 1916. No appeal was ever taken from said foreclosure decree, which included in its terms an express description of the said railroad parcel as being a portion of the premises embraced in said mortgage and affected by said decree in so far as the rights and interests of the mortgagor were concerned, and this fact supplies, in our opinion, the additional and conclusive reason why the defendant and appellant Henry Conlin, in the present action, as the successor in interest of said mortgagor, cannot be heard to contend

that the mortgage of his predecessor in interest did not embrace in its description the said railroad parcel, including whatever interest therein had been acquired by it through the conveyance from Emma Rose.

[2] Subsequent to the making and entry of said foreclosure decree an order of sale was duly issued thereon, and on February 24, 1917, a foreclosure sale was had under said order, at which sale said railroad parcel was struck off to said Andrew F. Burke, acting as agent for said Emma Rose. The sum realized at said foreclosure sale being insufficient to satisfy the judgment in said action, a deficiency judgment was docketed on December 4, 1917, for the sum of $25,038.93. On December 2, 1918, a commissioner's deed was duly issued to Emma Rose, as the person then entitled thereto under said foreclosure sale, which deed embraced in its description of the properties covered by it the said railroad parcel of land. In the meantime, and while the foreclosure proceedings above referred to were going on, the East San Mateo Land Company, as the then owner of said railroad parcel of land, commenced an action to recover compensation from the Southern Pacific Company for its continued occupation and use for the purposes of its railroad system of the said railroad parcel of land after the expiration of the estate for years granted to its predecessor therein by Alvinza Hayward, as above set forth.

The complaint in said action alleged that said plaintiff therein was the successor by mesne conveyance of all the right, title, and interest of said Alvinza Hayward in said parcel of land; that the estate for years granted by said Alvinza Hayward to the predecessor of the defendant in that action had ceased and terminated on August 18, 1910, and that thereupon the estate in remainder and reversion had reverted to and become vested in the plaintiff in that action, and that the defendant therein had, immediately upon the termination of its said estate for years, therein appropriated and continued to use said parcel of land for its benefit as a railroad corporation, and for its right of way for the operation of its railroad system thereover, without having paid said plaintiff compensation for said appropriation and use. These allegations were followed with a prayer for the value of the land so taken, appropriated, and used in the sum of $77,800.

A more particular reference to the extended averments of said complaint would serve to show beyond reasonable dispute, in our judgment, that said action thus brought by said East San Mateo Land Company was one essentially and solely for the recovery of such compensation for the taking and use of said parcel of land by said railroad company as it would have been the right of said East San Mateo Land Company, as the then owner of said land, to have had awarded to it in a proceeding for the condemnation of said land, and of all necessary rights of way thereover under the law of eminent domain, had such a proceeding been initiated by said railroad corporation; and that, this being so, whatever sum of money the trial court should determine to be due and payable to the plaintiff in such an action must be held to stand in lieu of the land so taken and used by the railroad company for quasi public uses under the law of eminent domain. The following authorities so hold, and we are satisfied that their conclusion in that regard is sound, equitable dôctrine, and is susceptible as such to application to the facts of the case at bar; Sawyer v. Landers, 56 Iowa, 422, 9 N. W. 341; Platt v. Bright, 31 N. J. Eq. 81; Bright v. Platt, 32 N. J. Eq. 362; Kansas City. v. North American Trust Co., 110 Mo. App. 647, 85 S. W. 681.

[3, 4] Our attention has been called to the case of Anderson v. Citizens' Sav. & Trust Co., 197 Pac. 113, just decided by the Supreme Court, which is claimed by appellant as authority for its contention that the plaintiff herein should have asserted her claim in the compensation suit, and that, not having done so, the judgment in that suit is to be held to be final in determining who was entitled to such compensation. It is sufficient to say, however, in response to this contention, that the plaintiff herein was not made a party to the action commenced by the East San Mateo Land Company against the Southern Pacific Company to recover compensation for the lands, premises, and rights of way appropriated and being used by it, and which were covered by this plaintiff's mortgage then in course of foreclosure; nor was said plaintiff brought into said action at any time prior to the rendition of the judgment therein rendered in favor of Henry Conlin, successor in interest of the original plaintiff in that action, by virtue of transfers made by it of its rights of action after said suit was begun.

It may be said that the plaintiff herein could have injected herself into that action as intervener therein, and thus had the rights and claims which she here asserts determined therein. Had she done so, it cannot be questioned that the trial court in that action would have been bound to take cognizance of her equitable interest in said railroad parcel of land by virtue of her mortgage thereon, and have protected that interest in its judgment awarding compensation to the parties entitled thereto for the taking and use of said land by the railroad under its right of eminent domain; but the plaintiff was not bound to inject herself into that case; and, had she sought to do so at any time prior to the sale in the foreclosure suit, she would doubtless have been met with the proposition that the other properties covered by her mortgage would suffice to pay her debt, and that she must exhaust her remedies as to those before she could claim the right to any part

of the compensation to be awarded to the plaintiff therein in the action instituted by him.

The course pursued by the plaintiff herein, while attendant with certain risks, would seem to be the logical and orderly course to be pursued by her. She had instituted her foreclosure suit before the East San Mateo Company, her immediate debtor, began its suit for compensation against the railroad company. She pursued that foreclosure suit to its termination in a foreclosure sale, with the result that, on November 24, 1917, she became, through her agent, the purchaser of all of the properties upon which her mortgage had been foreclosed, including the railroad parcel, for the taking of which by the Southern Pacific Company the defendant herein was still prosecuting his action for compensation. On December 14, 1917, a deficiency judgment in her favor was docketed in the sum of $25,083.93. On December 2, 1918, a commissioner's deed was executed to her conveying, among other properties, the said railroad parcel, which deed, under well-known rules of law, related back to the date of her mortgage, and reinvested her with all of the right to and interest in the said parcel of land for the purchase money of which said mortgage had been given. Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704; Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118; People's Sav. Bank v. Hodgdon, 64 Cal. 95, 27 Pac. 938. In the meantime the defendant's action for compensation for the taking and use of said parcel of land by the railroad under its right of eminent domain was still pending, and was not finally determined upon appeal so as to become a final judgment until the denial of a rehearing by the Supreme Court of the case of Conlin v. Southern Pacific Co., supra. The present action was commenced on May 19, 1919.

In thus proceeding to a foreclosure and sale under her mortgage, and to the issuance of a commissioner's deed thereunder, the plaintiff herein, Emma Rose, had reinvested herself with the ownership of this particular portion of the properties mortgaged to her, and had also procured a deficiency judgment for the sum still remaining due and payable upon said mortgage. In so doing she was apparently following to its logical conclusion the procedure intimated, if not expressly decided, in the case of Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 665, 128 Pac. 9, 18, wherein the appellate court, quoting from the case of Matter of Morris Avenue, 118 App. Div. 121, 103 N. Y. Supp. 182, said:

"The question as to the right of an award between a mortgagee and the owner of the equity has arisen in several cases and the rule seems to be well established that, where a mortgage has been given upon property prior to the taking of a portion thereof by the city, if, upon a foreclosure and sale after the taking by the city, the amount realized is insufficient to meet the mortgage debt, the lien of the mortgage would extend to and embrace so much of the damages awarded as should be needed to make good the deficiency."

We are satisfied from the foregoing facts and cases that the plaintiff herein was entitled to commence and maintain this action for the purpose of having it determined that she was equitably entitled to the benefits of the judgment obtained by the defendant Henry Conlin herein against the railroad company.

[5] It may be proper at this point to refer briefly to certain further contentions urged by the appellant herein. Among these is the contention that the railroad company, by virtue of its occupation and use of the parcel of land in question for the permanent and quasi public uses and purposes of a railroad right of way, had thereby acquired, long prior to the date of the acquisition of any interest in said premises by Emma Rose, and therefore long prior to the conveyance by her to the predecessor to the defendant herein of said railroad parcel, and of its mortgage back to her, a permanent title or permanent right of occupancy of said parcel of land which was paramount and superior to her said conveyance and mortgage, and hence was not covered thereby; and that, this being so, the plaintiff herein could not have acquired any right to share in the benefits of the judgment obtained by the defendant herein against the railroad through the foreclosure of said mortgage and sale to her of said mortgaged premises. We perceive no merit in this contention. It was made by the railroad company in the action for compensation, and was therein opposed by the defendant herein; and it was therein decided that the rights of the railroad company with reference to occupation and use of the premises in question were referable to the term of years under which it had entered into possession of the same, and were altogether bounded by the words of the grant of said term. The appellant herein is therefore in no position to assert the existence in the railroad company of a paramount right to the use, occupation, and maintenance of its right of way over said railroad parcel, since its existence would have sufficed to have defeated his own right of recovery in the compensation suit.

[6] We also find no merit in the defendant's plea of the statute of limitations. The right of the plaintiff to commence and maintain the present action against said defendant arose when there was a res to which the remedy sought therein could be applied, in the form of a final judgment in the defendant's favor for compensation against the railroad company.

We do not deem the other points urged by

the appellant of sufficient merit to require discussion in detail.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

52 Cal. App. 796

ROSE et al. v. CONLIN et al. (Civ. 3558.)

(District Court of Appeal, First District, Division 1, California. April 13, 1921. Hearing Denied by Supreme Court June 9, 1921.)

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Emma Rose and others against Henry Conlin and others. Judgment for plaintiffs, and the named defendant appeals. Affirmed.

Charles W. Cobb and Henry Conlin, both of San Francisco (E. C. Chapman, of San Francisco, of counsel), for appellant.

Garret W. McEnerney, of San Francisco, for respondents.

PER CURIAM. Upon the authority of Rose v. Conlin (No. 3760) 198 Pac. 653, this day decided by this court, the order is affirmed.

52 Cal. App. 796

ROSE et al. v. CONLIN et al. (Civ. 3559.)

(District Court of Appeal, First District, Division 1, California. April 13, 1921. Hearing Denied by Supreme Court June 9, 1921.)

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Emma Rose and others against Henry Conlin and others. Judgment for plaintiffs, and named defendant appeals. Affirmed.

Charles W. Cobb and Henry Conlin, both of San Francisco (E. C. Chapman, of San Francisco, of counsel), for appellant.

Garret W. McEnerney, of San Francisco, for respondents.

PER CURIAM. Upon the authority of Rose v. Conlin (No. 3760) 198 Pac. 653, this day decided by this court, the order is affirmed.

52 Cal. App. 294

FINN v. DIAMOND LAUNDRY CO. (Civ. 3298.)

(District Court of Appeal, Second District, Division 1, California. April 16, 1921.)

1. Mechanics' liens ⊂=277(5) — Variance between notice of lien and complaint held fatal.

In an action to enforce a mechanic's lien for plumbing done for a laundry company, where the notice of lien recited one contract and the complaint was based upon an entirely different contract, the variance was fatal in view of Code Civ. Proc. § 1187.

2. Mechanics' liens ⊂=277(5) — No recovery for extra work where such work covered by specific contract recited in notice of lien.

In an action to enforce a mechanic's lien for plumbing done for a laundry company, where the notice of lien recited an agreement to pay plaintiff $600 for superintending the work, and the complaint alleged that the identical work which plaintiff was to superintend constituted extra plumbing work, for which 10 per cent. of the actual cost should be paid as compensation, there could be no recovery as for extra work.

3. Mechanics' liens ⊂=279—Claimant has burden of establishing right to recover for extra work.

To recover for extra work in a proceeding to enforce a mechanic's lien, the burden of showing that the work was in fact extra work *held* to be upon plaintiff.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by R. J. Finn against Diamond Laundry Company, to enforce a mechanic's lien. Judgment for plaintiff, and defendant appeals. Reversed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

SHAW, J. In an action to foreclose a mechanic's lien, plaintiff had judgment, from which defendant has appealed.

The notice of lien filed sets forth two separate and distinct contracts under and in accordance with which plaintiff, as therein stated, performed work and labor in superintending the installation of plumbing fixtures in a building which defendant, as owner, was constructing.

By the complaint each of these contracts is made the subject of a separate cause of action. In the first count thereof it is alleged that defendant, through its duly authorized agent, made a contract with plaintiff to superintend the installation of all "rough plumbing and plumbing proper in the building of the defendant * * * at all times during its construction and until its completion," which "said plumbing is and shall be known and referred to herein as the original contract work;" that the building is a laundry building, and, in addition to the plumbing and pipe fitting aforesaid (that is, "rough plumbing and plumbing proper"), has installed in it plumbing fixtures, supply and waste pipes; system of piping to and from laundry machinery for hot and cold water; for treated and untreated water; high and low pressure steam lines; gas, oil, and compressed air lines; a vacuum cleaning system, and a

sprinkler system, all of which was to be put in and was actually put in and installed in said building of defendant, and used by it as and for a laundry; that defendant promised, undertook, and agreed to pay plaintiff for said work as superintendent of the installation of said plumbing proper as aforesaid only, being the original contract work in the aforesaid building, the sum of $600, $575 of which it has paid.

The contract, as stated in the notice of lien, and upon which the cause of action is based, is as follows: That defendant, as owner, was engaged in constructing a building for use as a laundry and, acting through one Joseph H. Smailes, as its duly authorized agent, employed plaintiff—

"as superintendent of plumbing, having complete and entire charge of all plumbing and pipe fitting in the building at the aforesaid site, at all times during its construction and until its completion; that said work consisted of the installation of plumbing fixtures, supply and waste pipes, very complicated and special systems of piping to and from laundry machinery for hot and cold water, treated and untreated water, high and low pressure steam lines, gas, oil, and compressed air lines, vacuum cleaning system, and sprinkler system, all in said building. That said contract of employment was entered into on or about August 23, 1916, and for which said work and labor as aforesaid the said * * * Joseph H. Smailes contracted and agreed to pay the undersigned at the time of the completion of said building the sum of six hundred dollars ($600) for original contract work as set forth above, on which said price the sum of five hundred and seventy-five dollars ($575) has been paid."

It thus appears that, after stating that he was to have charge of all the plumbing and pipe fitting, the nature and character of which is set out with great particularity and detail plaintiff avers that, for superintending the installation of all of the work set forth above (which is all of that specifically described in the notice of lien), he was to be paid $600. But this is not the contract declared upon in the complaint, which alleges the work was done under and pursuant to another and entirely different contract, to wit: One for superintending the installation of all "rough plumbing and plumbing proper" in the building. Certainly the plumbing described in the notice of lien could not be deemed rough plumbing. However, conceding such interpretation such fact could not avail plaintiff herein, for the reason that, whatever its character, he, as appears from the notice of lien, was to superintend the installation of all that so particularly described, and for the work and labor in so doing he was to receive as compensation the sum of $600.

[1] Conceding, as found by the court, that the evidence established the existence of the contract set forth in the complaint, and that plaintiff performed the work thereunder, then it follows that the notice of lien filed was untrue; and, since no claim of lien upon the contract set forth in the complaint was ever filed, there could be no lien upon which to base the action. In other words, there was a fatal variance between the complaint and the notice of lien upon which the action was founded. Reed v. Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; Wagner v. Hansen, 103 Cal. 104, 37 Pac. 195. In discussing the requirements of section 1187 of the Code of Civil Procedure, providing for notice and claim of lien, the court in the last-cited case said:

"The purpose of the record and statement must be to inform the owner, in case of a contractor and laborers rendering service under such contract, as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits. * * * In all essential particulars it [the statement] must be true."

The statement of lien filed by plaintiff was not calculated to inform defendant as to the nature of the claim and contract which he asserted in his complaint. The language used therein imported a contract made between plaintiff and defendant's agent under which the former was to receive $600 for superintending all of the plumbing specifically described in the notice of lien. See Santa Monica, etc., Co. v. Hege, 119 Cal. 377, 51 Pac. 555, to the effect that, where the proof shows the contract set forth in the notice of lien to be untrue, it is fatal to the asserted lien.

In the second count of the complaint it is alleged that defendant promised and agreed to pay plaintiff for the labor of superintending the installation of extra plumbing work the sum of 10 per cent. of the actual cost thereof, which extra work consisted of all plumbing work of every kind or description other than that which plaintiff designates as original contract work, which extra plumbing work is described in the complaint as follows:

"All plumbing fixtures; supply and waste pipes; all systems of piping to and from laundry machinery for hot and cold water; treated and untreated water; high and low pressure steam lines; gas, oil, and compressed air lines; a vacuum cleaning system; and a sprinkler system, and all laundry piping; * * * and which said extra plumbing work was not set forth in the original plans and specifications, which were incomplete, for the purpose of making use of said building as a laundry; * * * that the total cost of said extra plumbing and laundry piping was and is the sum of $18,828.30;" 10 per cent. of which, due to plaintiff, is the sum of $1,882.82.

The contract upon which this cause of action is based, as stated in the notice of lien, is that defendant "further contracted and agreed to and with the undersigned, R. J. Finn, to pay him * * * the sum of 10 per cent. of the actual cost of all extra plumbing work of every kind and description, laundry piping, etc., as necessary to complete said building, which said 'extra work' was not set

forth in the original plans and specifications, which were incomplete," and that the total cost thereof was $20,493.66.

[2] It is apparent that the work which plaintiff in this count described as extra work is identically the same, in part at least, as that comprised in the work which, as shown by the contract set forth in the notice of lien, he, as we have hereinbefore held, agreed to perform for the $600; and, hence, to the extent that it was the same, he could not recover therefor as extra work.

[3] Moreover, if any part thereof was work not called for by the "original plans and specifications, which were incomplete," the burden of showing such fact devolved upon plaintiff. Upon this point no attempt was made to segregate the extras from what plaintiff terms the original contract work. On the contrary, counsel for respondent says that it was, as stated by plaintiff, impossible to do so. Hence the court was left to mere conjecture as to the character, extent, and cost, both as to the work done under the original contract and that constituting extras. Plaintiff's theory, in support of which some meager evidence was introduced, that he was to receive $600 for work to the extent of $5,850, and 10 per cent. of the cost of all work over that amount, is not only inconsistent with the contracts set forth in the notice of lien, but likewise inconsistent with the allegations of the complaint.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

52 Cal. App. 274

Ex parte BRACKLIS. (Cr. 559.)

(District Court of Appeal, Third District, California. April 15, 1921.)

1. Jury ⟸4—Jury in a felony case must consist of 12 men.

A jury in a felony case must consist of 12 men, and a defendant on trial cannot waive his right to such a jury; the right secured by the Constitution being the right as it was known at common law.

2. Jury ⟸127—Accused must depend upon examination of jurors to acquaint self with qualifications.

A party on trial must depend upon an examination of the jurors on voir dire to acquaint himself with their qualifications, and he cannot go ahead and take the chance of a favorable verdict and then raise the point after verdict that a juror was not qualified.

3. Jury ⟸142—Accused held not entitled to discharge by reason of decrepit juror.

While a defendant may not waive a constitutional jury of 12 persons, he can, by acquiescence or by silence, waive the qualifications of any jurors, and after a verdict an accused cannot for the first time claim that there were only 11 jurors, in that one of the 12 was not in possession of his natural faculties by reason of decrepitude.

4. Habeas corpus ⟸3—Person having ample remedy in court below not entitled to.

Habeas corpus was not proper remedy to obtain release by one claiming that judgment was void because one juror was not in possession of his natural faculties by reason of decrepitude, since accused had an ample remedy in the court below by a motion on a proper showing to set aside the judgment.

5. Habeas corpus ⟸30(1)—Alleged error must render judgment utterly void.

Unless alleged error is so great that it renders the judgment utterly void, it cannot be raised by habeas corpus, as a writ of habeas corpus cannot be converted into a writ of error.

Application by A. P. Bracklis for writ of habeas corpus to be directed to the sheriff of Sacramento county to secure his release. Writ dismissed.

C. B. Harris and A. B. Reynolds, both of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., C. Chas. Jones, Deputy Atty. Gen., and Hugh B. Bradford, Dist. Atty., and Thomas A. Farrell, Asst. Dist. Atty., both of Sacramento, for respondent.

PREWETT, Presiding Judge pro tem. The petitioner was charged with the commission of a felony. He was convicted thereof by a jury of 12 men. He sets out in his petition that one of these jurors was not a competent juror, in that he was not in possession of his natural faculties, and was so decrepit that he was unable to comprehend the nature or character of the charge upon which the said A. P. Bracklis was being tried, and was unable to comprehend the nature and effect of the testimony adduced during the trial. He argues from this that the jury consisted of but 11 men, and that he was therefore deprived of his constitutional right of trial by jury.

[1] 1. It may be conceded that a jury in a felony case must consist of 12 men, and that a defendant on trial cannot waive his right to such a jury. The right secured by the Constitution is the right as it was known at common law. People v. Powell, 87 Cal. 349, 25 Pac. 481, 11 L. R. A. 75; Matter of O'Connor, 29 Cal. App. 225, 155 Pac. 115. At common law as well as under the constitutional provision, a jury in a felony case must consist of 12.

[2] 2. It is a general doctrine in this state that a party on trial must depend upon his examination of the jurors on voir dire to acquaint himself with their qualifications, and that he cannot go ahead and take the

chances of a favorable verdict and then raise the point after verdict. This rule is so pronounced that he cannot even raise the point for the first time on motion for a new trial or on appeal. Still less can it be raised on habeas corpus, where only jurisdictional matters may be inquired into.

"It appears by the affidavit on motion for a new trial that one Dahl, a juror who sat in the case, was not a citizen of the United States, and this fact is relied upon for a new trial. After a verdict is rendered it is too late to raise for the first time the question now presented. * * * Counsel admit the soundness of this doctrine as a general proposition, but insist that the present case is an exception to the rule. The general doctrine is based upon the proposition that the objection comes too late, inasmuch as counsel should examine the juror as to his general qualifications in the first instance." People v. Evans, 124 Cal. 206, 56 Pac. 1024.

In another case the defendant, on motion for a new trial, offered to show that one of the jurors was a nonresident. The court overruled the point by saying:

"The objection to the juror went to his competency, and had it been timely made, full opportunity for which was given defendant before the jury was sworn, should have been sustained. It was too late to raise the objection after the trial." People v. McFarlane, 138 Cal. 481, 171 Pac. 568, 72 Pac. 48, 61 L. R. A. 245.

"An objection to a juror must be taken before he is sworn to try the cause." People v. Boren, 139 Cal. 210, 72 Pac. 899.

In People v. Henderson, 28 Cal. 465, one grand juror was not a citizen and another was not a taxpayer. The court said:

"The defendant * * * examined such jurors as he saw fit as to their qualifications, and exercised his right of challenge. No objection was made to either of these two jurors, nor did defendant question them upon the points referred to. Conceding the point to be otherwise good, under these circumstances the objection came too late, when taken for the first time after indictment found. The objection should have been made by challenge at the time of the impaneling of the jury."

"The objection that one of the jurors was an alien could not be taken for the first time upon the motion for a new trial. The defendants might have examined him upon the subject, and exercised their right of challenge before he was sworn, but having failed to do this, they must suffer the consequences of their own neglect." People v. Chung Lit, 17 Cal. 320.

It would be as impracticable as it is unnecessary to attempt to quote from the large number of California cases approving the foregoing doctrine.

3. The petitioner, however, insists that the disqualification of this juror was one that went to his entire capacity to act at all; that, in effect, he was not a juror. The description of his infirmity as contained in the petition is not very full or satisfactory, but it may readily be deduced therefrom that the alleged infirmity was the decrepitude of age or illness. The petition contains no suggestion of insanity or any sudden physical or mental stroke that overwhelmed his faculties. The infirmities arising from old age are usually so apparent that a party could not be excused from observing them and questioning the juror concerning them. A case might be imagined where an adroit person cunningly insane might deceive the court and counsel, but, if so, we have no evidence of such a condition in this case.

[3] What may be the rule in a case where a juror becomes insane during the progress of the trial, or where he successfully conceals his insanity from counsel until after the trial, it would be idle to inquire. In this case, there is no complaint that the juror was insane. It is charged only that he was not in possession of his natural faculties by reason of decrepitude. While a defendant may not waive a constitutional jury of 12 persons, it seems that he can, by acquiescence or by silence, waive the qualifications of any juror. Especially is this so in a case where the infirmity arises from the decreptitude of the juror. The authorities are clear that a party cannot sit idly by and take the chances of a favorable verdict, and then after verdict raise a point which he should have raised before the juror was sworn. The very purpose of the voir dire examination as to general qualifications is to ascertain whether or not the juror is a fit person to serve in that capacity at all. Having failed when he could and should have acted, the petitioner waived such limited disqualification as may have existed.

4. Petitioner has not shown that he was not aware of his alleged infirmity during the trial. We have shown by the foregoing authorities that it is quite necessary, in order to be heard on this point at all, that he should show that he was unaware of the objection to the juror in time to make seasonable objection to him.

[4, 5] 5. But petitioner is not seeking the proper remedy. There was, at most, no such wide departure from the established forms of procedure as to render the whole judgment void. He had an ample remedy in the court below, of which remedy he should have availed himself. He should have moved the court on a proper showing to set aside the judgment. This method of procedure is sustained in the case of People v. Perez, 9 Cal. App. 265, 98 Pac. 870. This proceeding is in the nature of a writ of error coram nobis, and, while not such in form, it answers the same purpose. People v. Silver, 154 Cal. 556, 98 Pac. 543.

Unless this alleged error is so great that it renders the judgment utterly void, it cannot be reached by habeas corpus, for it is

well settled that the writ of habeas corpus cannot be converted into a writ of error.

"To grant this, however, would be to wrest the writ of habeas corpus from its primary purpose and to give it an operation that is not contemplated by the law. Its function is to determine the legality of one's detention by an inquiry into the question of jurisdiction and the validity of the process upon its face, and whether anything has transpired since it was issued to render it invalid. It is not designed to retry issues of fact or to answer the purpose of an appeal." In re Leonardino, 9 Cal. App. 690, 100 Pac. 708.

The writ is dismissed, and the petitioner remanded.

We concur: BURNETT, J; HART, J.

52 Cal. App. 237

STEPP et al. v. WILLIAMS et al.

(Civ. 2230.)

(District Court of Appeal, Third District, California. April 14, 1921.)

1. Waters and water courses ⟸152(8)—Evidence held to sustain a finding of an appropriation by plaintiffs' predecessor.

In an action to quiet title to water of a spring, evidence *held* sufficient to establish an appropriation by plaintiffs' predecessor.

2. Waters and water courses ⟸130—No usufruct can be acquired in waste waters.

Waste waters from the ditch of an irrigation district are of a vagrant and fugitive character; so long as they are not controlled by the owner of the ditch from which they escaped they are subject to appropriation and use by others, but no usufruct can be acquired therein.

3. Frauds, statute of ⟸72(1)—The right in water is "real property" within the statute.

Water, being a part and parcel of the land to which it is appurtenant, is "real property," and a conveyance or agreement to convey such an interest is within Code Civ. Proc. § 1971, and section 1974, subd. 5, and must be in writing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Property.]

4. Frauds, statute of ⟸158(4)—Evidence held to show executed parol grant.

In an action involving the right to water for irrigation purposes, evidence *held* to establish an executed parol grant to plaintiff's predecessor.

5. Waters and water courses ⟸138—Riparian right cannot be acquired by mere use unless the user gives cause of action.

As a general proposition, a riparian right cannot be acquired by mere use or lost by disuse unless there is such an invasion of the rights of the party against whom title by prescription is claimed that he would have had a ground of action against the intruder.

6. Waters and water courses ⟸138—Right to waters of spring held established by adverse user.

In an action involving the right to the waters of a spring, plaintiffs *held* to have established adverse title as a result of user by their predecessor.

7. Frauds, statute of ⟸119(2)—To prevent manifest injustice, equity will prevent reliance on the statute.

Under principles of estoppel to prevent a manifest injustice, or, in other words, prevent acts which would work what in the eyes of equity would be a fraud on the rights of another equity will prevent reliance on the statute.

8. Frauds, statute of ⟸144—Parties held estopped from denying the validity of parol grant of waters.

Where defendants' predecessor made a parol grant of the waters of a spring, and plaintiffs' predecessor, acting thereon, established an irrigation ditch at the expense of approximately $2,000 and made a considerable annual outlay therefor, defendants are equitably estopped from denying the validity of the parol grant, though it was subject to an attack because within the statute.

9. Waters and water courses ⟸152(11)—Decree adjudging priorities sufficient.

Where the court found that the flow of a spring was 175 inches, that plaintiffs were entitled to 100 inches, defendants being entitled to 40 inches reserved by their predecessor, the decree which stated that plaintiffs were entitled to their 100 inches is not defective, because it did not state the amount to which the defendants were entitled, etc.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by Emma S. Stepp and another against Judith E. Williams, individually, and as executor of the last will and testament of Chas. W. Williams, deceased, and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Jamison & Wylie, of Alturas, and C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for appellants.

D. B. Robnett, of Alturas, for respondents.

HART, J. The defendants own certain lands in Modoc county, Cal., upon which there is a spring, the waters of which flow over and across the lands of defendants; plaintiffs claim a four-fifths interest in the spring and in the waters flowing therefrom under an alleged oral grant from Chas. W. Williams, deceased, the predecessor in interest of defendants. Plaintiffs brought this action to quiet their alleged title to the waters of said spring, and for an injunction restraining defendants from interfering with the said waters claimed by plaintiffs. Defendants, Judith E. Williams, both in her individual

and representative capacity, and Gary Williams, answered said complaint, denying the allegations of the complaint as to the grant of said waters of said spring, and by way of cross-complaint alleged the ownership of said spring and the lands on which the same is located, and a right and title to said spring by reason thereof and by reason of their riparian rights, and by prescription.

The court, in substance, found as follows:

The spring, the right to the waters of which is in controversy here, is situated on the lands of the defendants, who, as to said lands, are the successors in interest of one Charles W. Williams. Continuously from and including the year 1882 to the time of his death on the 25th day of February, 1918, said Williams was the owner and in the occupancy of the land on which the spring in question is situated.

In the year 1883, Charles W. Wells, who was at the time of the commencement of this action deceased, but in the year just named the husband of Emma S. Stepp, one of the plaintiffs herein, made homestead entry of certain land, and also a desert land entry of certain other land, and after due proceedings received a patent therefor from the United States government, all said lands, as well as the plaintiffs' land, upon which the said spring is located, being situate in Modoc county. The plaintiffs are the successors in interest of said Wells in the homestead and desert entries above mentioned. The said lands of plaintiffs "are all of a dry, barren nature, and would not produce crops in paying quantities without artificial irrigation, and the said lands would be of little or no value without such irrigation, and at the times said lands were entered by said Charles W. Wells said lands were of this character, all of which was well known to said Charles W. Wells;" that either in the year of 1882 or of 1883 said Williams "told Charles W. Wells, husband of said plaintiff, Emma S. Stepp, that he, the said Wells, could have the said spring and the waters running therefrom, except a small quantity of water required by the said Charles W. Williams, not exceeding 40 inches, measured under a 4-inch pressure."

Wells and his wife, plaintiff Stepp, relying upon the offer of the waters of said spring so made to Wells by said Williams, thereupon "commenced the construction of a levee around said spring to restrain the waters thereof from flowing onto the lands of said Charles W. Williams, and commenced the construction of a ditch leading from said levee and spring to the lands of said Charles W. Wells and said Emma S. Stepp, * * * and diligently prosecuted the work of constructing said levee and ditch until the same was completed, and upon the completion of said levee and ditch said Charles Wells diverted and appropriated all the waters of said spring and the stream issuing therefrom, except 40 inches, measured under a 4-inch pressure, so reserved by said Charles W. Williams, and by means of said ditch conveyed the same to the aforesaid lands of said Charles W. Wells and plaintiff, Emma S. Stepp, his wife, and applied the same to a beneficial use in the irrigation of said lands and the production of valuable crops, and for stock and domestic purposes, as hereinbefore found;" that the ditch so constructed by said Wells and his said wife was of an average width of 5 feet and of an average depth of 2 feet, and was and is between 6 and 8 miles in length; that it required a period of 5 years to complete the construction of the ditch, during which time said Wells devoted "all the time and money he was able to devote to the construction of the same," and the cost of the original construction of the dam and ditch was approximately $2,000.

That, after being told by said Williams that he might have the said spring and water, said Wells proceeded to clear a portion of his lands, and planted an orchard, consisting of two or three dozens of fruit trees, and also planted about 300 acres of said lands in crops of hay, grain, and alfalfa, all of which required artificial irrigation, and for which said Wells had no supply of water except from the said spring; that said Wells expended large sums of money in improving the said property by fencing the same and constructing other improvements thereon, "all of which said improvements would be useless unless said Charles W. Wells was able to cultivate said lands and irrigate the same and produce crops thereon; that all of said facts were known to and by the said Charles W. Williams and said * * * Williams was at all times apprised of the work that said * * * Wells was doing and having done in the construction of said ditch and dam and in the clearing and cultivating of said lands, and the diversion, appropriation, and use of said waters of said spring by said * * * Wells, as aforesaid"; that the use of 100 inches of the waters of said stream and spring by the said Wells was at no time interrupted by said Williams.

That the original amount of water "appropriated and diverted" by Wells from said spring "under grant of right" from Williams was "at least 125 inches, measured under a 4-inch pressure," but Wells, on the 16th day of May, 1884, granted by a deed of conveyance to one Wm. H. Nelson, the owner of certain lands over which the said ditch was constructed, "or was to be constructed," an undivided one-fifth interest in and to said ditch and the said water right, since which time Wells and his successors in interest have claimed, diverted, and used as their own, "and under their own right," 100 inches of said spring and stream, measured under a 4-inch pressure, "over and above any and all interest in and to the waters of said spring

which they had theretofore deeded to the said William H. Nelson."

That the plaintiffs and their predecessors in interest, for over 30 years from the time of the completion of the dam and ditch by means of which they diverted and used the waters of said spring to the time of the commencement of this action, have "continuously, uninterruptedly, openly, notoriously, under a claim of right, and adversely to the defendants and their predecessors in interest, and adversely to said Charles W. Williams, and with the knowledge and acquiescence of said * * * Williams, diverted, appropriated, claimed, and used, 100 inches of the waters of said spring and stream * * * upon the aforesaid lands for the irrigation thereof, and for the production" of the crops above mentioned, and for stock and domestic use; that during all said time said number of inches of water "have been necessary and indispensable for the proper irrigation of said lands and for the production of said crops," etc.

It is further found that ever since the completion of said dam and ditch the plaintiffs and their grantors have cleaned and maintained the ditch every year, at an annual cost of $250 and that said work of "cleaning and maintaining" has been open and notorious, and was within the knowledge of said Williams during his lifetime, and without objection, interference, or interruption by him or his agents.

It was found that the payment of all taxes of whatsoever kind and nature assessed or levied against the lands of plaintiff and against the ditch and water right in question for more than 5 years continuously immediately preceding the commencement of this action had been made by plaintiffs.

The court also found that the waters of the spring were riparian to the lands of the defendants, but the riparian rights of the latter thereto to the extent of 125 inches measured under a 4-inch pressure, ceased to exist by virtue of the grant of said waters to the plaintiffs and their grantors, etc. But it was also found:

"That, during the years 1882, 1883, and 1884, a great deal of the lands of the said Chas. W. Williams lying below and west of the said spring were saturated with water, and were swamped, and were thus rendered unfit for cultivation, and said defendants' predecessors in interest required no water for the irrigation of said lands; * * * that the lands of said defendants and the crops growing upon the same will not dry up and wither away, or not mature, nor will the said lands, nor the whole thereof, or any part thereof, become unproductive or of little value, nor will defendants be compelled to abandon the cultivation of said lands (as alleged in the complaint), if they are deprived of the said 100 inches of the waters of said spring," etc.

The judgment awards to plaintiffs the first 100 inches of the waters flowing from said spring and the stream, measured under a 4-inch pressure, and quiets their title thereto, and enjoins defendants or their agents, etc., from interfering with or in any manner obstructing the right of the plaintiffs to take and divert in the manner described by the findings said number of inches of the waters flowing from said spring.

This appeal is from said judgment, by the alternative method (Code Civ. Proc. §§ 953a and 953b).

The findings above recapitulated are attacked upon the ground that there is no evidence to provide them with the requisite support. The several assignments under this head constitute the principal bases for the claim that the judgment should be reversed.

A vast amount of evidence, both for the plaintiffs and the defendants, was received in the case. We have examined it with care, and upon such examination we have found no reason for doubting that the findings are sufficiently supported. To enter here upon a detailed examination of the evidence would involve a task which would require an extended statement herein of the testimony, and we will, therefore, in a general way only refer to the testimony, except in an instance or so where specific reference to the testimony of some particular witness may be deemed essential to or at least proper for the purposes of the decision. As in nearly all cases where the question as to the sufficiency of the support of the findings afforded by the evidence is an issue submitted on appeal, there is here, as to some of the essential points, a substantial conflict, and, as learned counsel concede, in such a situation as to the proofs a reviewing court is required to leave the determination of such conflict precisely where the Constitution has placed it, viz.: With the tribunal before which the proofs have been directly adduced. But there are certain of the essential facts as to the existence of which in this case there is neither any controversy here nor, consequently, a conflict, but which counsel for appellants earnestly contend do not establish a legal right in the plaintiffs to the waters or any portion thereof of the spring in question.

It should first be explained that both Charles W. Williams, the original owner of the land on which the spring the right to the waters of which is here in controversy is located, and the predecessor in interest of defendants, and Charles W. Wells, who located and owned the lands now owned by the plaintiffs, and to and for the benefit of which the plaintiffs claim the right to take the waters of said spring, were deceased at the time of the commencement of this action; that Judith E. Williams, defendant executrix, and Gary Williams, her codefendant, are respectively, widow and son of said Charles W. Williams; that plaintiff Emma S. Stepp is the widow of Chas. W. Wells, deceased, she, however, having intermarried with one Stepp after

the death of said Wells, and that the plaintiff Mary V. Graham is the daughter of said Emma Stepp by her former husband, Wells.

In considering the evidence it will be convenient, and perhaps less apt to be confusing, to designate the lands of plaintiffs and the ditch constructed for the purpose of carrying the waters of said spring to said lands as the "Wells lands" and the "Wells ditch," respectively.

As the findings show, the spring in controversy is located in a corner of the Williams lands, which are, of course, riparian thereto. There are two springs in near proximity to each other, one being referred to in the testimony as the North, or Warm, spring and the other the South spring, the latter spring being also on the Williams lands. It is from the North or Warm spring that the plaintiffs claim the right to take and divert and convey the waters to their lands.

It should further be explained that there is testimony tending to show that a considerable portion of the Williams land situated near these springs was of a swampy or marshy character and that, therefore, as to that portion of said land there was no necessity for artificial irrigation. There was, however, a small acreage of the Williams lands near the springs, variously estimated by the witnesses as embracing from 30 to 40 acres, which, to make it productive, did require irrigation at the time of the alleged gift of the waters of the North spring by Williams to Wells.

The Williams and the Wells lands, as well as lands owned by other parties, were situated not far distant from Pitt river. Much of the Williams lands was irrigated by means of a large ditch through and by which the waters of said river were diverted and used for agricultural purposes. There were several thousands of acres of land irrigated by means of this ditch (generally referred to by the witnesses as the "Big Ditch"), the lands so irrigated being owned by different parties, including, as stated, the Williams lands. These lands were situated east and northeast of the Wells ditch, and the evidence shows that in irrigating said lands from the "Big Ditch" a large quantity of the waters diverted through said ditch would get away, and become "waste waters," which flowed sporadically—that is, whenever particular lands entitled to the use of said waters were being irrigated—towards the Wells ditch, and would ultimately seep thereinto, very often in sufficient quantities to overflow the last-named ditch.

There is no dispute as to the fact that the climate in the locality in which the lands of the plaintiffs are situated is of extreme aridity, and that, consequently, said lands are dry and barren, and would be wholly useless and worthless for the production thereon of the usual agricultural crops and garden truck without artificial irrigation.

It is also undisputed that in the year 1883, when Wells made the homestead and desert land entries mentioned in the findings, the lands which were thus taken up by him were covered with sagebrush, the removal of which, to render said lands available for practical agricultural purposes, was absolutely necessary. The evidence discloses that, having in mind the location of these lands, Wells first set about to find a water supply for the irrigation of the same, and, according to the testimony of the witness Cable, had a conversation with Charles W. Williams, the predecessor of the defendants, in which said Williams said to Wells that if he (Wells) could raise the dam then surrounding the spring in question to such a height as would facilitate the flow of the waters therefrom into a reservoir or ditch he could have all the water of said spring, except a quantity sufficient to irrigate the 30 or 40 acres near the spring, referred to in the findings, for the purpose of irrigating his lands, and for domestic purposes. This conversation occurred before Wells had taken decisive steps looking to the due location of the lands. It is further made to appear by the evidence that, acting upon and accepting this offer by Williams, Wells immediately proceeded to construct a ditch connecting the spring with his lands. The distance between the spring and the said lands is approximately seven miles. It appears that he was a man of limited means, and, as a result, was required to prosecute the work of construction with a degree of diligence only which was commensurate with his financial ability. The consequence was that the work of constructing the ditch covered a number of years. In fact, the undisputed evidence is that Wells began the work of building the ditch in the year 1883, and finished it in the year 1888, the total cost thereof, not including the labor he himself bestowed upon the work, being approximately $2,000.

After the completion of the ditch, Wells, on the 20th day of October, 1888, filed, and on the same day caused to be recorded in the office of the county recorder of Modoc county, a written notice whereby he gave notice that he had "appropriated all the water from the springs commonly known as the Williams Springs situated in the [describing the Williams lands] to the extent of 400 inches of water measured under a 4-inch pressure." Said notice was also at that time posted at the spring in question, the point of diversion of the waters thereof.

The ditch, as constructed, passed over and through a portion of the land of Williams, and in close proximity to the latter's residence. The ditch also passed through and over a portion of the land of one W. H. Nelson, which adjoined the lands of Wil-

liams, and, as the findings show, Wells, as a consideration for the right to run the ditch over and through the land of Nelson, conveyed by deed to the latter a one-fifth interest in said ditch and the water right connected therewith. This deed was recorded in the office of the county recorder of Modoc county, at the request of said Nelson, on the 2d day of June, 1884. It may also be stated here that Williams having later become the owner by purchase of the Nelson land over which said ditch passes, likewise became the owner of Nelson's one-fifth interest in the ditch and the water right.

The undisputed evidence also shows that, while the work of constructing the ditch was in progress, Wells made material and extensive improvements on his lands, erecting thereon a house in which to live, erecting fences around the lands, removing the sagebush thereon, and otherwise putting the lands in a condition suitable to use for agricultural and other like purposes. He planted a small orchard on the land, and raised a limited amount of garden products and produced alfalfa, and cultivated the wild hay growing thereon. The water for these purposes, prior to the completion of the ditch, was hauled to the lands by Wells, by what particular means the record does not disclose.

As stated, the work of building the ditch was completed in the year 1888, from which time until after the death of C. W. Williams, which occurred on the 25th day of February, 1918, Wells and his successors in interest have continuously diverted to and used upon their lands the waters of said spring for irrigating, stock, and domestic purposes.

There is testimony by a large number of witnesses—persons who had either been employed on the Wells ranch or at times had been in possession of it under leases—that the water from the spring was diverted by means of the ditch in question to and used upon said ranch in the irrigation of from 200 to 250 acres thereof for upwards of 30 years or more without molestation or protest from or by Charles W. Williams. The same witnesses, as well as Mrs. Stepp and her son, testified that every year, during the period above mentioned, Wells, and, subsequently to his death, Mrs. Stepp, caused the ditch to be cleared of moss growing and débris accumulating therein from one end of the ditch to the other—that is, from the Wells ranch to the spring—and that the expense each of said years of performing that work averaged in money the sum, approximately, of $250. Some of the work of clearing the ditch of the obstructions which impeded the free passage of the waters of the spring through the ditch to said ranch necessarily was done on the portion of the Williams land over which the ditch passes and, as seen, near the residence of Williams, and the witnesses just referred to testified that at no time did C. W. Williams, or any member of his family, or any one acting for him, ever interfere with or protest against such work being so done either on his premises or at the springs. In fact, it appears that, on one occasion, when Wells was building the ditch, and before its completion, Williams, at the request of Wells, performed some work on the ditch near the spring, for which Wells compensated him to the extent of $27 or thereabouts.

On another occasion, Mrs. Stepp testified said Williams was present while she had some Indians cleaning the ditch, and at that time Williams not only did not protest against the cleaning of the ditch, but had an Indian employee of his, who was with him at the time, to show the other Indians how to do the work properly. In brief, as to C. W. Williams' attitude relative to the maintenance of the ditch, there is evidence showing, or at least plainly tending to show, and sufficient to support a finding to that effect, if the trial court believed it, that Williams, down to the day of his death, all along regarded his gift or grant of the waters of the spring to Wells, except the small quantity reserved for the irrigation of some 35 or 40 acres of his own land, as perfectly valid, and that the right to said waters or the use thereof had and was vested in Wells. For instance, on one occasion, many years after he had given said waters to Wells, and while the latter was using the same through and by means of the ditch constructed by him, Williams, in a conversation with the witness Layton, in a way expressed regret that he had given the waters of the spring to Wells, explaining that when he parted with his right to the waters flowing from the spring he had no use for all said waters, but that since then conditions had changed, so that the said waters would "now come in very handy" to him. In this same conversation he further explained to the witness that many years prior to the date of said conversation Wells had said to him (Williams) that he contemplated constructing a ditch whereby he could convey water for irrigation to the lands he proposed to locate from Pitt river; that he (Williams) then said to Wells: "There's no use of your going to that expense; if you can raise the dam at this spring so as to get the water therefrom into a ditch, you may have the water, except a small amount for irrigating the 30 or 40 acres of my own land lying near the spring," or words to that effect.

It further appears that in the years of 1916 and 1917 a controversy arose between the plaintiff and the Williamses over the waste waters flowing from the "Big Ditch," some of which, as seen, would, on occasions, drift into a swale near the Wells ditch, and thence by seepage into said ditch, often filling the same to the point of overflowing. The Williams people claimed that the plaintiffs were entitled to no part of said waste

water, and insisted upon their right to impound the same for their own exclusive use and purposes. Williams, it appears, had constructed a flume across the Wells ditch for the purpose of conserving said waste waters, and thus had prevented the flow of the same into said ditch. A conversation occurred early in the year 1917 between the plaintiff, Emma S. Stepp, and Gary Williams, one of the defendants, and in the presence of the witness Graham, a Mr. Hughes, son-in-law of C. W. Williams, and the attorney for the plaintiffs. In that conversation, so Mrs. Stepp and Graham testified, Gary Williams stated that the right of Mrs. Stepp to the waters of the spring was not disputed by him or any of his family; that they knew that the plaintiffs owned the waters of the spring, but, as to the waste waters from the "Big Ditch," they did not know whether plaintiffs owned them or not, but that they (the Williamses) were of the belief that they owned the waste waters.

There is testimony that the spring in question was the only available source affording a definite supply of water of a sufficient flow for the necessary irrigation of the Wells lands; that the Wells ditch, if kept clean, and free from sediment and other obstructions, has a carrying capacity of at least 200 inches of water; that for many years—in fact, continuously from the time that the ditch was completed down to the time of the obstruction thereof by the damming up of the ditch by the defendants in August, 1918 (after the death of C. W. Williams)—at least 125 inches of water, measured under a 4-inch pressure, over and beyond the 35 or 40 inches of water, likewise measured, which the court found that Chas. W. Williams had reserved for use on the 35 or 40 acres referred to above, flowed into the ditch from said spring and thence to the lands of the plaintiffs; that, as seen, one-fifth of said amount of said waters (25 inches thereof) was conveyed by Wells to William H. Nelson; that the amount of the waters so conveyed and reaching the lands of plaintiffs was necessary for the proper irrigation of fruit trees, crops of hay, and garden truck produced thereon, and for stock and domestic purposes. It is true that there was no testimony introduced showing that an exact measurement had ever been made of the waters flowing through the ditch from the spring, but a civil engineer did testify that the ditch, at a certain point therein, was capable of carrying 500 or 600 inches, while there was other testimony, based upon the observations and judgment of those thoroughly acquainted with the ditch for many years, to the effect that 100 inches were required for the necessary uses of the plaintiffs, and that the latter, until their ditch was interfered with in the year 1918 by the defendants, as above explained, always secured all the water necessary or requisite for sufficiently irrigating from 200 to 300 acres of their ranch.

[1, 2] The above rather general résumé of the evidence is taken mainly from the testimony of witnesses introduced by the plaintiff, and is clearly confirmatory of the declaration made in outset hereof that the findings are well supported. Indeed, as above suggested, there is, upon some of the points, little, if any, substantial variance between the testimony received upon behalf of the plaintiffs and that of the defendants. The latter themselves in effect admitted that some water from the spring in question had continuously, for many years, been diverted from the spring into the Wells ditch, and thence to the Wells ranch. They claimed, however, that the said ditch, because of not being of the proper grade, was incapable of carrying more than 30 or 40 inches of water from the spring to the Wells ranch, and that thus no greater number of inches of water from the spring had ever been diverted into the ditch. This testimony, however, was based upon observations made just before this action was commenced, and at a time when the defendants had refused to permit the plaintiffs to go upon their land, as the latter had always theretofore done without being interfered with, for the purpose of clearing the part of the ditch thereon of such obstructions as had accumulated therein during the months the ditch was not in actual use. And, in this connection, this pertinent suggestion may well be ventured: That it is not probable that Wells and his successors, who own approximately 300 acres of land wholly worthless for agricultural purposes without artificial irrigation, would have constructed at an expense of $2,000 and maintained at a yearly cost of approximately $300 a ditch the carrying capacity of which would not exceed 30 inches of water, which according to the testimony, would irrigate not to exceed 30 or 40 acres of land. But, be that as it may, upon the question of the carrying capacity of the ditch there is, as we have shown, positive testimony for plaintiffs in direct conflict with the testmony for the defendants last referred to.

There is the further claim, though (and this was the main theory upon which the defendants resisted at the trial the right of plaintiffs to more than 30 or 40 inches of water from the spring, if any at all), that by far the greater portion of the water carried to the Wells ranch through the latter's ditch was from the waste waters escaping from the "Big Ditch." But, as in rebuttal of that proposition of fact, the plaintiff showed, even by one of the defendants and some of their other witnesses, that the said waste waters were subject to such control by the owners of the "Big Ditch" as that they could be, and often were, diverted from the Wells

ditch, and therefore could not get into that artificial waterway.

As we have seen, there were several times when the certain lands entitled to irrigation from the "Big Ditch" were being irrigated the waste waters therefrom would flow in a different direction from the Wells ditch and would never reach said ditch. Gary Williams, one of the defendants, testified that he could so manipulate the "Big Ditch" that, when irrigating from it, he could either overflow the Wells ditch or make it dry. In a word, from the testimony for the plaintiffs, as well as from some of that for the defendants, it is a reasonable inference to say that the Wells ditch was supplied with the waste waters from the "Big Ditch" only periodically, or whenever it might happen that certain lands entitled to be irrigated from the latter ditch, and which sloped towards the Wells ditch, were being irrigated. These waste waters were of a vagrant or fugitive character, and, while so long as they remained so or were not controlled by the owner of the ditch from which they escaped they were subject to appropriation and use by others, a usufruct could not be acquired therein (Dannenbrink v. Burger, 23 Cal. App. 587–596, 138 Pac. 751); hence, the plaintiffs could not rely upon them as providing a source for a definite or continuous supply of a sufficient quantity of water for their necessary purposes, and it is not reasonable to suppose from the evidence that they intended to do so when they built their ditch. Indeed, as is plainly evident, the construction of the ditch to the spring and the building of a dam around the spring in a manner to permit the flow of the waters of the spring into the ditch are themselves convincing evidence of the fact that plaintiffs expected and intended to rely for their water supply wholly upon the spring. But, at all events, it is clear that upon this point, as well as upon all the other vital facts, there at least exists a substantial conflict in the evidence.

As before stated, the fixing of quantities as to the waters flowing from the spring and those customarily carried therefrom by the ditch to the lands of plaintiffs is based upon testimony involving the opinions or the best judgment of those familiar with the spring and the ditch, and generally with the requirements as to water for irrigation purposes under the conditions shown to exist in the locality in which the lands of plaintiffs and those of the defendants are situated. There were no exact measurements shown. In such a case more or less difficulty in defining the precise rights of the parties is always to be expected, and the court can do no more than to exercise and apply its best judgment under the circumstances as shown in arriving at a conclusion as to what is just and right as to both the contending parties. To this end it may draw such inferences from all the testimony and the general situation as the same may reasonably afford. Here (and we are now speaking of the quantity of water awarded to plaintiffs) we have testimony showing the capacity of the ditch, the amount of water in bulk it has usually conveyed to the lands of plaintiffs in the irrigating seasons, the number of inches required to irrigate a certain area, the number of acres irrigated by plaintiffs, and an approximation of the quantity of water which ordinarily flows from the spring into the ditch. From all these facts the court could form a fair and reasonable judgment and conclusion as to the quantity of the waters of the spring to which the plaintiffs are entitled, and at the same time allow to the defendants enough of said waters to measure up to the reservation made by C. W. Williams, and this, we conclude, after a careful reading of the testimony, it has done. Indeed, it has done more, for it has given to the defendants 35 inches of water in excess of the amount which was reserved by their predecessor from the alleged grant of the waters of the spring to Wells.

And thus we are brought to a consideration of other legal points arising and involved in this controversy.

The plaintiffs contend that the evidence and findings show that C. W. Williams conveyed to their predecessor in interest by an executed parol grant the waters of the spring in question, and that also they acquired a title to said waters by adverse user or prescription. On the other hand, the defendants, in addition to the contention that the findings derive no support from the evidence, of which proposition we have already disposed adversely to their position, maintain that, inasmuch as the plaintiffs' predecessor did not take actual possession of the waters of the spring until some 5 years after the alleged grant of the waters of the spring, there was not, and could not have been, an executed parol grant of said waters; that the alleged grant is, therefore, void, since water, being a part and parcel of the land to which it is appurtenant, is real property, which cannot be transferred or granted except by an instrument in writing. Code Civ. Proc. § 1971. Or, it is further contended, if the transaction amounted only to an executory oral agreement to convey the water, the transaction or agreement is still void, since it is also the law that an agreement to convey real estate or any interest therein, to be valid or of legal force, must be reduced to writing. Code Civ. Proc. § 1973, subd. 5.

[3] There is no legal proposition better settled in this state than that the interest here claimed by the plaintiffs is an estate in real property, and that a conveyance or an agreement to convey such an interest is within the statute of frauds, and must therefore be in writing. Hayes v. Fine, 91 Cal. 391, 398, 27 Pac. 772, and cases therein named;

Churchill v. Russell, 148 Cal. 1, 4, 82 Pac. 440.

[4] It is believed, however, that the gift of the waters to the predecessor in title of the plaintiffs involved an executed parol grant of said waters. It is true that Wells did not, upon being given the right to the waters of the spring, proceed immediately to use the same. In the very nature of the case this was impossible. But he did proceed at once with the preliminary preparations essential to the putting of the waters to use, and prosecuted those preparations as expeditiously as the circumstances and conditions and the nature of the grant would permit, and this, we think, was sufficient in such a case as this to constitute an executed parol grant. However, if that position were logically assailable, it would seem to us that there can be no doubt that the evidence establishes in the plaintiff title to the waters by prescription or adverse user.

[5, 6] In the first place, it is to be noted that in the year 1888 Wells posted a notice of the appropriation of 400 inches of the waters of the spring at the spring, the point of diversion of said waters, and caused said notice to be recorded in the office of the recorder of Modoc county. From that time on and until interrupted in the diversion of said waters by defendants in the year 1918, he and his successors, under a claim of right, continuously, openly, notoriously, and, indeed, with the actual knowledge of Charles W. Williams and the defendants here, diverted and conveyed to his ranch by means of the ditch the waters of said spring, or so much thereof as was necessary for their purposes. Here, then, is clearly shown a prescriptive right, since such use under such circumstances would carry with it a presumptive grant—that is, such use involves all the elements of a prescriptive right to said waters by adverse user. Roseberry v. Clark, 23 Cal. App. 549, 557, 138 Pac. 923; Faulkner v. Rondini, 104 Cal. 140, 146, 37 Pac. 883. In stating this conclusion, we are not unmindful of the general proposition that a riparian right cannot be acquired by mere use or lost by disuse, by which it is meant, as we understand that doctrine, that, unless there is such an invasion of the riparian rights of the party against whom title by prescription is claimed that he would have had a ground of action against the intruder, no prescriptive title to such waters can arise or be established. Faulkner v. Rondini, supra. We have here, however, not only the invasion by a nonriparian owner of the riparian rights of the defendants, but an invasion of which the riparian owners had actual knowledge, and such an invasion as would have constituted a ground of action in his favor against the invader. Upon what theory may it be held that thus a prescriptive title to the waters in question is not established, such invasion having more than covered the statutory period of five years prescribed for the acquisition of such a title or title by adverse user or possession? Indeed, we think we are justified in holding, upon this record, that the plaintiffs have established a parol grant, followed by adverse user. Roseberry v. Clark, supra.

[7, 8] But this case may, in strict harmony with the evidence and the findings, be considered upon the theory that the use of the waters of the spring by Wells and his successors, the plaintiffs herein, was under a license from the predecessors in interest of the defendants, and that the better doctrine of the case, and one upon which it may justly be decided in favor of the plaintiffs, involves an equitable concept whose animating principle is natural or abstract right and justice—a principle which justly discountenances or frowns upon transactions the consummation of which would work a gross injustice upon the rights of a person. The doctrine referred to is that of estoppel, which, while never operating to destroy the very salutary rules involved in the statute of frauds, will, upon the highest considerations of right and justice, deny to individuals the privilege of invoking the protection of that statute where their acts and conduct in a transaction with others would render the statute a shield to rather than a prevention of manifest injustice, or, in other words, the prevention of acts which would work what in the eyes of equity would be a fraud upon the rights of another person.

The cases applying the doctrine referred to, where the proved facts and circumstances are such as we have in the instant case, are numerous, both in this and other jurisdictions, and among them are, notably, Churchill v. Russell, 148 Cal. 1, 82 Pac. 440; Stoner v. Zucker, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704; Roseberry v. Clark, 23 Cal. App. 549, 138 Pac. 923; Smith v. Green, 109 Cal. 228, 234, 41 Pac. 1022; Blankenship v. Whaley, 124 Cal. 300, 304, 57 Pac. 79; Flickinger v. Shaw, 87 Cal. 126, 131, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; Raritan Waterpower Co. v. Veghte, 21 N. J. Eq. 475; Rerick v. Kern, 14 Serg. & R. (Pa.) 271, 16 Am. Dec. 497. See, also, comment of Prof. Freeman on the last-named case in 16 Am. Dec. 501 et seq.

It is sufficient to refer specifically herein to a few only of the above cases to illustrate the application to a case of this kind of the equitable doctrine or principle mentioned.

Churchill v. Russell, as in the case at bar, involved the question of the validity of an executed parol license given by the plaintiff to the defendants to take the waters of a certain stream known as Butte creek, in Siskiyou county. The plaintiff's predecessor in interest had, many years prior to the giving of said license, duly appropriated all of

the waters of said stream. Before permission to divert the waters of the stream to their land was given by one Boyes, plaintiff's predecessor in title, the defendants had an interview with Boyes, in which they said to the latter that they had an opportunity to purchase the homestead right of a man named Snell to certain land situated near the plaintiff's lands, and also stated that if he (Boyes) would grant to them the right forever to 20 inches of the waters of said creek they would purchase said homestead right and prove up on it. Boyes assented to that proposition and explicitly assured the defendants that, as he disliked Snell, and would like to see him leave the community, they could have for all time the 20 inches of water asked for. The defendants purchased the Snell homestead right and proceeded with the work necessary for effecting the diversion to the land that they had thus acquired of the said water, and to make improvements upon said land. Several years thereafter the plaintiff, the successor in interest of Boyes, brought an action to restrain the defendants from diverting the waters of said creek. The Supreme Court, in deciding the case, declared that the plaintiff, if having knowledge or notice of the license by Boyes to defendants, would, under the facts above stated, be estopped from denying the latter's right to divert 20 inches of water from said creek to their land.

In Stoner v. Zucker, 148 Cal. supra, at page 520, 83 Pac. 810, 113 Am. St. Rep. 301, 7 Ann. Cas. 704, Mr. Justice Henshaw, after reviewing some of the cases exemplifying the application of the principle, with characteristic clearness, thus summarizes the rule as applicable to cases similar in their facts to the one before us:

"The recognized principle, therefore, is that where a licensee has entered [upon the premises of another] under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures, or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for."

The rule as it is stated in Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 475, supra, as follows, is noticeably applicable to the facts of this case as proved and found:

"To the extent that the license is executed, equity will not disturb it or permit its revocation. Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law, affecting the land of another, and to which his consent is necessary, and where such consent is expressly proved, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of consent, although not according to the strict mode of the common law, or within the statute of frauds; and to defeat such a purpose will, upon a proper bill filed, enjoin the licensor from accomplishing his fraud, or when he asks relief it will be refused, or if granted, will be allowed merely in the shape of compensation, but protecting the right of the licensee."

Without further quotation from the above-cited cases, all of which are illuminating upon the proposition in hand, it is to be said that the rule, to the extent that it is announced in those cases, is sustained by the courts of a majority of the American state jurisdictions. The case of Kinsell v. Thomas, 18 Cal. App. 683, 124 Pac. 220, while not as to the facts precisely this case, applies the doctrine to an executed parol grant of real property.

The findings, supported as we think by sufficient evidence, bring this case (as has already been stated) clearly within the rule as it is declared in the California cases and the New Jersey case above quoted. Here, as we have seen, the predecessor in title of the plaintiffs, relying upon the grant of the waters of the spring to him by the predecessor of the defendants, not only made valuable and expensive improvements upon his own land, but went to great expense in digging a ditch for the purpose of securing the use of the waters so granted to him. Not only that, but he maintained the ditch and the dam around the spring for many years at a large annual outlay of money and labor, and with the actual knowledge not alone of the predecessor of the defendants but of the defendants themselves. It seems to us that, if there ever was a case where equitable estoppel should intervene to prevent injustice, this is the case, for it would be manifestly inequitable and unjust to permit the defendants, upon the facts as they were proved and found, to deny the validity of the parol grant or license (if, under the facts, the latter, technically, be the appropriate characterization of the transaction) upon which the plaintiffs rely for their title to the waters in dispute.

Another point made by the defendants is that they acquired the right to all the waters of the spring as against the plaintiffs by adverse user. What has been said above regarding the sufficiency of the evidence to support the findings constitutes a sufficient reply to this point. We may, in addition, say that even the defendants and their witnesses themselves admitted that during the irrigation season there was always more or less water from the spring flowing in the ditch. Moreover, the testimony is, as we have shown, that the plaintiffs always used the waters flowing in the ditch when they needed them. Of course, there are times when waters for irrigation are not needed

or used by the owner thereof, but an adverse right cannot be acquired against the owner by a person using the waters at times when the owner does not require them for his own purposes. If the claimant has used the water at such times as he needed it, it is regarded by the law as a continuous use. Hesperia Land, etc., v. Rogers, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209, Silva v. Hawn, 10 Cal. App. 544, 551, 102 Pac. 952.

It is further objected that the findings and the judgment are fatally uncertain in that they fail to find and adjudicate the paramount right and define the right of the defendants. We are of the opinion that the decree is, under the peculiar circumstances of this case, sufficiently certain and definite in the adjudication of the respective rights of the parties.

[9] The court found that the natural flow of water from the spring was 175 inches, measured under a 4-inch pressure. It also found, as seen, that the plaintiffs were entitled to the first 100 inches of the water of said spring likewise measured, and upon evidence by the defendants themselves that an inch of water to the acre would be sufficient to fulfill the terms of the reservation by their predecessor, that the defendants were entitled to 40 inches, measured under like pressure, which were reserved by their predecessor when he granted the said waters to the predecessor of plaintiffs. These findings, as we have shown, are sufficiently supported evidentially. While the decree does not specifically state the amount of water that the defendants are entitled to take from the spring, it is obvious that if, as the findings and the decree declare, the plaintiffs are entitled to 100 inches of said water, the defendants have available to them for their own use all the waters of the spring over and above the amount to which the plaintiffs are entitled, which amount, according to the findings, would be 35 inches in excess of the quantity to which the defendants are entitled under the reservation by their predecessor. While the court could just as well have specifically fixed the rights of the defendants in the decree, as it did those of the plaintiffs, still it is very clear that by the decree, viewed by the light of the findings, the defendants are made to know precisely what their rights in the spring are. The decree here is wholly dissimilar to those in the cases cited by appellant, of which Watson v. Lawson, 166 Cal. 235, 135 Pac. 961, may be given as an example. In that case the judgment merely declared that the defendants were entitled to "sufficient water for the proper irrigation of so much of their several lands as they have heretofore irrigated with such water." Obviously, such a decision cannot be upheld, since it is plain that by it to the defendants themselves was practically committed the determination of the quantity of water that they were entitled to.

We have found no reason for disturbing the judgment and it is therefore affirmed.

We concur: PREWETT, Presiding Judge pro tem.; BURNETT, J.

186 Cal. 1

MILLER v. LERDO LAND CO. (L. A. 5926.)

(Supreme Court of California. June 3, 1921.)

Trusts ⊂=31—Brokerage contract held not to create express trust.

A contract giving plaintiff the right to sell defendant's land, plaintiff to receive one-third of the proceeds, but having no interest in the land, *held* not to create an express trust in plaintiff's favor, and a judgment directing defendant to sell the land and pay plaintiff one-third of the proceeds within a given time in default of which the land was to be sold by a receiver was unwarranted.

In Bank.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by C. E. Miller against the Lerdo Land Company. Judgment for plaintiff, and defendant appeals. Reversed.

Anderson & Borton, of Bakersfield, for appellant.

Nathan Newby, of Los Angeles, for respondent.

LENNON, J. This is an appeal from a judgment in an action to quiet title to and declare a trust in certain lands situated in Kern county, Cal. We quote and adopt the following statement of facts from the opinion rendered in this case by the District Court of Appeal and written by Mr. Justice Knight:

"This is an appeal by the defendant, Lerdo Land Company, a corporation, from a judgment in which it was decreed that said Lerdo Land Company holds legal title to 1,390.08 acres of land situate in Kern county in trust for the purpose of selling the same and accounting to plaintiff for one-third of the gross selling price of any and all of said lands until finally disposed of. Said judgment further decreed that said land be sold by said Lerdo Land Company within six months from the date of the entry of judgment, at the rate of $150 per acre, unless plaintiff consents in writing to a sale for a less sum, and in the event of a failure on the part of said Lerdo Land Company to sell such land within that period that it be sold by a receiver (who was named in the decree) at public or private sale, for the highest price obtainable, for cash or on time, subject to the confirmation of the court, and that from the proceeds of said sale the costs shall first be deducted, and the balance divided, one-third to the plaintiff and two-thirds to the defendant.

"The controversy arises over two written agreements between the parties, the first of which is dated October 2, 1912, and the second, which is supplemental to the first, is dated May 29, 1913. The first agreement is quite elaborate and comprehensive, and it will therefore necessitate paraphrasing or merely stating the substance of many of its provisions.

"By its terms respondent was given the exclusive right to sell, within three years, 6,481.03 acres of land situate in Kern county belonging to appellant, providing 1,500 acres or more were sold by the end of the first year, and 4,000 acres by the end of the second year. The land was to be sold in tracts of 10 acres or more, except lots in town sites. The sale price was to be $150 or more per acre. If the land sold for $150 per acre, respondent was to receive one-third and appellants two-thirds of the selling price, and if it sold for more than $150 per acre the surplus was to be equally divided. The town-site lots were to be sold under a special arrangement, which it is not necessary to mention here in detail. Provision was also made for selling on deferred payments, in which event a special arrangement was made for the time when respondent should receive his pro rata. It was also provided that respondent should enter immediately upon a selling campaign, and that during the life of the contract he should not engage in the business of selling any other land subdivision without appellant's written consent.

"Appellant agreed to commence and to continue with the development of water wells on the property sold, and as the property was developed to equip said wells with casings,

pumps, motors, etc., in order to supply the land sold with water for irrigation. It was provided that a certain quantity of water should be supplied for each 160 acres of land. Said agreement also contained the following provision: 'Provided always, however, that if it shall be ascertained and determined by the first party (Lerdo Land Company) in the drilling of wells upon any portion of the lands that water cannot be discovered, produced, and developed for the irrigation of the same in adequate quantities, and at reasonable cost, then and in that event the first party shall in writing notify the party of the second part to that effect, and shall describe the lands upon which it has been ascertained and determined that it is not practicable to develop and deliver water in adequate quantities and at such reasonable cost, and such lands so described in such notice shall thereupon be removed from the terms of this agreement, and shall cease to be affected hereby or included herein.' Provision was also made for an extension of the time to sell the land if the sales were retarded by the failure to develop water.

"On May 29, 1913, a supplemental agreement was entered into, by the terms of which it was provided: 'Whereas, the parties hereto did on the 2d day of October, 1912, enter into a certain indenture of agreement whereby the party of the second part was constituted the agent of the party of the first part for the purpose of selling its lands known as the "Lerdo lands," consisting of about seven thousand (7,000) acres in the county of Kern, state of California, for the consideration and upon the conditions therein expressed, a copy of which said agreement is hereby referred to and made a part hereof; and

" 'Whereas said agreement provided among other things that the parties thereto might mutually agree to except and release from said agreement any of said lands included therein, should it be determined that it would not be profitable to develop water upon said lands or sell the same:

" 'Now, therefore, this agreement is to witness that the parties hereby mutually agree that the following described lands shall be withdrawn from the operation of said agreement: [Here follows the description of the land.]

" 'It is further understood and agreed that in consideration of the withdrawal of said lands, and of the waiver by the party of the second part of his commissions as provided in said indenture of agreement, that the party of the second part shall be entitled to the equal one-third of the selling price of any and all of said lands hereinabove described, to be paid at the times and in the manner and according to the terms of sale of the remaining two-thirds interest in said lands or any thereof at whatever date said lands or any thereof shall or may be sold, without deduction on account of any mortgage or other lien or incumbrance made, done, or suffered by the party of the first part, its successors, agents, or assigns; provided, however, that said lands shall not be sold at less than $150 per acre except with the consent of the party of the second part in writing first had and obtained.'

"The supplemental agreement was dated and signed in duplicate by respondent on May 29, 1913, and transmitted by him to the president of the appellant company. On September 26, 1913, one of the duplicates was returned to respondent, duly signed by appellant, and the other duplicate was retained by appellant.

"It was the finding of the court that the supplemental agreement of May 29, 1913, was obtained from the respondent through the representations of the president and secretary, respectively, of the appellant company, to the effect that 'in order to relieve the defendant from the obligation to develop water for the irrigation of certain portions of the Lerdo tract, the said defendant desired to withdraw, by mutual consent of the plaintiff and defendant, portions of said Lerdo tract described in the sales contract dated October 2, 1912, from the operation of said contract,' and that it was further represented to respondent 'that so much of the purchase money that might be received from the sale of said land to be withdrawn as would be necessary would be used for the development of the remainder of said Lerdo Tract, by the installation of an efficient irrigation system, and that, unless sold as oil land, said development would have to be postponed indefinitely.' The court further found 'that on and after the 29th day of May, 1913, plaintiff and defendant treated the lands described in said contract as having been withdrawn from the operation of the sales contract dated October 2, 1912, and no attempts were made to sell any of said land for agricultural purposes after May 29, 1913; * * * that defendant never at any time drilled any wells or attempted to drill any wells upon said land or to install any irrigation system thereon for the purpose of irrigating said land solely for the reason that said land had been withdrawn from sale for agricultural purposes by said contract dated May 29, 1913.' And the court further found that the installation of an irrigation system on said withdrawn land would have cost the defendant a sum in excess of $30,000, of which expense the defendant was relieved by said contract dated May 29, 1913.

"No sales of the land under the supplemental agreement of May 29, 1913, were made, and on March 24, 1914, appellant caused to be served upon respondent a notice to the effect that said supplemental agreement was not the corporate act of said Lerdo Land Company, nor was it ever authorized or approved by it, and therefore was not binding upon it. This action was filed by respondent on April 6, 1915."

We are of the opinion that the decree of the trial court cannot be sustained for the reason that neither the pleadings nor proof justify that portion of the findings and decree determining that a trust exists in the lands. Respondent's rights under the contract of May 29, 1913, are that he shall receive one-third of the selling price of any and all of the said lands; that this one-third of the selling price shall be paid to respondent at the times and in the manner and according to the same terms as the remaining two-thirds are paid to appellant; that there shall be no deduction on account of any mortgage or other lien or incumbrance made, done, or suffered by appellant, its successors or assigns. It is apparent from a recital of the substance of the provisions that the contract

conferred upon respondent nothing more than a right to one-third of the proceeds when the lands are sold. There is a distinction between an interest in the land itself and an interest in the money obtained from the sale of the land. Green v. Brooks, 81 Cal. 328, 332, 22 Pac. 849. In the cases of Green v. Brooks, supra, and Hannah v. Canty, 175 Cal. 763, 167 Pac. 373, cited by respondent in support of the theory that a trust exists, the person claiming to be the beneficiary of the trust was, in effect, one of the purchasers of the land in question and had a direct interest therein. The contract relied upon by respondent, however, does not, by any possible construction, purport to pass a present interest in the lands to respondent nor to provide for the holding of the lands or any interest therein for the benefit of respondent, nor is there anything from which any such intention can fairly be inferred. There is, therefore, no express trust, and respondent does not contend that any other kind of trust exists. It is clear from the uncontradicted evidence that the appellant corporation refused to part with any interest in the lands, and it follows that the decree imposes upon the parties terms not within the purview of their agreement in that it compels appellant to sell the lands, although appellant is still the sole owner thereof. The decree creates further rights in favor of respondent by depriving appellant of the right to control the terms of the sale and placing the same in the hands of a receiver despite the fact that the parties contemplated and stipulated that appellant should determine all the conditions of sale, with the single proviso that the price should not fall below $150 per acre.

It is unnecessary to discuss the several other points raised upon the appeal, for the sole object of the action is to declare a trust in the lands. It having been determined that no trust exists, respondent's action necessarily fails.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

186 Cal. 32

WILLIAMS v. BULLOCK TRACTOR CO. (L. A. 5583.)

(Supreme Court of California. June 3, 1921.)

1. Pleading ⟸403(3)—Deficiency in complaint cured by answer.

In an action to recover purchase money paid for a farm tractor, the failure of the complaint to refer to the fact that a written agreement of sale was entered into, accompanied by a written warranty, was immaterial, where the deficiency was supplied by the averments of the answer.

2. Sales ⟸267—Complaint in action for purchase price held to contain irrelevant matter.

Where a written agreement of sale and warranty expressly excluded all implied warranties, so that the written contract became the measure of liability, averments of the complaint, in an action to recover purchase price, as to oral statements and general advertising representations by defendant's agents, upon which plaintiff relied, were irrelevant and immaterial matters.

3. Pleading ⟸403(3)—Complaint to recover purchase price held sufficient when supplemented by averments of answer.

A complaint, in an action to recover purchase price paid for a farm tractor, supplemented by averments of the answer, *held* sufficient after rejecting surplusage, although there was no direct allegation that the tractor failed for lack of suitable material; durability averments as to defects and weaknesses sufficiently implying such failure.

4. Appeal and error ⟸268(1), 719(6)—Sufficiency of evidence not reviewable, where no specifications of insufficiency assignment of errors or exceptions.

Appellant cannot object to the sufficiency of the evidence to sustain findings, where the bill of exceptions contains no specifications of insufficiency, nor any assignments of error or exceptions reserved.

5. Appeal and error ⟸241—Motion as to evidence insufficient to warrant review of sufficiency of evidence.

Although motions to strike out portions of testimony and to dismiss complaint and give defendant judgment and the insufficiency of certain parts of evidence to sustain certain findings are alleged, there is insufficient assignment of errors of law occurring on the trial to warrant review of the evidence, where no objection of general insufficiency of evidence to sustain any findings material to a judgment under the term of contract of sale involved was contained in such motions.

6. Sales ⟸285(4)—Timely notice of defects waived by seller's conduct.

Literal compliance with requirements of warranty in a contract of sale, requiring immediate written notice if the tractor sold failed to work well after three days' trial and immediate return of the tractor, in which event the price was to be refunded, *held* waived by seller's acts, where delivery was never actually made or accepted by the buyer, and seller's agents were unable to put the tractor in proper condition, and the buyer was entitled to recover the purchase price.

7. Sales ⟸440(3)—Evidence that warranted machine was in good condition long after rejection held inadmissible.

In an action to recover the purchase price of a farm tractor, testimony of witnesses who inspected the tractor long after the attempt to operate it, and after the buyer's attempted rescission for breach of warranty, to the effect that they discovered nothing wrong with it, etc., was inadmissible, where there was no showing that the tractor remained in same

condition as when it was previously tried out, and, as it was the seller's duty to make the tractor work satisfactorily upon demand within a reasonable time, such evidence was immaterial to the buyer's right to recover.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Annie P. Williams against the Bullock Tractor Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellant.

George H. Moore, of Los Angeles, for respondent.

SLOANE, J. This appeal is taken from a judgment for plaintiff to recover from defendant $1,280, with interest and costs, on account of money paid by plaintiff to defendant on a contract of purchase of a gasoline farm tractor, which contract was rescinded by plaintiff for failure of certain conditions and warranties of the contract.

The action was tried on an amended complaint and answer thereto. The amended complaint sets forth in general terms the agreement of the plaintiff to buy, and of the defendant to sell, a certain tractor, known as a "16–10 H. P. creeping grip gasoline tractor, complete, at and for the sum of $1,156.25," and that the plaintiff then and there, on or about January 26, 1916, paid to said defendant said sum of $1,156.25 for said tractor. It is further alleged that the defendant thereafter, on or about the 4th day of February, 1916, delivered the tractor at plaintiff's ranch, near Victorville, in the county of San Bernardino, Cal., and then and there, for a period of about three days, attempted to operate said tractor on plaintiff's said ranch; that the attempt to make the tractor work failed because of structural defects, breakage of parts, excessive heating of engine, faulty adjustment of the machinery, etc.; that during all the times while said defendant, through its agents and servants, was operating and in charge and control of said tractor, it represented to plaintiff and assured plaintiff that said tractor would operate satisfactorily when the same was properly adjusted and when certain new parts were added thereto; that the defendant then left the tractor with plaintiff with the representation that it would work satisfactorily on the replacement of certain minor parts, which were to be supplied by defendant and sent to the ranch; that the tractor was left by defendant in the field at plaintiff's ranch in charge of plaintiff's mechanics; that thereafter plaintiff attempted to operate said tractor but was unable to make it work, and on February 10 again notified defendant of such fact, and defendant thereupon sent to plaintiff at her ranch certain parts for the engine and a new carburetor representing that with such new parts the tractor would work satisfactorily; that plaintiff thereupon made further attempts to operate the tractor, with the result that the engine became overheated, the parts broken and out of adjustment, although carefully and competently managed and controlled by plaintiff's mechanic; that complaint was again made to defendant, who, on or about March 13, 1916, sent a mechanic to the ranch to adjust, repair, and overhaul the tractor, and that said mechanic worked about eight hours on March 13, and again on March 14, in an attempt to put the tractor in working order but was unable to do so, and said mechanic left said tractor at plaintiff's ranch and the same has not been moved and could not be moved or operated since; "that at the time defendant's said mechanic worked on said tractor said mechanic found that the engine was worn and could not be made to operate without being entirely overhauled and partially rebuilt; that other bearings on said tractor were entirely worn out; that the oil feeders were broken; that the piston rings were entirely worn out and the cylinders were worn; that the gear wheels were not true; that the brake was broken; that certain oil cups were omitted; that the piston bearings on the crank shaft were worn; that the cam on the exhaust arms was out of adjustment and numerous other defects existed on said tractor; that said mechanic was unable to repair said tractor or make it operate"; and at all times and up to the commencement of this action said defendant has failed and refused to attempt to repair, overhaul, or adjust said tractor, and plaintiff alleges that said tractor cannot be repaired, overhauled, or adjusted or made to operate or run for any considerable period of time or at all, and cannot be made to do the work represented by defendant to the plaintiff as aforesaid, or to do the work for which it was manufactured by the defendant; that the consideration for the said sum of $1,156.25, paid by the plaintiff to the defendant, has wholly failed; that on or about the 8th day of April, 1916, the plaintiff served notice of rescission, notified defendant that the tractor was at plaintiff's ranch where left by defendant's mechanic, subject to the order and control of defendant, and demanded the return and payment to plaintiff of said sum of $1,156.25, and that no part of said sum has been repaid.

There was a second count in the complaint to recover the sum of $1,156.25 as money had and received by the defendant to and for the use of the plaintiff. The court on the trial found the facts for the plaintiff, as above stated, substantially as alleged in the complaint, and gave judgment for plaintiff for the amount named, from which judgment the defendant appeals.

In stating the issues presented by the complaint there has thus far been no reference to terms of contract or conditions of sale upon the breach of which plaintiff's right of rescission may rest.

The facts pleaded in the complaint in this regard were certain representations by defendant's agents, made orally and by printed advertising matter, relating to the qualities of the tractor. It is alleged that as an inducement to the contract the agents of defendant guaranteed that the tractor was of the latest model, would run and operate continuously, pulling a load and maintaining a speed of 2½ miles per hour; that it would operate in a field, pulling not less than three plows, turning a 14-inch furrow, 8 or 10 inches deep; that it would plow 6 or 8 acres a day; that it was free from defects in construction and was entirely suitable and fit for farm work; together with many other enumerated qualities of excellence. It is further alleged that plaintiff had no knowledge of or experience with tractors, and relied on the representations of defendant's agents, and that defendant was aware of that fact.

[1] No reference is made in the complaint to the fact that a written agreement of sale was entered into between the parties, accompanied by a written warranty signed by the defendant, and which, it is contended, contains the conditions of the sale and limits the liability of the defendant. However, this contract and warranty was set out in full by defendant's answer, and entered into the issues presented to the court on the trial as completely as though pleaded by the plaintiff. The deficiency in this respect of plaintiff's pleading was therefore supplied by the averments of the answer. Shively v. Semi-Tropic, etc., Co., 99 Cal. 259, 33 Pac. 848; Daggett v. Gray, 110 Cal. 169, 42 Pac. 568; Sav. Bank v. Barrett, 126 Cal. 413, 58 Pac. 914; Flinn v. Ferry, 127 Cal. 654, 60 Pac. 434.

The contract and warranty alleged by the answer and proven on the trial are in words and figures as follows:

"Order for 'Creeping Grip' Gasoline Tractor.

"To Bullock Tractor Company, Chicago, Ill., U. S. A.

"The undersigned, of Victorville post office, county of San Bernardino, state of California, rural route No. ———, hereby purchase of you, subject to all the conditions of agreement and warranty printed on back of this order, and made a part hereof: To be shipped to A. P. Williams, R. R. station, Victorville, Cal., via Santa Fé. Quantity 1. Size 16–10 H. P. 'creeping grip' gasoline tractor complete, and agrees to pay freight on same from Los Angeles, Cal., U. S. A., and to settle for said tractor by payment of (1,156.25) eleven hundred fifty-six and twenty-five hundredths dollars as follows: Cash.

"It is expressly agreed that this order shall not be countermanded, and that said tractor shall remain and be held by the undersigned as your exclusive property until the purchase money shall have been paid in full; and that said tractor or any part of same shall be and remain personal property in whatsoever manner it may be annexed to realty. This order is given subject to acceptance by the Bullock Tractor Company.

"Signed and dated the 26th day of January, 1916.

"[Signed] Annie P. Williams, Purchaser.

"Dated at Chicago, Ill., ———, 191—.

"Accepted, Bullock Tractor Company,

"By ————.

"Recommended for acceptance by A. C. Michael.

"Warranty.

"Bullock Tractor Company (a corporation) warrants its 'creeping grip' tractor herein described to be well made of good materials, and durable if used with proper care.

"Said company agrees to furnish, free of charge, any part that may prove defective within one year; said company may at its option require the return of such defective part, freight or express prepaid, to the factory for inspection and examination, and assumes no responsibility when the machine, or part returned, indicates misuse or neglect of alterations or repairs made outside its factory. If upon three days' trial, with proper care, the tractor fails to work well, the purchaser shall immediately give written notice to the Bullock Tractor Company, at Chicago, Ill., and to the agent from whom it was purchased, stating wherein the tractor fails, and when the purchaser desires us to send a competent man to put it in good working order, shall allow reasonable time therefor, and render necessary and friendly assistance to operate it.

"If the trouble is due to defective material or workmanship, the total cost of sending the expert shall be borne by the company; otherwise the purchaser shall pay said expense. If the tractor cannot then be made to work well, the purchaser shall immediately return it to said agent, and the price paid shall be refunded, which shall constitute a settlement in full of the transaction.

"Use of the tractor after three days, or failure to give written notice to said company and its agent, or failure to return the tractor as above specified, shall operate as an acceptance of it, and a fulfillment of this warranty.

"This warranty cannot be changed or abridged, and excludes all implied warranties.

"Bullock Tractor Company."

[2] It may be conceded, under this agreement and warranty and the express stipulation therein that the agreement "excludes all implied warranties," that this written contract is the measure of defendant's liability as to the quality and utility of the tractor, and that the averments of the complaint as to oral statements and general advertising representations on the part of the defendant's agents, upon which plaintiff relied, are irrelevant and immaterial matter. Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 164 Pac. 792. However, it is expressly guaranteed by the contract that the tractor is well made and of good materials, and

durable, if properly cared for "and durable if used with proper care," and it is provided that "if upon three days' trial, with proper care, the tractor fails to work well, the purchaser shall immediately" notify the tractor company, which shall "send a competent man to put the machine in good working order," and "if the tractor cannot be made to work well the purchaser shall immediately return it to said agent, and the price paid shall be refunded, which shall constitute a settlement in full of the transaction."

[3] We think the pleadings thus supplemented by the averments of the answer present sufficient facts to maintain a cause of action upon the conditions for recovery of the purchase money as set out in the written contract and warranty after rejecting all other representations pleaded as surplusage.

Although there is no direct allegation in the complaint that the tractor failed for lack of suitable material and durability, the averments as to its numerous defects and weaknesses sufficiently imply such failure.

The findings of the trial court, while covering the irrelevant matter pleaded as to oral representations of the qualities of their tractor, are ample as to the lack of quality and durability of the tractor and failure of the defendant to put it in working condition, to support plaintiff's rescission and demand for repayment of the purchase money.

The court finds:

That "said tractor was neither well made of good materials nor was it durable if or when used with proper care"; that it could not be operated "because it was improperly constructed and built, and was not made of good materials and was not durable"; that at times "said tractor would not develop sufficient power to move its own weight, and the plaintiff after ten days was unable to plow with said tractor to exceed two acres; that said tractor in said time wore out the piston rings; that the main bearings of the drive shaft became worn; that certain oil pipes and feed pipes became broken and disconnected; that the clutch collars were entirely worn out; the engine when run became excessively hot and it was necessary to stop said engine and allow it to cool off so that the same would run at all; parts and portions thereof became loosened and broken, and said tractor would not pull the load that would be pulled by an ordinary two-horse team; that during all of said time said tractor was properly lubricated with oil, was furnished proper fuel and proper oil, and had and was given by plaintiff proper care in all respects."

[4] The appellant is not in a position here to object to the sufficiency of the evidence to support the findings, in that the bill of exceptions contains no specifications of insufficiency, or any assignment of errors or exceptions reserved. Millar v. Millar, 175 Cal. 797, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Smith v. Meade, 36 Cal. App. 173, 171 Pac. 815.

[5] Neither do we think there is sufficient assignment of errors of law occurring on the trial to entitle appellant to a review of the evidence. Motions were made and overruled at the close of the trial, which it is claimed were substantially a motion for nonsuit. These included a motion to strike out portions of the testimony and to dismiss the complaint and give judgment for defendant, and insufficiency of certain specified parts of the evidence to sustain certain findings is alleged, but no objection of general insufficiency of the evidence to sustain any of the findings material to a judgment under the terms of the contract and warranty was contained in the motions.

The greater portion of appellant's voluminous briefs, however, is devoted to discussion of the conflicting evidence, and we have considered the same, with the result that we find ample testimony to support the findings. Nearly all the probative facts relating to the condition and operation of the tractor given with considerable detail in the findings, are, in substance, a synopsis of the testimony of plaintiff's witnesses.

There can be no question, under the findings and evidence, that the trial court was justified in its conclusion that the tractor was not well made of good materials or durable in use, or that the plaintiff, if she acted in due time and on proper notice to the defendant, was justified in rescinding the contract and demanding a return of the purchase money.

[6] Appellant, however, claims that notice of the unsatisfactory condition of the tractor was not given in compliance with the contract, that the rescission was not made within the time stipulated, and that no return of the tractor was made to defendant's agents.

It was stipulated under the agreement of warranty that—

"If upon three days' trial, with proper care, the tractor fails to work well the purchaser shall immediately give written notice to the Bullock Tractor Company, at Chicago, Ill., and to the agent from whom it was purchased, stating wherein the tractor fails, and when the purchaser desires us to send a competent man to put it in good working order, shall allow reasonable time therefor, and render necessary and friendly assistance to operate it."

And further:

"If the tractor cannot then be made to work well, the purchaser shall immediately return it to said agent, and the price paid shall be refunded."

And also that—

"Use of the tractor after three days, or failure to give written notice to said company and its agent, or failure to return the tractor as above specified, shall operate as an acceptance of it, and a fulfillment of this warranty."

There was no literal compliance with these requirements. But so far as time may have

been of the essence of the agreement, this was waived by the acts of defendant. Delivery of the tractor was at no time actually made, or accepted, by the plaintiff. Defendant's agents undertook personally to deliver the tractor at plaintiff's ranch and put it in operation. It arrived in their charge in a crippled condition on the 3d of February. On the 4th it was repaired and adjusted, and during the 4th, 5th, and 6th defendant's agents were in charge attempting to make it work. They were not successful, and on the last date named plaintiff stated to said agents and servants that said tractor was not satisfactory and refused to accept it. It was however, left at the ranch, and plaintiff's sons, one of whom was experienced in mechanics and with motors and machinery, attempted to put it in operation. The findings are that they handled it skillfully and with due care. They were unable to get any better results for the reason of the defects as found by the court, and on February 9th, within three days after defendant's agents had left it, after their own futile experiments, plaintiff "notified the defendant in writing that said tractor was not satisfactory," and called attention to its defective and broken condition, and requested that a mechanic be sent immediately to put it into commission. Thereafter plaintiff sent certain new parts, including a carburetor that did not fit. The machine still not operating, defendant sent a mechanic on March 13th, who worked on the tractor unavailingly for about two days and then abandoned it because he did not have parts and material sufficient to make the necessary repairs. No further attempt was made by defendant to put the tractor in a condition to operate, and after waiting until the 8th of April, 1916, the plaintiff in writing again notified defendant that the tractor would not work and gave notice of rescission of the contract, and that the tractor was at the ranch where defendant's agents had left it and was subject to defendant's orders, and demanded repayment of the purchase money.

There were further negotiations, but no substantial repair of the tractor. A further notice of rescission and demand for return of the purchase money was made on May 12th. Plaintiff had never accepted delivery of the tractor, and notice to defendant and its agents that they would find it where they had left it and that it was subject to their orders was a sufficient return of any possession plaintiff had.

Under the pleadings, evidence, and findings the plaintiff was entitled to recover.

[7] The more serious question of error arises upon the exception of defendant to the ruling of the trial court excluding from the evidence the depositions of certain of defendant's witnesses. The testimony thus offered was of witnesses who inspected the tractor long after the attempt to operate it and after the rescission by plaintiff, and was to the effect that on such inspection they discovered nothing wrong with the tractor, and after some slight adjustments were able to operate it satisfactorily. Such testimony could only be admitted after a showing that the tractor remained in the same condition as when it was previously tried out. Although there was evidence that it had been left standing where it was when plaintiff rejected it and had not been used since, we have looked in vain for any affirmative showing that it had not been overhauled or changed.

In any event, it was the duty of the defendant under the contract to make the tractor work satisfactorily upon demand and within a reasonable time, and evidence that some months later defendant's witnesses were able to operate it with slight repairs is immaterial to plaintiff's right to recovery. Moreover, the evidence was cumulative; the defendant having had the advantage of the testimony of its agents who sold the machine and who tested and repaired it on the attempted delivery as to its condition at that time.

Many of the points involved in this appeal are covered by the opinion of Mr. Justice Hart in Ventura Mfg. Co. v. Warfield, 37 Cal. App. 147, 174 Pac. 382, an action strikingly similar to this in its facts and in the issue presented on appeal. Judgment for plaintiff was affirmed and a petition for hearing in this court was denied.

The judgment herein is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; OLNEY, J.; WILBUR, J.; SHAW, J.; LAWLOR, J.

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CITY OF SAN BERNARDINO v. CITY OF RIVERSIDE et al. (L. A. 5925.)

(Supreme Court of California. June 3, 1921. Rehearing Denied June 30, 1921.)

1. Waters and water courses ⊂⊃34—Original rights to waters in streams based on common law.

The original rights to the waters in the streams in California are those which by the common law were vested in the owners of the land abutting upon the stream under the doctrine of riparian rights, and such rights are attached to the land as parcel thereof, and are private property.

2. Waters and water courses ⊂⊃127—Doctrine of "appropriation" stated.

Appropriation under the Civil Code is but another form of prescription, and the original rights of the abutting landowners are not divested thereby until the period of prescription has run in favor of the appropriator; and appropriation does not confer title immediately, as if by grant from the state, except when it

affects lands belonging to the state or the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appropriate—Appropriation.]

3. Waters and water courses ⊂=79—Rights in stream are protected against diversion of underground waters.

Where a stream runs over porous material saturated with water, and the underground waters support the stream, either by upward or lateral pressure, or feed it directly, persons having rights in the stream will be protected against a depletion thereof by adverse diversions of such underground waters, although there may be a point of distance from the stream at which a diversion of such underground water will have so little effect on the stream that it will not be actionable, it being ordinarily a question for the trial court whether this is true in the case before it.

4. Waters and water courses ⊂=101, 107(2)—Rule as to reciprocal rights in "percolating waters" stated; unreasonable taking of underground waters enjoined.

The rule in regard to "percolating waters" is that each owner of land overlying the same general underground supply of water may take such water on his own land for any beneficial use thereon so long as such taking works no unreasonable injury to other land overlying such waters; that, if the natural supply is not sufficient for all such owners, each is entitled only to his reasonable proportion of the whole; and that each may apply to the courts to restrain an injurious and unreasonable taking by another, and to have the respective rights adjudicated, and the use regulated, so as to prevent unnecessary injury and restrict each to his reasonable share.

5. Waters and water courses ⊂=101, 107(1)—Rule as to right to take "percolating waters" outside of watershed of underground basin stated; owner of overlying land may have right to subterranean waters adjudicated though he does not use the waters.

No one, not even the owner of overlying land, has the right to take water for any purpose out of a watershed over an underground basin or general underground water supply, if such taking will deprive of water any lands within the basin; and while the owner of overlying land who does not use such water thereon, and whose land is not injured by an exportation of the water to outside lands, has no right to enjoin such exportation, he may nevertheless apply to the court for a judgment declaring his own right to be paramount, and that such exportation is subordinate to his own right, and enjoining the taker from making an adverse claim to the water, or from taking it in such quantities or in such a manner as to destroy or endanger the source of supply.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Percolating Waters.]

6. Waters and water courses ⊂=190—City located in watershed over underground basin has water rights only as appropriator, and not as administrator of water rights of its inhabitants.

Under Civ. Code, § 1410, as amended, a city situated in a watershed over an underground basin or reservoir has no rights in the waters thereof as being subject to public use for the common benefit of its inhabitants or owners of the overlying lands, on the theory that the city is the administrator of such public use and has become substituted to the individual rights of owners for the benefit of all, but such water is private property, and the city's rights are only those of an appropriator.

7. Waters and water courses ⊂=140—Prior appropriator entitled to have his rights declared superior.

When a conflict arises between two appropriators of water, and their rights are otherwise equal, the prior appropriator, under Civ. Code, § 1414, will prevail so far as the conflict extends; and in an action to quiet title the prior appropriator is entitled to have his prior right declared to be superior to that of subsequent appropriators.

8. Waters and water courses ⊂=145—Appropriator may change place or character of use or place where water is taken.

With regard to water rights by appropriation, the appropriator may change the place or character of the use or the place from whence the water is taken out of the source, provided others are not injured by the change, and this rule applies to the taking of underground as well as surface waters.

9. Waters and water courses ⊂=152(11)—Judgment in action between cities as to water rights should not undertake to provide for future use.

In action between city lying in watershed over underground basin or water supply and a city and water company situated outside of the watershed, as to rights in the water in the watershed, *held* that, as the parties had the rights of appropriators only, the judgment should not undertake to provide for future apportionment of the waters of the artesian basin, but should definitely determine the existing rights of the parties.

In Bank.

Appeal from Superior Court, San Bernardino County; Frank G. Finlayson, Judge.

Action by the City of San Bernardino against the City of Riverside and another. From the judgment, both parties appeal. Reversed and remanded.

Byron Waters, C. C. Haskell, Ralph E. Swing, and William Guthrie, all of San Bernardino, for plaintiff.

Henry Goodcell, of San Bernardino, and W. G. Irving and Miguel Estudillo, of Riverside (Samuel C. Wiel, of San Francisco, of counsel), for defendants.

SHAW, J. Both parties have appealed from the judgment.

The city of San Bernardino is situated in what is known as the San Bernardino artesian basin, and the lands comprising it overlie a part of the subterranean water of said basin. The dispute in the case arises from the fact that both parties are taking such subterranean waters, the plaintiff taking them for the use of its inhabitants for domestic and other purposes, and the defendants taking them to be transported to the city of Riverside and the vicinity thereof for irrigation and domestic use, said region being entirely outside of the said basin and of the watershed which supplies water thereto. The complaint asks that the claims and rights of each of the parties be determined and adjudicated, and that the defendants be enjoined from diverting water from said basin for use upon lands not situated therein or in the watershed tributary thereto.

The answer sets up the several claims of the defendants to the water aforesaid, and denies that plaintiff has any paramount rights thereto. The defendants also filed a cross-complaint, asking that their rights to take water from said basin should be determined and adjusted.

The court made elaborate findings in the case, covering 300 pages in the printed transcript. Judgment was thereupon rendered, declaring the respective rights of the several parties in the water of the said basin. It was stipulated between the parties that—

"Whatever judgment may legally be entered as based on the findings of fact may be entered regardless of whether the findings, or any of them, are or are not embraced in the pleadings as filed."

The appeal is presented upon the judgment roll alone, and, in view of the aforesaid stipulation, our consideration of the case may be limited to a review of the findings, conclusions of law, and judgment. The facts hereinafter stated are set forth in the findings.

The San Bernardino artesian basin is a plain, sloping generally toward the southwest. It is about 25 miles long from northwest to southeast, and 10 miles wide. It is bounded on the northwest, north, and east by high mountains, and on the west, south, and southeast by hills or higher lands. At the southwest, near the town of Colton, there is a gap in the hills and higher lands, through which the water falling on the watershed, of which the basin is the lower part, escapes, partly by streams on the surface and partly by seepage through the sands, gravels, and soil beneath. The gradient of the surface of the basin from the foot of the mountains toward this outlet varies from 25 to 50 feet per mile. Near the center there are level spaces which, prior to any artificial drainage, were swamps or marshes. It is probable that the basin was originally a lake, and that its present condition is the result of the gradual filling of the bed in the course of ages by detritus washed down from the adjacent mountains. The material of the basin is composed of boulders, gravel, sand, and soils of varying textures.

As the lake bed gradually filled, the torrents from the mountain canyons changed their courses from time to time, forming underground strata or waterways of coarser material, in which water percolates more freely than elsewhere. The material also lies in strata of varying permeability. In the adjacent mountains there are several canyons, in each of which a small stream generally flows in the dry season, and from each of which a large stream flows when there is a heavy rain upon its watershed. Of these the largest are Santa Ana river, at the easterly end, and Lytle creek, at the northwest. At the mouth of each canyon, where it emerges from the mountains, there is the usual debris cone of the coarser materials, such as boulders and gravel. In these cones a large portion of the water of the respective streams sinks and disappears.

The Santa Ana river and Lytle creek are the only streams that continue flowing on the surface as far as the outlet, and not infrequently in the dry season they also disappear before reaching it. The porous material filling the bed of the ancient lake is at least 1,000 feet in depth in some places. The outlet, it is believed, was originally a narrow gorge, which has become filled to the surface with material sufficiently impervious to water to serve as a dam and prevent the escape of water below the surface to any great extent. The whole mass of underlying strata composing this basin is saturated with water. The upper stratum is soil of a closer texture than the strata beneath. This overlying cap confines the water to the porous strata below, and the gradient of these formations causes a hydrostatic pressure therein. This pressure forces to the surface a large part of the water, beginning near Harlem springs, six miles from the outlet, and forms a stream known as Warm creek. This stream gradually increases in volume in its course toward the outlet, at which point, before any artificial depletion of the waters of the basin, there was ordinarily a flow amounting to 3,500 inches of water. A smaller creek of similar origin, called Town creek, is tributary to Warm creek. Both pass through the city of San Bernardino. As early as 1869 a well was sunk in the basin, in which the water rose to the surface and flowed out as a stream. From that time until the present it has been a common custom for persons owning land over this basin and desiring water to obtain the same by means of such

artesian wells. There are now between 2,000 and 3,000 of them, and by means thereof large quantities of water are taken from the underground supply. Owing to the large number of these wells the pressure in the strata has decreased, so that many of them do not flow over the surface, and pumps are used to raise the water.

Before proceeding to the specific questions presented, we deem it advisable to state some general principles of law on the subject of the waters of streams and artesian basins, which must be kept in mind in the consideration of the case.

[1] 1. The original rights to the waters of the streams in this state are those which by the common law were vested in the owners of the land abutting upon the stream, under the doctrine of riparian rights, as it is commonly termed. Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Hudson v. Dailey, 156 Cal. 628, 105 Pac. 748; Palmer v. R. R. Comm., 167 Cal. 165, 138 Pac. 997. Such rights are attached to the land as parcel thereof, and, of course, are private property. It is not necessary here to state the doctrine more fully, since there are no serious differences between the parties concerning it. We do not speak in this case of the public rights of navigation and fishery in navigable waters.

[2] It follows in consequence of this fact that all other present existing rights in the waters of streams have been acquired in some manner from the owners of such abutting lands, either by prescription, by contract, or by condemnation. Appropriation under the Civil Code is but another form of prescription, and the original rights of the abutting landowners are not divested thereby until the period of prescription has run in favor of the appropriator. This is a matter of some importance, for the effect of the Code provisions has been greatly misunderstood, especially by the general public and in public discussion. It is often erroneously assumed that such "appropriation" confers title immediately, as if by grant from the state. This is not true, except when it affects lands belonging to the state or the United States. Palmer v. R. R. Com., 167 Cal. 172, 138 Pac. 997.

[3] When a stream runs over porous material saturated with water, and the underground waters support the stream, either by upward or lateral pressure, or feed it directly, persons having rights in the stream will be protected against a depletion thereof by adverse diversions of such underground waters if they are injured thereby. There may be a point of distance from the stream at which a diversion of such underground water will have so little effect on the stream that it will not be actionable. It is ordinarily a question for the trial court to determine whether or not this is true in the particular case before it. These matters are considered as applied to differing conditions in Los Angeles v. Pomeroy, 124 Cal. 617, 57 Pac. 585, Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, Hudson v. Dailey, 156 Cal. 626, 105 Pac. 748, McClintock v. Hudson, 141 Cal. 279, 74 Pac. 849, and other cases, and will be adverted to herein in connection with the rights of Riverside Water Company.

The law of so-called "percolating" waters presents the principal questions in issue in this case. These waters are almost invariably found in permeable material of more or less density, in such as sand, gravel, and boulders intermixed, in which the water will move readily by the force of gravity. The original title to such water was in the owner of the land in which it is found, under the elementary rule that the title and ownership of land extends to the center of the earth, and includes everything within the cone having the superficial boundaries of the land for the base and the center of the earth for its vertex. The transfer of the land by the government to the individual passed this title, and gave the landowner the right to all the water therein. Originally in this state it was assumed that this title was absolute, and that each landowner could take out as much of such underground water as he pleased, regardless of the effect thereof on other lands, provided he took it on his own land, and without a malicious intent to injure others. But the immediate effect of such taking of water out of such land usually is to draw out the water from the surrounding land into the void or depression caused in the water plane in the land from which it is taken, and this, if continued, lowers the subsurface water plane in the vicinity thereof, and eventually, to a greater or less extent, throughout the basin in which the lands are situated. If there is artesian pressure therein, this will reduce the pressure. In this manner the owner of one tract of land in such basin could take such water from another tract without an actual trespass thereon, and thus an injury could be done which the owner of the other tract could not prevent by any lawful physical means, and a resort to the courts was necessary. In cases presenting these facts the original assumption of absolute ownership in such water was held untenable under the conditions existing in this state, and the doctrine that the respective rights of owners of land in the waters percolating or lying beneath the surface are reciprocal and correlative as to each other was adopted. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Newport v. Temescal W. Co., 149 Cal. 535, 87 Pac. 372, 6 L. R. A. (N. S.) 1098; Burr v. Maclay, etc., Co., 154 Cal. 428, 98 Pac. 260; and other cases.

[4] With regard to such landowners, these cases hold that each owner of land overlying the same general underground supply of water may take such water on his own land for any beneficial use thereon, so long as such taking works no unreasonable injury to other land overlying such waters; that, if the natural supply is not sufficient for all such owners, each is entitled only to his reasonable proportion of the whole, and that each may apply to the courts to restrain an injurious and unreasonable taking by another, and to have the respective rights adjudicated and the use regulated so as to prevent unnecessary injury and restrict each to his reasonable share.

[5] With respect to other parties who take for use on lands outside the watershed of the basin, it is now established by said decisions that no one, not even the owner of overlying land, has the right to take water out of the watershed for any purpose, if such taking will deprive of water any lands within the basin; that, while the owner of overlying land who does not use such water thereon, and whose land is not injured by an exportation of the water to outside lands, has no right to enjoin such exportation, he may nevertheless apply to the court for a judgment declaring his own right to be paramount, and that such exportation is subordinate to his own right, and enjoining the taker from making an adverse claim to the water, or from taking it in such quantities or in such a manner as to destroy or endanger the source of supply. Burr v. Maclay, etc., Co., 154 Cal. 436, 98 Pac. 260. With respect to such cases—

"The court unquestionably has power to make reasonable regulations for the use of such water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person having the paramount right in the substantial enjoyment of that right and to prevent its ultimate destruction."

2. The court finds, and the judgment declares (clause 7) that the city of San Bernardino has the right to take and use in its public water service 100 inches of water from the natural surface flow of Lytle creek; that it also has the right (clause 6) to take from the subterranean waters such quantity of water as may be necessary for useful purposes beneficial to the several parcels of land which it owns overlying the basin, including Lugo park and Meadowbrook park, subject to future regulation as to the quantity to be taken; that Meadowbrook park is riparian to Warm creek, and that the city of San Bernardino, as owner thereof, is entitled to use thereon so much of the water of said creek as may be reasonably required, subject to future regulation as to quantity (clause 14).

Also (clause 10) that the defendant Riverside Water Company, subject to prior rights of others to take water from Warm creek above its own intake, is entitled to take perpetually the entire natural flow of the creek at its point of intake, except as such flow may be diminished by water rightfully taken from the basin by the wells of the other parties to the action; that when said natural flow into its canal, at the intake thereof, during the months from April to October, inclusive, falls below an average aggregate of 2,710 inches, said company, while taking the whole flow of the creek, may also take from said basin into said canal, by means of wells, enough additional water to maintain an average aggregate flow of 2,710 inches therein, but, in effect, that all of the water so taken by wells must be used, so far as necessary, for irrigation and domestic use on certain 10,387.35 acres of land outside the basin, but not exceeding for use in irrigation, at any time, the quantity required to irrigate the crops and trees growing on said lands, according to a certain schedule of quantities allowed per acre for various kinds of crops and trees stated in the findings and judgment. It is entitled to take for these purposes all the natural flow of the creek when it exceeds 2,710 inches. It is also entitled (clause 15) to the reasonable use of the waters of Warm creek on certain lands riparian thereto which it owns, subject to future regulation by the court.

The court finds and adjudges (clause 11) that the city of Riverside is entitled to take from the basin for municipal uses and for its inhabitants an annual average flow of 282 inches. It is declared that the word "inch," when referring to water, is used in the findings and judgment to designate a continuous flow equal to "one-fiftieth of a cubic foot of water per second of time." For the sake of brevity, we use the word with the same meaning in this opinion.

3. In so far as the above-stated provisions of the judgment purport to declare the present rights of the three parties to the action to take and use the water in question away from the lands in which they lie, they do not appear to be injurious to any of them under the conditions found and adjudged to be now existing. Each party, as will be hereinafter more fully shown, is claiming such water solely as an appropriator of water necessary to supply a public use of which it is the administrator. The court finds and the judgment declares that, up to the time of the trial, there was at all times more water coming into the artesian basin, and included in the surface streams and underground waters thereof, than was required to supply all the needs of all the parties, and all the rightful diversions of all other parties therefrom. While this condition continues there can be no unreasonable injury to any one from the continued

taking in quantities no greater than has been taken heretofore. In dry years they might be compelled by necessity to bore more wells, or to put in more pumps, or substitute more powerful ones, in order to obtain the supply now in use, but this must be considered no more than a reasonable requirement, at least under the conditions existing in that part of the state, so long as this process does not result in using quantities of water exceeding the quantity that would be restored to the basin, in excess of the use, during succeeding wet years.

For these reasons we do not deem it necessary to discuss extensively the objections of any of the parties to the judgment so far as it operates only on the aforesaid existing rights and relates to existing conditions. In other parts of the judgment the court below undertook to provide for future conditions and contingencies, to authorize further and additional takings of water from the basin in the future as the needs of future conditions might require, and to establish a mode for the regulation and administration of the waters of the basin by the court by proceedings in this action after judgment. In our opinion, these parts of the judgment are so far erroneous that the entire judgment must be reversed, and the cause remanded for further proceedings. As will hereinafter be shown, the requirement that the Riverside Water Company must deliver the water it takes from the basin by wells exclusively to the 10,387.35 acres of land to which it has been heretofore delivered, is also erroneous. We proceed to the considerations of the provisions last mentioned.

4. The defendants earnestly object to the provisions of the judgment regarding the existence of a "surplus" or "deficiency" as therein defined. Clause 16 thereof defines the words thus:

"The word 'surplus' used in this judgment means, and for all purposes of this judgment shall be deemed to mean, that condition of the San Bernardino artesian basin which exists when the average annual feed to the basin or water crop, that is, all water which rightfully and properly reaches and replenishes the basin, exceeds, for any year or period of years, the aggregate of all the artificial rightful drafts, together with all the natural drafts, made on said basin during the same period; and a 'deficiency,' as that word is used in this judgment, exists during such times as there is not a surplus, as herein defined."

It is further adjudged (clause 13) that there now exists in said basin a "surplus" of water, as thus defined; and (clause 12) that, while any such surplus exists, and so long as it continues, each of the parties may take for any beneficial purpose from said basin by wells "such quantities of water, even though in excess of the quantities hereinbefore specified, as such parties may deem reasonably necessary or proper, but not for waste," except that the Riverside Water Company must not take water therefrom by wells when it is not taking all of the natural flow of Warm creek. This provision is declared to be effective, "anything hereinbefore to the contrary notwithstanding."

It seems clear that, if the surplus exists, as both findings and judgment declare, and while it exists, the taking of additional water by either party can cause no substantial injury to either of the other parties, so far as their respective rights as owners of overlying lands, or as owners of the adjudged rights to take by means of wells the stated quantities aforesaid, are concerned, provided such additional taking is not allowed by continued use to ripen into a right superior or equal to the rights so adjudged, or to their rights as owners of overlying lands. The judgment contains other provisions which we think must be so construed as to prevent either party from claiming that a continued taking of such additional water shall give any right superior or equal to the rights as owners of overlying land, or to the present rights to take by means of wells. The judgment reserves in the court jurisdiction to determine, at any time, and from time to time, of its own motion, or on motion of either party, whether there is or is not a surplus, and thereupon to make such order or judgment as may be appropriate as to the quantity of water to be taken from the basin, or as to the use to which it may be applied, by any party or parties to the action, during such times as there shall not be a surplus in the basin. Neither party could, by such aditional taking or use, obtain any right that would avail against this reserved power of the court, or that could be set up in opposition to any order the court should make in the proper exercise of that power. It should, however, have made an express declaration to that effect, instead of providing it by implication arising from the reservation of power. The case, in this respect, falls within the doctrine stated in Burr v. Maclay R. W. Co., as aforesaid.

The rights of the Riverside Water Company to the natural flow of Warm creek are not fully protected by these provisions. The findings show that it has rights relating to the waters of said creek of two sorts, both of which are perhaps prior and paramount to the rights of the other parties hereto to take water from said basin for public use. The first is the right to take the entire natural flow of the creek. The second arises from the depletion of the natural flow by the taking of water from the basin by the other parties hereto and others, subsequent to the inception of its own right in the stream, and is the right to take, by means of wells bored in the basin, enough water to augment the depleted natural flow, so as to produce in its canal a total flow of 2,710 inch-

es during specified months. These rights should be declared to be paramount to the rights of the other parties hereto if the findings justify that conclusion. The judgment erroneously assumes, apparently, as matter of law, that the respective rights of the parties to take water for public use are coequal. See on this point, post, subd. 7. While the surplus continues, the condition of the respective parties as to their right to take water from the basin or public use is substantially the same as that of several appropriators from a surface stream having more than enough water for all. No injunction should issue against the taking of water while the supply is ample for all. But the respective priorities of each water right should be adjudged, so that, if in the future the supply falls below the quantity necessary for all, he who has the prior right may have his preferred right protected.

We are of the opinion that the aforesaid definition of the word "surplus" prescribes an impractical and unworkable plan for the determination of the question, whether there is or is not a surplus. The court must first ascertain "the average annual feed" to the basin from water "rightfully and properly" reaching it and "replenishing" it, for any year or period of years. This obviously refers to the "average annual" rainfall on the watershed, and to the part thereof which reaches and replenishes the basin. The findings show the difficulties attending this inquiry. The annual rainfall has varied from 37.51 inches in 1883–84 to 7.49 inches in 1898–99. The average annual rainfall at San Bernardino from July 1, 1871, to July 1, 1916, was 16.2 inches per year. From 1893–94 to 1899–1900, the yearly average was only 11.09 inches. The water which sinks into the débris cones and percolates underground toward the outlet moves at the rate of only 2 miles in a year, and it is several years before it reaches the points where Warm creek rises, and where the wells of the parties are located. Hence neither the rain of a wet year nor the decrease in a dry year becomes manifest in the water level at Warm creek and at the wells in question for several years afterward.

There are no practical means of ascertaining the total annual rainfall on the watershed. No records are kept, except in San Bernardino and a few other places. We may judicially take knowledge that the amount varies greatly in different parts of the watershed; that in the high mountains it will usually greatly exceed the fall in the basin; that cloudbursts may occur in one of the canyons when there is a mere sprinkle in other parts of the range, and that, even in a general storm, the rain may be heavy at one place and light in others without any cause except the course of the winds, the conformation of the mountains, and the like, and that a slight change in the direction of the wind will materially affect the rainfall in the different places affected. During the period from 1881 to 1916, the rainfall at San Bernardino was 16.41 inches, and that at Riverside 11.02 inches. The two cities are about 20 miles apart, on the same general plateau, and with about one hundred feet difference in elevation. To ascertain with even approximate accuracy the rainfall on the entire watershed for any year a large number of additional daily records must be kept, and great expense must be incurred therefor.

The actual increase to the waters of the basin in any one year cannot be measured by the rainfall for that year. During a heavy general rain a large proportion of the precipitation flows down from the canyons in the channels of the surface streams and through the outlet of the basin without ever sinking below the surface. It is impossible to measure these flood waters. Such a flood may constitute the major portion of the seasonal rainfall. In another season the rains may come more regularly and evenly, but in the same quantity, so that a very large portion of it sinks into the basin, and none runs off. In the drier seasons the rain may practically all evaporate, and none of the waters thereof reach the basin. The amount of such evaporation cannot be measured. It will vary from time to time, according to the humidity or aridity of the atmosphere, and the amount of sunshine.

From these facts, all of which appear in the findings, it is apparent that the first factor in the computation of the surplus, the amount of water rightfully and properly reaching the basin, cannot be ascertained.

The other factor, the "artificial rightful drafts" upon the basin, could not in any event be computed or ascertained without extraordinary expense. The average amounts taken by the three parties to this action are ascertained and stated in the findings. But these comprise much less than half of the drafts that may be "rightful." Other companies and persons take and carry away to outside lands about 6,000 inches. In addition to this exportation, between 2,000 and 3,000 wells are operated by owners of land in the basin to obtain water for use upon their respective tracts of land. None of these exporters and users is a party to this action. The amount thus taken for overlying lands would naturally vary greatly from day to day and from time to time. There is no means of compelling the persons concerned to keep accounts of the quantities taken. The parties to this action have no right to enter the premises of such users to measure the water taken. The ascertainment of the amounts taken in any one year, or at all, is, therefore, practically impossible for either party.

If such deficiency were actually ascer-

tained, and an order were made apportioning to each party its proper reduction on account thereof, it would not prevent the exhaustion of the water in the basin. The order would bind no one except the three parties to this action. Other persons are taking from the basin, presumably by right, a much larger quantity of water than is taken by the parties. The order would have no effect upon any of them. If their needs were greater, as would be probable in a dry year, they would naturally take more than before, and it is certain they would take no less. Thus the exploitation of the water of the basin would proceed, and its exhaustion would ensue, from the excessive use by other persons, while the respective parties would be restrained by this order. If such exploitation continued for 5 years uninterruptedly under claim of right, with the knowledge of the parties hereto and to their injury, such adverse use would ripen into a right to do so perpetually as against these parties. Civ. Code, § 1007; Katz v. Walkinshaw, 141 Cal. 135, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Burr v. Maclay, etc., Co., 254 Cal. 436, 98 Pac. 260; Barton v. Riverside W. Co., 155 Cal. 518, 101 Pac. 790, 23 L. R. A. (N. S.) 331. Thus it appears not only that such an order would be practically ineffective, but also that it would endanger the rights of all the parties.

5. In addition to the above-stated rights adjudged in favor of San Bernardino, the judgment declares (clause 8) that said city is entitled to take perpetually from the basin by means of wells, for municipal uses and for the use of its inhabitants, quantities of water which, together with the quantity it obtains from Lytle creek, will be sufficient to supply to each inhabitant an average of 200 gallons daily, and also to irrigate crops and trees grown on privately owned lands within the city at the rate of 1 inch to every 4.5 acres in citrus fruits; 1 inch to every 2.66 acres in alfalfa and garden crops; 1 inch to every 10 acres in grain; and 1 inch to every 6 acres in deciduous fruits, all to be measured at the point of delivery on the land.

This provision is objectionable, on the ground that it is uncertain in regard to the quantity of water to which the right is given thereby; that it "fails to attain the certainty necessary to an estoppel" upon a part of "the subject of the litigation." Riverside W. Co. v. Sargent, 112 Cal. 233, 44 Pac. 560. In that case the judgment of the lower court was that the defendant had the right to take water by a certain dam and ditch "to the extent of the full capacity of said ditch." This, it was said, was too uncertain, because of the fact that the carrying capacity of the ditch, its size, and grade, was not shown by the record. In the present case the findings show the present population of San Bernardino, but there are no data from which to ascertain the number of acres of land therein grown in the specified crops from time to time. The population is expected to increase, and the area of such land will fluctuate materially from year to year. The object of the provision evidently was to provide for more water in the future, as the need increased. It is impossible, for these reasons, to ascertain from anything in the findings or judgment the extent of such increase, and hence the amount of water the plaintiff may be entitled to under this clause cannot be determined.

There is no finding expressly to the effect that said city has ever acquired the right, as against the defendants, to take additional quantities of water from the artesian basin by means of wells, except such as it may have by reason of its being the owner of lands overlying the basin for use on such land, which, of course, does not include the right to take it for public use. The findings and judgment suggest that the theory of the court below was that the fact that the city iself was situated within the basin gave it the right to take water therefrom for any public use which, as a municipality, it has the power to administer. As this proposition is also involved in the consideration of the further right given by clause 9 of the judgment treated in the next following subdivision of this opinion, we will not further discuss it here.

[6] 6. The next objection of the defendants is to clause 9 of the judgment, declaring that the city of San Bernardino is entitled to take perpetually from the basin, if required for any reasonable beneficial use, as much water as said city, as an owner of land in the city overlying the basin, and all private owners of such land within the city, as such owners of overlying land, shall be entitled, in the aggregate, to take from the basin; such taking by the city, however, to be subject to the supervision of the court both as to the quantity taken and as to the uses to which it is to be applied.

In support of this clause, and also of clause 13 aforesaid, allowing water to be taken when a surplus exists without limit as to quantity, the plaintiff advances the theory that the underlying waters of this basin are by law subject to public use for the common benefit of the overlying lands and of the inhabitants of the basin, or have become so by the acts of the parties interested therein, that the part of the waters pertaining to the lands within the city is set apart by law for the common public use of the owners of the land and other persons in the city, that the city has in some manner become the administrator of this public or common use in place of the landowners, and has become substituted to their individual rights for the benefit of all, and that, in that character, it may

at any time take from any part of the basin, whether the place of taking be inside or outside of the city, so much of the waters thereof as may then be necessary for such public use, not exceeding the aggregate quantity originally pertaining to the lands within the city. The court below, it is claimed, held to some theory of this nature, and framed these provisions in accordance therewith.

This theory is refuted by what we have already said. The ownership of the land, at common law, included all that lay within and under it. A grant of land by public authority to an individual without reservation carried with it title to all water lying therein, and vested in the grantee the absolute title to the water therein, as much so as to the earth and rocks and the trees growing thereon, subject only to the correlative rights of other landowners in such waters, under the maxim of the Civil Code that "one must so use his own rights as not to infringe upon the rights of another." Sec. 3514. The water was part of the land, and it was no more public property, or subject to public or common use, than was the land. This was true even under the Mexican law. Lux v. Haggin, 69 Cal. 331, 4 Pac. 919, 10 Pac. 674. We mention this because the land within the city of San Bernardino is a part of a Mexican grant.

The water in all these lands, therefore, is private property, and will remain private property until it is taken from the owners of the land and devoted to public use. It does not appear that this has ever been done, except in so far as the taking of waters of the basin by the plaintiff and defendants, respectively, by means of wells bored in land outside of the city, has drawn from the waters underlying lands within the city. This may have happened, but none of the owners of the land, so far as appears, have ever conveyed or transferred to any of the parties the right to take such water in that or any other manner. So far as such right has been acquired from them by prescription, it extends only to the quantity heretofore taken, and does not include the taking of an additional quantity in the future, and the dedication to public use of that which has been taken has not been made by such landowners, but by the party who has taken the water from them.

Neither the city of San Bernardino, or either of the defendants, aside from their respective rights acquired by prescription and by the estoppel against interference with an established public use under tihe doctrine stated in Barton v. Riverside W. Co., 155 Cal. 515, 101 Pac. 790, 23 L. R. A. (N. S.) 331, and Miller & Lux v. Enterprise, etc., Co., 169 Cal. 425, 147 Pac. 567, has ever taken any steps to acquire rights to take water from the basin except by acquiring tracts of land therein and boring wells in such land. The purchase of the land conferred no water right upon the buyer except the right to take water for use on the land itself. The lands acquired by San Bernardino for this purpose, and the only land in which it has bored wells for such water, all lie outside the city. Consequently the acquisition of the land conferred no title to the rights of the owners of overlying lands within the city to take water for use on their respective tracts of land therein. It is suggested that the fact that the city issued bonds to raise money with which to buy these outside lands, and install its works to take water therefrom for public use in the city, and that the electors of the city approved the bond issue by a two-thirds vote at an election held for that purpose, operated as a transfer to the city by each owner of land within the city of the right to take the water for public use which he was entitled, as such landowner, to take from the basin, and as an agreement that it might be taken from the basin by means of wells on any land outside the city. We can see no connection whatever between the act of voting and the result claimed for it. No landowner could vote away another's right. There is nothing to show how many, if any, or who, of the landowners voted. The proceedings for the election presented no such question to the voters for decision. It is evident that the proceedings and vote are utterly without significance.

Our conclusion is that the several water rights in the basin pertaining to the lands in the city as overlying lands are not by law, and have not become, in fact, subject to public use by the city, or a part of the water rights which it owns.

7. Plaintiff contends that the rights of each of the parties to take water from the basin by wells are equal. This contention is based on the fact found by the court that there always has been, and still is, sufficient water in the basin to supply the parties and all others who take said waters with all the water they have heretofore taken. From this it is argued that neither party has injured any of the others by the diversion and use of such waters, that there has been no invasion by either of any right to the use of the waters by the others, and hence, that the respective uses have not been adverse as to each other, and the statute of limitations did not begin to run so as to start the period of prescription. As authority for this proposition they quote from Anaheim, etc., Co. v. Semi-Tropic, etc., Co., 64 Cal. 192, 30 Pac. 626, the following passage:

"It is very clear that, while there was sufficient water flowing in the river to supply the wants and demands of all the parties, its use by one could not be an invasion of any right of any other; and as the court below found, as a fact, that, until within a year or two prior to the commencement of the action, there was sufficient water flowing in the river to supply

the wants and demands of all the parties, it is plain that the plaintiffs as against the owners of the Santiago Rancho have acquired no right by prescription."

They also cite to the same point Alta, etc., Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217, and Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883. In the Anaheim Case both parties were exercising their rights to use the water of the river on riparian land. In such case the use by one is not adverse to the other unless he is using more than his share, to the detriment of the other. In the Alta Company Case the remarks on the subject are obiter. The point decided was that one who trespasses on land of another, and, while so doing, cultivates the land and irrigates it from a stream on which it abuts, does not thereby acquire any right to the water apart from the land, so that, when he is compelled to yield possession to the true owner, the prior use of the water by such trespasser does not give him a right thereto which he can convey to a third person.

In Faulkner v. Rondoni, the plaintiff had acquired his water right prior to any diversion of use of the water of the stream by the defendant. The defendant had, however, diverted and used the water continuously for a period of 5 years before the beginning of the action of plaintiff to quiet his title. There was enough water in the stream for both all the time, and the use by the defendant had not in any way interfered with the use by the plaintiff. The plaintiff's use was prior in time and, of course, it could not have been divested by a subsequent use which in no way affected his enjoyment thereof. The priority of the rights of either party in such cases could not become an important question until there was an interference by one of them with the use of the other. When that occurs the principle stated in section 1414 of the Civil Code, that "as between appropriators, the one first in time is the first in right," becomes applicable. It is a principle which applies as well to ordinary prescriptive rights as to rights of appropriation under the Code. Hill v. King, 8 Cal. 338; Butte Co. v. Vaughn, 11 Cal. 153, 154, 70 Am. Dec. 769; Davis v. Gale, 32 Cal. 33, 91 Am. Dec. 554.

[7] We understand the true rule to be that, when a conflict arises between two appropriators of water, and their rights are otherwise equal, the prior appropriator will prevail so far as the conflict extends. It necessarily follows that in an action to quiet his title the prior appropriator is entitled to have his prior right declared to be superior to that of subsequent appropriators.

We do not hold that the findings show that the diversions of water by the respective parties have not interfered with the diversion and use of water by the other parties. On the contrary, the facts found indicate that the several diversions have interfered with each other. We do not take up this question, but leave the extent and effect of the interferences from the facts found, as well as the question of priorities, for the consideration of the trial court when the case is remanded for further proceedings.

[8] 8. As above indicated, the judgment appears to declare that the water to be taken by the Riverside Water Company from its wells bored in the basin cannot be used except for the irrigation of the particular lands to which it has been heretofore supplied, and must not exceed the quantity necessary to irrigate the same according to the abovementioned schedule of quantities per acre for specified crops or trees thereon. It is at least susceptible of that construction. If so intended, it is to that extent contrary to law. It has long been settled in this state with regard to water rights by appropriation that the appropriator may change the place of use thereof, or the character of the use, without affecting his right to take it, and that other persons interested in the source from which it comes have no right to object to such changes. Maeris v. Bicknell, 7 Cal. 263, 68 Am. Dec. 257; Davis v. Gale, 32 Cal. 33, 91 Am. Dec. 554; Ramelli v. Irish, 96 Cal. 217, 31 Pac. 41. It is also settled that such appropriator may change the place from whence the water is taken out of the source, provided others are not injured by such change. Ramelli v. Irish, supra; Barton v. Riverside W. Co., 155 Cal. 517, 101 Pac. 790, 23 L. R. A. (N. S.) 331.

In Barton v. Riverside, this doctrine was applied to the waters of this artesian basin. The reasons for the right to make the above changes are that, by his taking and devoting water to a beneficial use, the appropriator has acquired the right to take the quantity which he beneficially uses, as against others having no superior rights in the source, and that neither the particular place of use, the character of the use, nor the place of taking is a necessary factor in such acquisition. The change of place of taking becomes wrongful only in the event that others are injured thereby. These reasons are as well applicable to the taking of underground waters of any kind as to diversions from a surface stream, and we perceive no reason why the same rule should not apply equally to both.

9. We think it sufficiently appears from what we have already said that, with respect to the taking of water from the basin for the public uses which they respectively serve, the status of each of the parties hereto is that of an appropriator only. For that purpose neither party obtains any right to additional water by reason of its ownership of land within the basin, for the water rights arising from such ownership pertain exclu-

sively to the land, and are not devoted to public use by reason of such ownership. Whenever either party takes such water from the land and delivers it into its reservoirs, canals, or mains as a part of its water held for the public use, at that moment it becomes a mere appropriator of that water, and its rights thereto are no greater, as against the other parties, than would be the case if the water was taken out of land which it did not own.

As heretofore suggested, the court below was apparently of the opinion that the waters of this basin were by law subject to public use. Possibly in this connection it may have considered the legislative declaration on the subject in 1911, amending section 1410 of the Civil Code. The section, as amended, opens with this declaration:

"All water or the use of water within the state of California is the property of the people of the state of California."

Taken literally, this would include all water in the state privately owned, and that pertaining to lands of the United States, as well as that owned by the state. It should not require discussion or authority to demonstrate that the state cannot in this manner take private property for public use. See Palmer v. R. R. Com., 167 Cal. 175, 138 Pac. 997. The Constitution expressly forbids it. Article 1, § 14. The water that pertained to or was contained in the lands of the state was already the property of the people when this amendment was adopted. The statute was without effect on any other property.

10. We do not attempt to declare from the findings what the respective rights of the several parties are to the waters in the basin, nor what judgment should be given with regard thereto. The findings state the facts at great length, and give many details which are evidentiary in effect and which might reasonably warrant the drawing of varying inferences therefrom. They are more comparable to a bill of exceptions summarizing the evidence, as such bills should, than to findings of ultimate facts. The determination of the material and controlling facts from such a mass of evidentiary facts is more properly the work of a trial court than of an appellate court. Furthermore, our conclusions upon the points we have treated are in so many particulars opposed to the apparent views of the learned judge who made the findings and rendered the judgment that we are by no means certain that additional evidence may not be necessary for the intelligent decision of some of the questions involved in the case and presented by the facts found.

The briefs contain 1700 printed pages, and they discuss many minor points which we have not noticed. We do not consider them essential to any of the points we have decided, nor necessary for the guidance of the trial court in future proceedings. Our conclusions upon the more important questions may be summarized as follows:

[9] (a) With respect to the waters taken from the artesian basin for public use, each party stands in the character of an appropriator, and its rights therein are to be determined by the law relating to appropriators, and are not to be measured either by the law regarding riparian rights or by the law concerning the rights of the landowner in water underlying his land.

(b) In this action the court should not undertake to provide for the future apportionment of the waters of the artesian basin or for the ascertainment of a surplus or deficiency, but should confine itself to the adjudication of the existing rights and priorities of the parties to the action in the waters involved. The judgment should state the quantity of water to which each party is entitled, and should not leave such quantity indefinite or dependent on future needs, events, or conditions.

(c) The judgment should not make any declaration of the right of any party to take in the future any water to which it has no present right.

(d) The plaintiff is not substituted to nor entitled to use the water or water rights of the owners of land within its limits unless it has acquired such right directly or indirectly from such landowners, and then only for use on the particular land of such owner.

(e) The measure of a water right acquired by taking and using the water extends only to the quantity actually theretofore applied to beneficial uses, and includes no right to take additional water in the future.

The judgment is reversed, and the cause remanded, with directions to the court below to make new conclusions of law and render a new judgment on the findings, in accordance with this opinion, and, if necessary to do so, to take additional evidence relating to, and make an additional finding upon, any point involved in the case, or, if the parties agree thereto, to try the entire case anew. Neither party shall recover its costs of appeal herein.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

185 Cal. 763

In re THOMPSON'S ESTATE. (L. A. 6354.)

(Supreme Court of California. June 1, 1921. Rehearing Denied June 30, 1921.)

1. Wills ⟸293(6)—Person to whom copy of will was sent by testatrix cannot testify to contents.

Under Code Civ. Proc. § 1339, requiring the provisions of a lost or destroyed will to be proved by two credible witnesses where a testatrix sent a copy of her will to her sister stating that it was her last will, the sister could not testify to the contents of the will, but only to the hearsay declaration of the testatrix. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

2. Wills ⟸297(3) — Declarations of decedent cannot take place of witness in proving lost or destroyed will.

Under Code Civ. Proc. § 1339, providing that no will shall be proved as a lost or destroyed will unless its provisions are clearly and distinctly proved by at least two credible witnesses, declarations of the decedent cannot take the place of one of the two witnesses. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

3. Wills ⟸293(4) — Evidence of contents of revoked will admissible to show effect on earlier will though proved by only one witness.

Under Civ. Code, § 1297, providing that the revocation of a revoked will does not revive the earlier will unless such was the intention where a lost or destroyed will containing a revoking clause was revoked by cancellation or otherwise, evidence of its contents may be considered to determine its effect on an earlier will, though its contents are established by only one witness. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

4. Wills ⟸306 — Evidence held to support finding that revoking will was in existence when testatrix died.

Evidence *held* sufficient to warrant a finding that a lost or destroyed will relied on as revoking an earlier will was still in existence at the time of the decedent's death. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

5. Wills ⟸306—Contents of lost or destroyed will cannot be proved to establish revocation of earlier will except by two witnesses.

Under Code Civ. Proc. § 1339, relative to the proof of lost or destroyed wills, and notwithstanding Civ. Code, § 1297, providing that the revocation of a revoking will does not revive the first will, two witnesses are required to establish the contents of a lost or destroyed will which was unrevoked at the date of the testator's death for the purpose of showing revocation of an earlier will. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

6. Wills ⟸470—To be construed as a whole.

A will should be construed as a whole, and the intention of the testator derived from the whole instrument, and not from a single clause thereof. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

7. Wills ⟸290—That revoking clause was in lost will and effective must be proved.

For a revoking clause in a lost and unrevoked will to be effective as such, it must be established that such clause was in the will and thus an effective part of the will. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

8. Wills ⟸181—Revoking clause is part of will.

The revoking clause of a will is a part of the will and is to be treated as such, and not as a separate instrument revoking the will executed under Civ. Code, § 1292. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

9. Wills ⟸296, 312 — Proper to try validity of two alleged wills at the same time; evidence as to revoking clause in lost will admissible.

In probate proceedings it was a proper course to try the validity of two alleged wills, the latest of which had been lost or destroyed at the same time, and evidence as to the revoking clause in the lost will was admissible, but its effect on the earlier will must be determined in view of the admissibility of the latter will to probate as a will. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

10. Wills ⟸180—Revoking clause in lost will held not effective unless will effective.

Conceding that the contents of a will containing a revoking clause, though lost or destroyed and not susceptible of proof as a will by a single witness, can be established so far as it revokes former wills by one competent witness, the whole contents and purpose of the instrument must be considered in determining its effect, and where the lost will was practically identical with the first and amounted to little more than a republication, the revoking clause must be regarded as intended to be effective only on condition that the will becomes effective. (Per Sloane, J.)

Olney, Shaw, and Lawler, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Proceeding to probate the will of Augusta Thompson. From a judgment admitting the last of two alleged wills to probate, the contestant appeals. Reversed, with directions.

Rehearing denied; Shaw, Lawlor, and Olney, JJ., dissenting.

Jas. W. Bell, of Los Angeles, for appellant.

L. G. Susemihl, of Santa Monica, and Samuel J. Crawford, of Los Angeles, for respondent.

WILBUR, J. Respondent, the sister of the deceased, filed a will dated May 13, 1908, for probate. The surviving husband, the appellant, filed a contest of this will on the ground that the will had been revoked by a later will executed November 25, 1916, which will

he alleged had been destroyed without the intention of reviving the former will. Thereupon the sister filed a petition for the admission to probate of the will of 1916 as a lost or destroyed will. She also answered the contest of the will of 1908 by denying that the will of 1916 had been destroyed with the intention to revoke the same. Appellant filed no formal contest to the will of November 25, 1916, but he appeared at the time of the hearing, presented evidence, and claimed that the existence of the lost will was not established by two witnesses, and opposed its probate on that ground.

The will of 1916 appointed the respondent executrix without bonds and left all the property of the testatrix to the respondent except a bequest of $5 to the appellant, another $5 to a brother of testatrix, and one of $5 to a half-brother. The will also made certain provisions applicable only in the event that respondent predeceased her, which, because the sister survived the deceased, are immaterial. By the will of 1908 the respondent was made executrix thereof without bonds, and everything was given to the respondent except $1 bequeathed to the appellant.

At the time of the trial the respondent contended that the will of 1916 could not be proved because there were not two witnesses to prove its contents as required by section 1339, Code of Civil Procedure. Respondent offered proof of the due execution of the will of 1908, and thereupon rested. The court took the position that the second petition of respondent for the probate of the will of 1916 was in effect an amendment of the original petition for the probate of the will of 1908, and therefore announced that the will of 1908 could not be admitted to probate.

Respondent thereupon stated her position thus:

"We are claiming under the first will absolutely, if your honor please. It cannot prejudice the contestant's right for me to say that when we submitted the copy, so-called copy, of what we thought we might be able to establish in accordance with the law of a lost or destroyed will, that we believed that both witnesses to the second will were still alive, and that we could prove it under the statute that requires a lost or destroyed will to be proved by two credible witnesses. We filed that and made that similar statement to his honor Judge Rives on the hearing of this first will."

[1, 2] The court took the position that, if there was a later will, whether its terms could be proven or not, the first will was thereby revoked, and directed respondent to proceed with proof of the lost will. Respondent's counsel protested that they desired to rest with proof of the first will, and proceeded under protest to call B. G. Hurlburt, stating:

"There is only one witness we know of that could prove this will, and we will call that gentleman. That is the only witness we have any knowledge of."

This witness testified to the contents and the due execution of the will of 1916. The only other witness testifying to the contents of the will of 1916 was the respondent, who was examined on that subject by the court. To this testimony respondent's attorney objected as follows:

"I would like to object to her positive testimony that she received a copy on the ground that it is hearsay and not the best evidence."

The objection being overruled, the court elicited the testimony of the witness to the effect that respondent had received a letter at Portland, Or., in 1916, from the testatrix inclosing a copy of the will of 1916, and stating that it was her last will. The letter itself had been destroyed. The statement that the inclosed copy of a will was her last will was merely a declaration of the testatrix so that the question presented here resolves itself into this: Can a lost or destroyed will be proved by the testimony of one witness who saw the original will and by evidence of the declarations of the deceased as to its contents? The fact that the decedent accompanied her declaration by a carbon copy of the will did not place the recipient thereof in a position to testify of her own knowledge as to the contents of the lost or destroyed will, which she had never seen. Her testimony would merely establish the hearsay declaration of the deceased. In this state the statute (section 1339, Code Civ. Proc.) requires two credible witnesses, and the testimony of the declarations of the decedent cannot supply the place of one of these witnesses. This was held by the Supreme Court of the state of Washington, under a similar statute, in Estate of Needham, 70 Wash. 229, 126 Pac. 429, and, as we agree with that decision the order admitting the will of 1916 to probate must be reversed. The will of 1916 should have been denied probate.

[3] The next question to be considered is whether or not the evidence of one witness to the due execution of the will of 1916, and to its contents is sufficient to show a revocation of the will of 1908, and thus to show that the will of 1908 was not the last will of the decedent, and hence, as the will of 1916 cannot be effectively established by probate, that the decedent died intestate. If the will of 1916 had been revoked by cancellation or otherwise the evidence of one witness to the contents of the will of 1916 would be sufficient to establish that it contained a revoking clause; for section 1297, Civil Code, declares that the revocation of a revoking will does not revive the first will "unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will." No doubt can be entertained that, where the second testamentary act is

revoked, evidence of the contents of the revoked will may be considered to determine the effect of such revocation upon an earlier will still in existence.

This is not a case where a will containing a revoking clause has been destroyed animo revocandi.

[4] The trial court found that the will of 1916 was in existence at the time of the death of the testatrix and was her last will. The finding is attacked by the appellant as not supported by the evidence. This finding is sustained solely by the declaration of the deceased and by the circumstances in the case. But the evidence is sufficient. This evidence is as follows: During her last illness the testatrix frequently stated to her nurse that she had left a will and that her papers were with her attorney, B. G. Hurlburt, and confirmed this statement only a few hours before her death on December 8, 1918. She further stated she desired her sister to have everything and did not desire her husband to have anything. The respondent testified that repeatedly between the date of the execution of the will up to July, 1918, the testatrix wrote to her stating that she wanted respondent to have everything and repeatedly referred to the will as still in existence.

As we have held in the Estate of Sweetman, 195 Pac. 918, decided February, 1921, the declarations of the deceased in connection with the other testimony were sufficient to sustain the findings of the trial court that the will was in existence at the time of decedent's death.

[5] The appellant, while contending that the evidence is insufficient to probate the will of 1916 as the last will and testament of the deceased, a contention which we have sustained, also contends that the proof of one witness that it contained a revoking clause is sufficient to establish the revocation of the will of 1908 by the will of 1916, although the latter cannot be probated as her will, and thus, by the failure to prove the will of 1916 as a will, and by its proof as an effective revocation of the will of 1908, to establish her intestacy. This position requires us to construe the law as to the proof of lost and destroyed wills and to determine what is meant by this phrase in section 1339, Code of Civil Procedure:

"*No will shall be proved as a lost or destroyed will* * * * unless its provisions are clearly and distinctly *proved* by at least two credible witnesses." (Italics ours.)

To state the proposition in somewhat different terms: Can a part of a lost or destroyed will be proved by one witness, i. e., the revoking clause, when the statute expressly forbids proving a lost or destroyed will by less than two credible witnesses? Or, to state the matter in terms more directly applicable to this case: Can the revoking clause of an unrevoked, lost, or destroyed will be proved by one witness and given effect, when the statute (section 1339, Code Civ. Proc.) requires two witnesses to prove such a will? This question would seem to carry its own answer because of the axiom that the whole is the sum of its parts, unless the revoking clause in a will is in legal effect a thing apart from the will, as distinct as, and equivalent in legal effect to, a revocation by destruction, by cancellation or by an instrument executed with the formalities of a will (Civ. Code, § 1292), which, no doubt, operates eo instanti.

[6] Passing for the moment the construction of section 1297, Civil Code, as to the effect of the revocation of a will containing a revoking clause, a point to which we will recur, it is a violation of the most fundamental principle for the construction of a will to separate one clause from its context and give effect thereto regardless of the balance of the will. It is elementary that a will should be construed as a whole, and that the intention of the testator is to be derived from the whole instrument, and not from a single clause thereof.

In dealing with a revoking clause of a revoked will, we are dealing with a clause which has itself been revoked except as saved by the express statute on that particular subject (section 1297, Civ. Code), but in dealing with the revoking clause of an unrevoked will it has force because it is unrevoked, and a part of the last will of the deceased.

We will examine some of the authorities dealing with the subject of the revoking clause in a will with special reference to its provability, but before doing so it is well to remember that frequently the revoking clause of a will is the only clause capable of proof because it is the only portion clearly recollected by witnesses, and that some of the cases deal with such a situation. It is well to remember also that at common law and in most states there is no arbitrary rule with reference to the measure of proof required to establish a lost will, and hence the measure of proof for a revoking clause of such a will would be the same whether offered for probate or to defeat a prior will, while the contention here is that the will of 1916 is sufficiently proved for the latter, but not for the former, purpose. It is evident that general statements in opinions dealing with the subject, or even rules laid down with reference to the effect of a revoking clause, ought not to be considered determinative of the matter under our peculiar statute where an arbitrary rule exists with reference to lost and destroyed wills.

[7] In order that the revoking clause in this lost and unrevoked will should be effective as such, it was necessary to establish that such clause was in her last will, and thus an effective part of her last will. A will is usually "proved" by being offered for probate.

Can its terms be "proved" otherwise? As was said in the Estate of Patterson, 155 Cal. 626, 636, 102 Pac. 941, 944, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625:

"It has been held by this court that a will cannot be given in evidence as the foundation of a right or title, unless it has been duly probated. McDaniel v. Pattison, 98 Cal. 86, 27 Pac. 651, 32 Pac. 805; Castro v. Richardson, 18 Cal. 480."

In that case the court was discussing the result of the destruction of a last will and testament without the intention of revoking the same, and was considering the effect of the amendment of 1907 to section 1339, Code of Civil Procedure (Stats. 1907, p. 122), passed after the death of the testatrix. It was held that the will could be probated. In that connection it is said:

"Because of its destruction in her lifetime the probate court, under the law as it existed at her death, could not allow it to be probated, because there could be no legal proof of it. * * * If a will had been duly executed and had not been destroyed, but was filed for probate, and could not be probated because of lack of proof of its execution, the heirs would take the estate, and it would be deemed to vest in them at the death of the testatrix, although the right thereto could not be positively known until it was demonstrated by the failure of proof upon the trial of the petition for probate. The statute provides what evidence may be taken in proof of a will upon such a proceeding."

Where a will has been refused probate because of undue influence, the revoking clause cannot be subsequently proved to show revocation of a prior will. Schouler on Wills (5th Ed.) §§ 418, 419; Laughton v. Atkins, 18 Mass. (1 Pick.) 535; Rudy v. Ulrich, 69 Pa. 177, 8 Am. Rep. 238; Lyon v. Dada, 127 Mich. 395, 86 N. W. 946. This is true even if it is shown in the latter case that the revoking clause was not obtained by undue influence, as the decision rejecting it for probate is conclusive between the parties. The effect of these decisions is that, where a will has been denied probate and the same parties are subsequently litigating the validity of a prior will, the validity of the revoking clause cannot again be relitigated. Applied to the facts of this case, these decisions would lead to the conclusion that, where a will had been offered for probate as a lost or destroyed will and had been denied probate, because of failure of proof, the adjudication between the parties as to the provability of the will and the validity of the revoking clause cannot subsequently be reopened in a case in which the revoking clause alone is put forward for the purpose of showing that a previous will has been revoked. If it is true that the denial of probate of the second will because of the lack of proof by two credible witnesses forecloses the question as to the provability of the revoking clause for the purpose of opposition to the probate of the first will, then it would seem to follow that the will of 1908 in this case, having been duly proven, should be probated notwithstanding the fact that it has been shown by one witness that there was a revoking clause in the will of 1916, where, as here, the appropriate order is one denying the probate of the will of 1916 for lack of proof. We do not cite these decisions as decisive of the question here involved, but they point to the conclusion indicated.

[8] These cases at least make it clear that the revoking clause of a will is a part of the will, and is to be treated as such, and not as a separate instrument having the equivalent effect of an instrument executed with all the formalities required in the case of a will. Section 1292, Civ. Code. This will be made clearer by excerpts from the above opinions. In the case of Laughton v. Atkins, supra, it is said:

"When the question was first proposed, it struck us all as novel and singular that an instrument once offered to be proved as a will, and disallowed as such by the court of final jurisdiction upon the subject, should be imagined to be capable of being used afterwards for any purpose whatever, the effect of such a decree seeming to be to render the instrument entirely null and void; but the arguments we have heard and the authorities cited have satisfied us that the case was not so clear as we at first believed it, though upon a thorough examination of the arguments and authorities we are convinced our first impression was well founded. * * *"

After quoting the statutory law of Massachusetts, the court proceeded as follows:

"An instrument, then, to have the effect of a revocation of a will which devises real estate before made, must be in itself either a will or codicil, or some other writing of the devisor, signed in the presence of three or more witnesses. If the instrument propounded as a revocation be in form a will, it must be perfect as such, and be subscribed and attested as is required by the statute. An instrument intended to be a will, but failing of its effect as such on account of some imperfection in its structure or for want of due execution, cannot be set up for the purpose of revoking a former will, for this substantial reason, that it cannot be known that the testator intended to revoke his will except for the purpose of substituting the other, and that it would be making the testator die without a will, though it was clearly his design not to do so. This principle has been settled by many decisions in the English courts of law and equity; their statute of frauds in relation to this subject being similar to ours. * * *

"It is true the instrument is perfect in all its parts, and is accompanied with all the formalities prescribed by the statute; but it comes before us connected with a decree declaring that it is null and void in itself, so that it never had any legal force or being as a will. How, then,

can it be treated as such for the important purpose of revoking a former will? If the principle deduced from the cases cited is true, that all we can see of a design to revoke is indicative of a purpose to substitute this for the one revoked, then to give effect to the revocation, and to deny any effect to the dispositions of the will, would be to thwart the intentions of the testatrix. How can we know from the will itself that she would not have preferred that the first will should stand, rather than that the heirs at law should enjoy the estate? It is obvious she meant no good to them in either of the wills."

The Pennsylvania case above cited (Rudy v. Ulrich, supra) also emphasizes the injustice of giving effect to the revoking clause of a will when the balance of the will has been denied probate, and distinguishes, in that respect, a will containing an express revocation from an instrument of revocation, executed with the formalities of a will. The statute of Pennsylvania on the subject of revocation is similar to our own. Section 1292, Civ. Code. The Supreme Court of Pennsylvania in that case states its reasons for its conclusion that the revoking clause cannot be given effect separate from the will containing it, in part as follows:

"Act Assembly April 8, 1833, §§ 13, 14 (Pamph. L. 250), provides in effect that no will in writing shall be repealed otherwise than by some other will or codicil in writing, or by other writing declaring such repeal, executed and proved in the same manner as is provided in the case of an original will. There are two modes of revocation here pointed out, besides cancellation, obliteration, etc.: First, another subsequent will or codicil duly executed and proved; and, second, some other writing declaring the revocation. It is implied that this other writing is not a will; that is, an act of disposition or declaration of what a man intends as to his property after his death. There may be a separate written revocation, not intended to take effect as a will or codicil, which need not therefore be propounded to the register for probate. This is a very reasonable provision. A man may be absent from home at a distance from the place where his will is deposited, or it may be lost or mislaid, so that he cannot have access to it to cancel or destroy it. He may wish, however, simply to abrogate it without making another will, and so die intestate. In such case he may execute a paper declaring his intention, which, provided it is signed by him and proved by two witnesses, will be effectual. No probate of it in the register's office is necessary. No letters testamentary or of administration cum testamento annexo are required to be issued upon it. *But the case is different when the revocation is contained in what purports to be a will disposing of property. The words of the act point to this: 'other writing,' that is, writing other than a will. A subsequent will without a revoking clause as effectually repeals a prior will as with one. No doubt, as stated by the learned judge below, a will may be void in part and otherwise valid, or it may be wholly invalid. One bequest or devise may be good, whilst other parts may be avoided. But then it stands as a will for those parts which are good.* [Italics ours.] * * * If good as a will at all by the act of 1833, it revoked the former will. This is the technical difficulty. The substantial one is still more serious. It cannot be known with any degree of assurance, sufficient to justify a legal judgment, that where there is a clause of revocation in a will making a certain disposition of property, that the testator really intended to revoke a prior will making a different disposition, except for the purpose of substituting in place thereof that contained in the second will. It would be making the testator die without any will at all, when it was clearly his intention, as drawn from his executing a paper purporting to be a will, not to do so. * * * We know, however, that express clauses of revocation are inserted in most wills as a mere matter of form, the mere expression of which is inherently implied, as are many other parts, such as the direction that all just debts and funeral expenses shall be first paid and discharged. As evincing an intention on the part of John Yerkes to die intestate unless the will of 1869 went into effect, that paper, executed as it has been found under undue influence, the very act of execution not the free exercise of his own volition, was no ground upon which any legal judgment could be rested. The parol evidence of what took place at the time of the execution of the paper of 1869 did not help the case of the defendants. It had no tendency to show that unless that paper stood he wished only his lawful issue to have his property, according to the intestate laws, leaving his unfortunate illegitimate child wholly unprovided for. All that he said was that he wanted to make another will. If the execution of that paper was induced by the undue influence of Catherine Rudy, there is some difficulty in comprehending why this declaration made in her presence, and with the same view, is not within the same objection. There was no evidence to submit to the jury, either in the paper itself or any declaration made by him at the time, that John Yerkes had any other object in revoking the will of 1865 than to substitute the disposition made by the will of 1869 for it. He had no intention to die intestate, but the contrary. The case of Barksdale v. Hopkins, 23 Georgia, 332, relied on by the counsel for the defendants, is not to the point, and does not sustain his contention. It holds merely that, if a will is before a probate court for probate, and a second will is pleaded as a revocation of the first, the probate court may take notice of the second, although it may be that the second is one which has not been admitted to probate, and one which is not offering itself for probate; consequently the probate court may hear proof touching the execution of the second. That is a proposition, it seems, too clear to be doubted, but it has no application to the present case."

In Stickney v. Hammond, 138 Mass. 116, a testator had left two instruments of different dates, each purporting to be his last will and each containing a clause expressly revoking all wills theretofore made. The two instruments were alike, except that the later one contained a clause exempting the executor from giving sureties on his probate bond. The first will was dated June 14,

1877, and the second September 8, 1877. The first will was offered for probate, and the second will was offered in evidence for the purpose of showing its revocation. The September will had been finally refused probate because of the neglect of the parties interested therein to defend an appeal taken from the order probating the will. It was conceded that the September will could not be proved as a will because of such neglect and consequent denial of probate. The main distinction between the Massachusetts case and the case at bar is that in the Massachusetts case the parties interested in the second will failed to prove its contents, and in the case at bar the statute expressly prohibits the effective establishment of the contents of the second will. In dealing with this question the court made the following statement:

"It has heretofore been held that an instrument purporting to be a will, with a clause of revocation of former wills, *cannot be offered in evidence as a revocation only, without a probate thereof.* [Italics ours.] Reid v. Borland, 14 Mass. 208; Laughton v. Atkins, 1 Pick. 535; Wallis v. Wallis, 114 Mass. 510. And for this substantial reason, that it must be inferred that the testator intended to revoke former wills for the purpose of giving effect to the new disposition of his property which he had substituted for that in his former wills, and if, for want of proper execution of the subsequent will, its defective construction, or other sufficient cause, proper effect cannot be given to it, we are not to suppose that he designed to die intestate.

"We can find nothing to distinguish the case at bar from those heretofore decided, and the ground upon which they rest appears to us satisfactory. Indeed, the facts as they here appear illustrate the soundness of the rule. The testator had purported only to add a codicil to his will made in June, 1877, and then in existence, exempting the executrix therein named from giving sureties on her bond. The scrivener to whom he applied for this purpose preferred to write out a new will, making the change suggested, and no other. He accordingly did so, and it was executed by the testator on September 17, 1877. The testator manifestly had no intention to revoke the will of June, 1877, *except as he at the same time substituted therefor the instrument of later date, which differed from it only in a purely secondary matter.* [Italics ours.]

The distinction between an instrument of revocation and an express revocation in a will pointed out in the case last cited is thus stated in Redfield on the Law of Wills, p. 328:

"It is not important that a revoking will should make any disposition of the property bequeathed in the former will. It has been held in some of the American courts that a subsequent will containing a clause of revocation, executed with due solemnity for the purpose of revoking an existing will, operates proprio vigore and instantaneously as a revocation, and consequently that the destruction of the second will did not revive the former one. This doctrine has an air of plausibility from the fact that an instrument of revocation alone would unquestionably have this effect, so long as it was allowed to remain operative. But that would show a present purpose of becoming intestate, carried into effect as far as practicable before death. But the making of a will with a revocatory clause is very different. It is but substituting one will for another. And the revocatory clause is made dependent, in some sense, upon the subsequent will going into operation. And there is, ordinarily, no purpose of having the revocatory clause operate, except upon that condition. The whole instrument is therefore ambulatory, and, when destroyed, it all ceases to have any operation. And the same is true of the destruction of a will merely revocatory of former wills. By such destruction the former wills, if in existence, become revived."

It is true that the author is contending for the rule enforced in the common-law courts of England, rather than that enforced in its ecclesiastical courts, a matter still undecided in many common-law states at the time Redfield wrote his treatise, but the contention of the author is worthy of consideration in determining the proper construction of our statute, requiring two witnesses to prove a lost will, notwithstanding section 1297, Civil Code, more nearly conforms to the rule of the ecclesiastical courts, a matter that will be discussed later.

To recur to the question under discussion: The question is, as to the measure of proof of a lost document: What did the Legislature mean when it enacted that a lost or destroyed will could not be proved except where two witnesses testified to its contents? The question is: Did the Legislature by that enactment intend that a part of the will could be enforced without being proved, and therefore without having two witnesses to establish its contents? It seems clear that the Legislature had no intention of authorizing a part of a will to be established by one witness when it declared that two were essential to "prove" the will, where the whole will is provable by one witness as definitely as the part is proved. When the second will is considered in this case, it is considered for the purpose of defeating the probate of another will, and thus to establish a right, namely, the right of an heir to succeed to the property, and for this purpose probate is usually required.

[9] The proper course under our practice was to try the matter of the validity of the two wills at the same time. We do not consider that the evidence as to the revoking clause was inadmissible on such hearing. The reasons given in Rudy v. Ulrich, supra, would seem conclusive as to its admissibility upon such a cross contest, but the effect of the evidence when admitted upon the will must be determined in view of its admissibility to probate, as a will. That it has no

validity separate and apart from the will of which it is a part seems clear from the foregoing decisions; consequently we think the trend of our decisions as well as of those above cited is that the effect of the will is entirely dependent upon its provability in probate, and that the usual and proper course is to first probate a will before it can be considered as effective, and, if not so first probated, that the same measure of proof should be required as upon probate.

If the revoking clause of a will stands upon the same basis as the balance of the will, there could scarcely be room for doubt as to the foregoing proposition, but it is insisted that section 1297, Civil Code, declaring the result of the revocation of a revoking will, in effect provides that the revoking clause operates instantly upon execution of the will containing it, and that for that reason its existence can be proved by any competent evidence, thereby establishing the fact that the prior will was revoked as of the date of the revoking will. This view finds support in the department opinion in Re Lones, 108 Cal. 688, 690, 41 Pac. 771, 772, where it is said:

"The mere execution of a subsequent revocatory will ends the first will, and such will is not revived by the revocation of the last will unless it is revived by the terms of such revocation. What sort of a revocation it must be which can by its terms revive a prior will is shown by the first subdivision of section 1292 of the Civil Code."

As the view expressed in Re Lones, supra, is entertained by three of my Associates, it is evident that the matter is worthy of serious consideration, and to that point we will now direct our attention.

The point decided in Re Lones was that the prior will was not revived under the circumstances of that case where the parties relied upon circumstances to show an intent to revive the previous will. The point is decided in these words:

"By no act or manifestation of intent, in writing or otherwise, not executed with the formalities with which a will should be executed, would the will of 1856 have been revived upon the cancellation of the will of 1885."

The reference to subdivision 1 of section 1292 in the quotation above also shows the same conclusion. That subdivision is as follows (section 1292):

"Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

"1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator. * * * "

The statement of the court that the will operates instantly to revoke the prior will is obiter dicta, although true in legal effect in every case except in the case of a lost or destroyed will. In other words, if the will remains effective and is probated, the former will is revoked thereby. On the other hand, if the will is revoked, the revoking clause is still effective. Hence it is not altogether inaccurate to say that the revoking clause operates eo instanti under section 1297, Civil Code.

A consideration of section 1297, Civil Code, requires some attention to the history of that legislation, and this involves the development of the English law. In the ecclesiastical courts it was held that the destruction of the revoking will animo revocandi did not re-establish the first will unless such was the intention of the testator, while the courts of common law held that the revocation of the latter will of itself revived the prior will. See discussion in Schouler on Wills (5th Ed.) § 413; also full discussion in Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322; Randall v. Beatty, 31 N. J. Eq. 643; Blackett v. Ziegler, 153 Iowa, 344, 133 N. W. 901, Ann. Cas. 1913E, 115, 37 L. R. A. (N. S.) 291. Jarman in his work on Wills (English edition) states that up to the time of the enactment of the statute of wills the effect of the revocation of the revoking will was to re-establish the will revoked. 1 Jarman on Wills, 192. In England this rule was changed by section 22 of the statutes of wills, enacted in 1837. 1 Jarman on Wills, 192; Schouler on Wills (5th Ed.) § 413; Pickens v. Davis, supra. That section is as follows:

"Sec. 22. And be it further enacted that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown." St. 7, Wm. IV & 1 Vict. c. 26, § 22, quoted in full in Schouler on Wills, supra.

Similar laws have been enacted in New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas, Virginia. Pickens v. Davis, supra; Am. Stat. Law, Stimson, §§ 2673, 2679, p. 360.

The Legislature of this state in 1850 enacted that the common law of England should control in all matters where not repugnant to our statute law and constitutional law. Stats. 1850, p. 219. Therefore, in the absence of any statutory provision in regard to the effect of the revocation of a revoking will, we would be involved in the same confusion that existed in the English courts, prior to the statute of wills, and the additional difficulty arising from the fact that no such distinctions as that between the ecclesi-

astical and common-law courts of England existed in this state. This confused state of the English law was carried into some of our states, and was duly settled in Iowa as late as 1911, where that court adopted the view of the ecclesiastical courts of England, and held that the effect of the revocation of a subsequent will containing a revoking clause was a question of the intent of the testator "to be gathered from admissible parol testimony." The question was also an open one in Massachusetts until 1883, when it was settled in Pickens v. Davis by adopting the rule in the English ecclesiastical courts. Pickens v. Davis, 134 Mass. 252, 253, 256, 45 Am. Rep. 322. See, also Aldrich v. Aldrich, 215 Mass. 164, 102 N. E. 487, Ann. Cas. 1914C, 906.

It was therefore expedient that the same Legislature that adopted the common law of England as a basis of our jurisprudence in enacting our statute of wills should enact a provision similar to the English statute of wills. Section 22, supra. This was done by section 11 of the act of 1850 (Stats. 1850, p. 178), since codified as section 1297, Civil Code. It is thus apparent that the reason for enacting section 1297, Civil Code, was to settle a question which was in doubt at the common law and which had been settled in England by the statute of wills in 1837. The purpose of this legislation was to determine the effect of a revocation of a revoking will. The statute does not in terms provide that the revoking clause of a will is different from the balance of a will in that it operates eo instanti. Of course, it could be held as a matter of construction that the effect of this legislation was to make the revoking clause operative at once. This, however, is entirely a matter of construction of the statute and is of no importance where no question as to the method of proving the revoking clause is involved, as already pointed out.

It should be observed, however, that the question of the method of establishing the fact that the second will contained a revoking clause is not involved in this legislation or in the decisions rendered under the common law, for the reason that both under the statute of wills and under the common law the contents of a lost or destroyed will could be proved in the same manner that any fact could be proved, and therefore no question could arise as to whether or not a revoking clause could be proved and given effect as such when the balance of the will could not be proved because of a statutory rule declaring that two witnesses are essential to the probate of a lost or destroyed will. However, the tendency of the English courts was to hold that the whole will must be proved; otherwise the part proven could not be given effect. That rule has been followed by some of the American courts, but the general rule is to the contrary, at least so it was stated in Thornton on Lost Wills, §§ 110, 111. Estate of Patterson, 155 Cal. 626, 102 Pac. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, supra.

The question we have to consider in the case at bar is the effect of a statute passed after the statute of wills and first enacted in 1851, providing that a lost will could not be established except by the testimony of two credible witnesses (Stats. 1851, p. 452, § 38) and the codification of that statute enacted in 1872 (Code Civ. Proc. § 1339).

Is it unreasonable in this condition of the law to say that, when the Legislature declared the will could not be proved except upon the testimony of two witnesses, the rule applied to every part of the will, when it is sought to make the same operative?

Granting for the moment that the revoking clause operates instantaneously to revoke the previous will, the question still remains: How are we going to establish that the will contained such a clause, by one or by two witnesses? So far as we have discovered, there is no case arising under a statute similar to ours, holding that, where the question of revocation is in dispute, the revoking clause of an unrevoked, lost, or destroyed will can be proved by less than two witnesses.

The statute in relation to the proof of a lost or destroyed will (section 1339, Code Civ. Proc.) should be construed with reference to its purpose and object. The purpose of requiring the proof of such a will by two witnesses is to prevent the fraudulent proof of a purported, but really nonexistent, will by the testimony of only one witness, on the theory that there is less likelihood of two witnesses committing perjury than one. But this policy applies with almost equal force to the revoking clause, which, if established, will as effectively defeat the intention of the testator as would a fraudulent will. To say that you can establish one part of a will for any purpose by evidence which is incompetent to establish the balance of the will works a manifest departure from the intention of the deceased in every instance where the question arises. This is shown by the case at bar. If we examine the whole of the subsequent will, it is manifest that the testatrix never intended to revoke the first will. What she really intended to do was to make a few slight changes therein, and yet, if we act under the rule contended for by the appellant, we must necessarily hold that the property of the decedent goes to her husband, in violation of her will twice expressed with all the formality provided by law.

Question at issue here not involved in English cases:

As already stated, at common law or under the English statute of wills the question involved here as to the amount of proof required to establish the revoking clause of a

lost and unrevoked will could not arise. The text-books on English probate law make this plain. In Theobald on Wills, pp. 51, 52, it is stated that the contents of a lost will may be established by secondary evidence, including the declarations of the deceased. The contents of such will may be established by a single witness, and, "where it is impossible to ascertain the whole contents of the will, effect will be given to such portions as can be ascertained, if the court is satisfied that they substantially represent the intention of the testator." That author also states the rule with reference to a lost will as follows:

"A subsequent will is no revocation of a former one if the contents of the later will are unknown, or if, though it is known that the later will differed from the former one, it is unknown in what respect it differed"—citing cases; Theobald on Wills, p. 45.

In Powles & Oakley on Probate, another English text-book (page 120), it is said:

"The contents of a lost will may be proved by a single witness, even though interested, whose veracity and competency are unimpeached. When the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved."

From the foregoing it is clear that the decisions of the English courts prior to the statute of wills are not authority upon the point involved here, and that the decisions subsequent to that statute cannot involve the question as to the proper measure of proof.

Effect of section 1297, Civil Code:

We conclude that it was foreign to the scope and purpose of section 1297, Civil Code, supra, to determine the effect of an unrevoked revoking clause of a will, and that whatever inferences are to be drawn therefrom with reference to the nonambulatory character of the revoking clause cannot overcome the more direct declarations of section 1339, Code of Civil Procedure, supra, as to the quantum of proof for a lost or destroyed will.

Further as to measure of proof:

A late case in Massachusetts (Giles v. Giles, 204 Mass. 383, 90 N. E. 595 [1909]), is worthy of consideration in connection with the subject of the effect of a revoking clause in a lost will. That court, it will be remembered, adopted the view of the English ecclesiastical courts as to the effect of a revoking clause a rule similar to our section 1297, Civil Code. Pickens v. Davis, supra. In Giles v. Giles, supra, the court considered the purpose of section 8, supra, Revised Laws, c. 135, providing for the method of revoking wills, which is similar to our section 1292, Civil Code. The question involved in the case is thus stated therein:

"The third issue was as follows: 'Was said instrument revoked by the said Charles E. Giles subsequently to the date, execution, and publication thereof by the making, execution, and publication of another will which has been lost or destroyed, and its contents cannot be proved so that it can be propounded for probate. * * * The purpose of the statute [section 8, supra] is to prevent the revocation of a will by a writing, *without a strong proof of the execution and revocatory character of the writing as is required to establish a will.*" [Italics ours.]

The former decisions of the Supreme Court of that state on the subject are therein reviewed as follows:

"It is the law of this commonwealth that, 'when an instrument of revocation is in existence and capable of being propounded for probate, *its validity should be tried by a direct proceeding instituted for the purpose in the probate court.* Laughton v. Atkins, 1 Pick. 535.' Wallis v. Wallis, 114 Mass. 510. If such an instrument has been 'lost or destroyed, it cannot be admitted to probate without clear and satisfactory proof of its whole contents.' Davis v. Sigourney, 8 Met. 487. It was decided in Wallis v. Wallis, ubi supra, that, 'if it can be proved that a later will was duly executed, attested, and subscribed, and that it contained a clause expressly revoking all former wills, but evidence of the rest of its contents cannot be obtained, it is nevertheless a good revocation.' But Chief Justice Gray added: 'And it can be made available only by allowing it to be set up in opposition to the probate of the earlier will, in accordance with the practice established in the English ecclesiastical courts before the Declaration of Independence, and adopted by the courts exercising similar jurisdiction in New York and New Jersey.' Helyer v. Helyer, 1 Lee, 472; Nelson v. McGiffert, 3 Barb. Ch. 158, 164; Day v. Day, 2 Green Ch. 549. *This means that proof of its execution is to be made in the same way as if it were to be admitted to probate as a will.* Indeed, under our statute it takes effect in the same way and under the same requirements as to execution as a will that directly disposes of property. * * *

"We are of opinion that, under the R. L. C. 135, § 8, to show a revocation of a will by a writing, the proof that there is a 'writing, signed, attested, and subscribed in the same manner as a will,' *must be of the same kind and quality as would be required to establish the writing as a will,* except that proof of its contents, beyond the fact that they are revocatory, need not be given. We think it plain that, apart from the statute, proof by the declarations of the testator would not be competent." (Italics ours.)

It is true that in the foregoing decision the question of whether or not the contents of a revoking document must be established by two witnesses was neither considered nor decided, as it was not involved under the Massachusetts law. The language of the court and the general tenor and effect of the decision would point to the conclusion that under the Massachusetts statute that court would require the proof of the revoking clause of a lost will to be established by two witnesses if such proof was essential under their law to establish such a will for probate as is required in this state.

Does the particular will revoke the former will when considered as an entirety?

If we assume that a subsequent will may be considered as a revoking instrument, and therefore proved by one witness, it would be unreasonable to consider the revoking clause alone in determining the effect of the second will as an instrument of revocation. Such a construction would be opposed not only to the rule for the construction of wills, but of all other writings, which are to be construed as a whole to determine their legal effect. It is true that the authorities draw a distinction between a will which operated to revoke a former will because inconsistent therewith and a will that contains a revoking clause. This is pointed out in Blackett v. Ziegler, supra. That case holds that the latter operates eo instanti, and that the former only operates in case the will is in effect at the time of death. The court quotes with approval the following from Page on Wills, § 273:

"In the United States, in the absence of a statute on this subject, the decisions are by no means uniform. The better line of authority made a distinction between the cases where the later will contained an express revocation clause, and where it was merely inconsistent with the earlier will. 'There seems to have been material distinction, and on good ground, between the state of a former will after a second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it. In the first case the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent, and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have the effect to do away with its predecessor. Being cut off before having its disposition of property awakened into life, it could have no affirmative operation through its dispositions upon the estate.' Where such distinction is recognized, the destruction of a later will inconsistent with an earlier will, but containing no clause of express revocation, revives the first will. Where the second will contains a clause of revocation, it is held in many jurisdictions in the United States, in accordance with the distinction already given, that the destruction of the second will does not revive the first will."

In California, however, this distinction between a revocation by implication and an express revocation cannot well be drawn, for section 1296 of our Civil Code expressly provides that the will is revoked by a subsequent will containing provisions inconsistent with the previous will as well as by a will containing an express clause of revocation, and section 1297 declares the effect of the destruction of the revoking will. If the execution of an inconsistent will operates as a revocation as well as and with equal force as a will containing an express revoking clause, as seems to be declared by section 1296, it would seem to follow, if we are to adopt the view that a lost revoking will may be proved as such by one witness, that the whole of an inconsistent lost will, containing no revoking clause, could be proven by one witness to establish a revocation of an earlier will. If this be true, with equal propriety the whole will can be proven in connection with and in explanation of an express revoking clause, and thus the court having the whole will before it would be able to say in the case at bar that the second will, taken as a whole, was really a codicil to the first, confirming its bequest, and devise to the sister. We do not hold that this can be done, but we are inclined to agree with Mr. Justice SLOANE that the revoking clause in the second will should be considered as a conditional revocation; that is, that the revocation is conditional upon the whole will being effective, and for that reason cannot be given effect unless the balance of the will is also given effect.

The order admitting the will of November 25, 1916, to probate is reversed, and the trial court is directed to admit the will of May 13, 1908, to probate upon the uncontradicted testimony of its due execution already in evidence; each party to pay its own costs on appeal.

We concur: ANGELLOTTI, C. J.; LENNON, J.

SLOANE, J. I concur in the conclusion reached by Justice WILBUR that there is insufficient proof of the revocation of the first will.

I am not satisfied, however, that an instrument purporting to be a subsequent will and containing apt language showing a present revocation of former wills may not be offered in evidence as independent proof of such revocation, and, when lost or destroyed, its terms of revocation be proved by a single competent witness. But I think that such an instrument, executed for the concurrent purposes of creating a new will and revoking an old one, is subject to a different construction as to its revoking clause than obtains in the interpretation of an instrument executed solely to revoke a former will.

It is held by many authorities, a number of which are cited in Justice WILBUR'S opinion, that where a testator couples the revocation of former wills with the publication of a new one, he declares his intention not to die intestate, and there is a strong implication that he only intends the act of revocation to take effect if the new will becomes operative; and it has therefore been frequently held that it is only after the subsequent will has been admitted to probate that it can be used as evidence of revocation

of former wills. Stickney v. Hammond, 138 Mass. 116; Peck's Appeal, 50 Conn. 562, 47 Am. Rep. 685; Reid v. Borland, 14 Mass. 208; Laughton v. Atkins, 1 Pick. (Mass.) 535; Wallis v. Wallis, 114 Mass. 510.

[10] But, conceding that the contents of such revoking will, though lost or destroyed, and not susceptible of proof as a will by a single witness, can be established as to a revocation of former wills by one competent witness, the whole contents and purpose of the instrument must be considered in determining whether it effects such revocation.

In the present instance Mrs. Thompson's second will was practically identical with the first in its disposition of her estate, and amounted to little more than a republication of the earlier will. It did contain express words of revocation of former wills, but it would be a very unjust and unreasonable construction of these words of revocation to hold that they were intended, in the event that this second will should fail of admission to probate, to defeat her twice-declared intention that substantially all her property should go to her sister.

In Wilbourn v. Shell, 59 Miss. 205, 42 Am. Rep. 363, the testator, in order to correct the spelling in his holographic will already executed, had it copied and attempted to execute the copy as a will, and destroyed the original. The court says:

"From a consideration of all the facts in evidence, we are satisfied that the testator destroyed his holographic will, under the belief that the copy thereof executed by him was a valid will, and not with the intention of dying intestate as to his lands. * * * Being inefficient because of the want of attestation, a revocation of the prior will, made by the testator under a belief in its validity, is conditional, and not absolute, and, the condition having failed, the original is in law still the existing will of the testator, and is entitled to probate."

Redfield on Evidence states the doctrine to similar effect:

"It is only where a testator revokes a former will, upon the supposition that he has executed a subsequent valid will, which proves invalid, that the act of revocation is held incomplete." 1 Redf. on Wills, *308.

"Where the testator destroyed his will, believing it had already been revoked by a later will, which proved to be invalid, and there was no other evidence of his intent except his declaration made at the time that it was no use to keep it, as he had another, it was held the will was not revoked." Redf. on Wills, *330.

In Stickney v. Hammond, supra, the court says:

"The testator manifestly had no intention to revoke the will of June, 1877, except as he at the same time substituted therefor the instrument of later date which differed from it only in a purely secondary matter."

So here Mrs. Thompson undoubtedly had no purpose or intent to destroy the testamentary effect of her former will except on the condition that the later will would become effective. Therefore, whether the evidence as to the contents of this second will is excluded or admitted, there is insufficient proof that the first will was revoked.

If this conclusion is sound, as the majority of the Justices concede, I see no need for this court to go further in its ruling on this appeal. The learned and persuasive arguments of the conflicting opinions filed herein but emphasize the intricacies of the subject and lead me to adopt the prudent course suggested in the quaint text of Swinburne, in his work on Wills, who, three centuries ago, found himself in deep water in trying to reconcile the accumulated learning of that day on this subject. On page 977 of the seventh edition of his work he is quoted as saying:

"Surely this question, especially concerning the manner of revocation to be made in the second testament, is very difficult, and such as in the answering whereof the writers do fight among themselves mightily and do contradict one another very strongly, so that the victory is very doubtful, and very hard it is to know whither opinion is truer, or more commonly received. Others labouring to reconcile these contradictions and to pacify these contentions have waded so for fine and dainty distinctions that they seem to swim up and down, and float hither and thither, I know not whither, in a deep and bottomless sea of intricate and confused divisions; so that if a man would adventure to follow them to the End of their Voyage, he might well doubt whether ever he should obtain any haven or safe landing. Wherefore for mine own part I thought to wade no farther from the shore than I could find fast footing, and where I might be within the reader's reach."

OLNEY, J. I dissent. The leading opinion holds that, because under our statute two witnesses are required to establish the contents of a lost or destroyed will for the purpose of probating it so that it may stand as the testator's last will effectively disposing of his property, two witnesses are likewise required to prove that it contained a clause revoking former wills, when it is sought, not to probate the instrument, but merely to show the revocation of a former will made by it. This position can be justified only upon the theory that a probate of the instrument is necessary in order that the clause of revocation contained in it be operative, since the Code section requiring two witnesses to prove the contents of a lost instrument applies only to the probate of a will. But that the probate of an instrument of revocation is not necessary appears plainly from our Code. Section 1292, Civil Code, provides in terms that a will may be revoked by any instrument suitably executed, whether it be a will or not, and manifestly probate cannot be

required of an instrument that is not a will. The section reads:

"Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

"1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator. * * *"

It is in fact conceded that, if the instrument of revocation be not a will, the Code section requiring two witnesses for proof of the contents of a lost will can have no application, but it is said that this is not true when the lost instrument is a will. But why should there be any difference? It is not sought in either case to prove the instrument as a will, but merely as a revocation, a very different thing, and the effect and operation of the instrument as being a revocation is the same whether it be a will or not.

There would be ground for making a difference if the effect and operation of a revocation contained in a will were dependent upon the will finally becoming effective and operative as the testator's last valid will. There is but one method of establishing an instrument as a decedent's last valid and operative will, and that is the probating of it. If, therefore, the operation of a clause of revocation contained in a will were dependent upon the instrument appearing at the testator's death to be his last will, its probate would be necessary to show the revocation worked by it. But it is not the law of this state, or of the other states that have adopted the rule of the ecclesiastical courts, that the operation of a clause of revocation in a will is dependent upon the instrument continuing until the testator's death as his valid last will, unsuperseded and unrevoked. Section 1297, Civil Code, provides just the contrary. It reads:

"If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation, the first will is duly republished."

If the revocation of one will contained in a second is still effective, although the second will is in turn revoked, such revocation is certainly not dependent on the second will appearing to be the last will of the testator. Right here is where fundamentally, as I see it, the leading opinion is wrong. It takes the position, in spite of the Code sections just quoted, that a revocatory clause in a will is ambulatory in effect like the disposing clauses of a will, and is not effective instantaneously with execution. Thus it is said:

"In order that the revoking clause in this lost and unrevoked will should be effective as such, it was necessary to establish that such clause was in her last will, and thus an effective part of her last will."

And again:

"If the revoking clause of a will stands upon the same basis as the balance of the will, there could scarcely be room for doubt as to the foregoing proposition, but it is insisted that section 1297, Civil Code, declaring the result of the revocation of a revoking will, in effect provides that the revoking clause operates instantly upon the execution of the will containing it, and that for that reason its existence can be proved by any competent evidence, thereby establishing the fact that the prior will was revoked as of the date of the revoking will. This view finds support in the department opinion In re Lones, 108 Cal. 688, 690."

Following the latter statement, the opinion then goes on to question the view expressed in Re Lones.

It is novel doctrine, indeed, that a formal revocation of a will, whether it be contained in a later will or in an instrument not a will, does not operate upon the execution of the instrument, but is ambulatory in effect in those jurisdictions which, like ours, have adopted the rule of the ecclesiastical courts that the revocation of a revoking will does not revive the first will. What authority is there for such doctrine, and what do our Code sections (1292 and 1297, Civil Code) mean other than that a formal revocation operates instantly with the execution of the instrument by which it is declared, regardless of whether that instrument be a will or not?

The leading opinion admits that, if the will containing the revocation clause is in turn revoked, the revocation is yet effective, the instrument cannot be probated, and, if destroyed, two witnesses as to its contents are not required for the purpose of proving the revocation. Is this not an admission that the revocation was effective from the beginning, from the time of execution of the instrument, and that the operation of the revocatory clause is quite different from that of the clauses disposing of the testator's estate? Upon what other theory is it possible that the revocation is effective although the will as a will has in turn been revoked? And when a will revoking former wills has been destroyed and secondary evidence of its contents is necessary, why should two witnesses be required to prove its contents, if its destruction were not by way of revocation, and less than two be sufficient if it were? What has the intent with which the instrument was destroyed got to do with the matter? If it be sought to prove the instrument for the purposes of probate as a will, then two witnesses as to its contents are required, regardless of whether it was destroyed animo revocandi or not. On the other hand, if it be sought to prove the instrument for some other purpose than probate, as, for example, to defeat the probate of a former will by

showing its revocation, why should the secondary proof required of its contents vary according as its destruction was animo revocandi or not? The statute makes no such difference. It makes the effect of the instrument the same in either case; it works a revocation. The statute does make a difference in the secondary proof required according to the purpose for which it is sought to prove the instrument, and requires more in case it is sought to probate the instrument than where it is sought to prove it for some other purpose. There is here a rational and recognized distinction, and it is this and this alone which in my judgment the statute makes. And certainly proving an instrument, whether it be destroyed or not, for the purpose of showing a revocation of wills worked by it, is not proving it for the purpose of probating it.

The leading opinion admittedly cites no authority which directly supports its position, and presumably there is none. It does cite a number which it considers indirectly support its position. It would unduly extend this dissenting opinion—already too long—to discuss them. Suffice it to say that an examination of them all plainly discloses, in my judgment, that each and all go upon some point not present here and making this case radically different from them.

Nor is it the fact, as the leading opinion assumes, that there are no authorities directly in point. In a number of cases the distinction has been made between proving the contents of a lost will for the purpose of probating it, and proving the contents for the purpose of showing the revocation of an earlier will, and in one at least the exact question would seem to have been presented and decided. The rule of the English ecclesiastical courts was that two witnesses, or at least a single witness with corroborating circumstances, were required for the probate of a will. 3 Wigmore on Evidence, §§ 2045 and 2048. Yet in Helyar v. Helyar, 1 Lee, Ecc. 472, 161 Eng. Rep. 174, Sir George Lee, after considering the point, held that for the purpose of showing the revocation of one will by a later one, which had been lost or destroyed, the uncorroborated evidence of a single witness was sufficient for the purpose of establishing the contents of the second will operating as a revocation.

The syllabus in Day v. Day, 3 N. J. Eq. 549, correctly states the decision. It reads:

"If a prior will be revoked by a subsequent one, and both be improperly destroyed, the contests of the first instrument cannot be established as the testator's will, although the contents of the second will cannot be ascertained."

In Nelson v. McGiffert, 3 Barb. Ch. 158, 49 Am. Dec. 170, the testator made two wills, one in 1832 and one in 1837. The first was offered for probate before the surrogate. The second had been destroyed, and proof was offered of it in resistance to the probate of the first as having revoked it. Under the New York practice at the time, the chancellor alone, not the surrogate, had the power to receive proof of a destroyed will for the purpose of establishing it as a testamentary disposition of the decedent's property; that is, for the purpose of probate. The point was made that, the second will not having been so established, the surrogate, upon the proceedings for the probate of the first will, could not receive proof of the second for the purpose of showing that the first had been revoked. Concerning this point, the court said (page 164):

"The only remaining questions are as to the due execution of the subsequent will of 1837, and its effect upon the will of 1832. There is no doubt as to the jurisdiction and power of the surrogate to receive proof that the will of 1832 was revoked by a subsequent will of the testator, and that such subsequent will had been fraudulently destroyed, or that it was destroyed by the testator when his mind had become so impaired that he was incompetent to perform a testamentary act. The chancellor alone had the power to take proof of such a will for the purpose of establishing it as a testamentary disposition of the property of the decedent. But, in resisting the probate of the instrument propounded by McGiffert as the last will and testament of the decedent, the heirs and next of kin had the right to introduce any testimony which would be sufficient to satisfy the surrogate that the instrument propounded was not in force as a valid will at the death of the testator named therein."

The rule in Mississippi, as in some other states, is, or at least was, that a lost or destroyed will cannot be probated unless all its contents are duly proven. It was held, nevertheless, in Vining v. Hall, 40 Miss. 83, that although a destroyed will could not be established as a will because its contents could not be fully proven, yet the clause of revocation which it contained could be shown, and was effective as a revocation of a former will which it was sought to establish.

In Massachusetts itself, from whose Supreme Court the leading opinion quotes liberally, the distinction between proving a lost or destroyed will for the purpose of probate and proving it for the purpose of showing a revocation is made. The syllabus in Wallis v. Wallis, 114 Mass. 510, correctly states the ruling, and reads:

"When a will revoking a former will is in existence, it must be established in the probate court; but when it has been lost or destroyed, and its contents cannot be sufficiently proved to admit it to probate, it may nevertheless be availed of as a revocation in opposition to the probate of the will revoked by it."

Finally, there is the decision to which I have referred as exactly in point here. It is In re Wear's Will, 131 App. Div. 875, 116 N. Y. Supp. 304. There the probate of a will was resisted on the ground that it had been

revoked by a second will which could not be found. That it is exactly in point here is apparent from the following quotation from it:

"The objection urged on this appeal from the decree of the surrogate refusing probate to the first will is that the proof offered and received of the execution of the second will is inadequate. The appellant contends that the proof must be of the character required by sections 2621 and 1865 of the Code of Civil Procedure, entitling a lost will to probate. The requirement of this section is that the provisions of such lost will must be established 'by at least two credible witnesses, a correct copy or draft being equivalent to one witness.' We are of the opinion that this contention cannot be sustained. It is one thing to admit to probate a will disposing of a man's estate where the will cannot be found, and quite another thing to merely establish that a second will, revoking a former will, has been duly made and executed and left in the possession of the decedent. In the one case we are assuming to dispose of property in a manner different from that prescribed by law in the absence of a will, while in the latter case we are merely permitting the property to descend in the manner which the law designates. In the case now under consideration the execution and delivery of the will to the decedent was proved by Mr. Eckstein, who drew both wills, and who was a subscribing witness in both of them. He would have been entirely competent to have proved the execution of the will, if it had been found, the remaining subscribing witness being dead; and he was equally competent to prove the execution and delivery of the will to the decedent, not for the purpose of establishing a lost will, but to show that the will offered for probate was not the last will and testament of the decedent, and that such an instrument was executed and left in such a custody that the presumption is that it was destroyed with the intention of revocation, with the result that the decedent died intestate. We are of opinion that the authorities relied upon by the learned surrogate support his conclusions, and that the decree refusing probate to the will of June, 1900, was properly made."

But one point more. The leading opinion in more than one place states in effect that the question is whether a less proof or a different measure of proof is required to prove a part of a will—to wit, a clause of revocation of former wills—than is required for proof of the whole instrument. In my judgment no such question is presented. The question which is presented is: Does the statutory rule as to the proof required for the purpose of probating the instrument, i. e., establishing it as the testator's valid and effective last will and testament, apply when it is not sought to prove the instrument for that purpose at all? The point that I would make is that, where the instrument is offered for the purpose of probate, the rule of the Code of Civil Procedure as to the proof required for that purpose applies, but where it is not sought to prove it for that purpose, then the Code section—applying in terms only to probate—has no application, and the general rules of evidence apply, and this, regardless of whether it is sought to prove the whole or only a part of the instrument.

It is easy in fact to suggest a case wherein it is sought to prove the whole of a will and where as well the will purports to dispose of property, and where yet the measure of proof required for probate would surely not apply. The declarations of a deceased member of a family as to relationship are always admissible in pedigree cases. Suppose in such a case it was desired to prove that John Smith was the son of James Smith, and for that purpose it was sought to prove a declaration to that effect by a brother of James Smith, the declaration consisting in a will reading, "I hereby give my estate to John Smith, the son of my brother James Smith." The declaration is certainly competent and admissible, whether the instrument has been probated or not, whether it is entitled to probate or not, or whether the declaration is all of the will or is only a part. And yet surely the proof of such a declaration is not governed by the rules applicable to proving the instrument for the purpose of probate, although the thing proven is identically the same in each case, the execution by a certain person of a certain document. The reason why a different measure of proof applies in one case than in the other is that the purposes for which it is sought to prove the instrument are different. If it is sought to prove an instrument for the purpose of probating it as the duly executed and unrevoked last will of the testator, we have a special statutory rule applicable. If it is sought to prove it for any other purpose, there is no special rule applicable, and the general rules of evidence apply. This would seem perfectly plain and simple, and yet the leading opinion would seem to fail completely to appreciate and meet it.

Reference is made to the rule that in this state and in other states which provide by statute for similar probate proceedings a will may not be introduced in evidence as a muniment of title, or, for that matter, be used in any way as a muniment of title, unless it has been probated. But this rule has no bearing on the present discussion. It is, in fact, not a rule of evidence at all. It is but a corollary of the propositions: (a) That an instrument which purports to be a will does yet not operate to transfer title unless it is the valid last will of a decedent; and (b) that in this state there has been provided by statute a proceeding in rem, i. e., probate, by which alone the fact that an instrument is the valid last will of a decedent may be established. The result is that, on the one hand, unless the instrument has been admitted to probate, no amount of proof will suffice to give it operation as a muniment of title, and, on the oth-

er hand, if it has been admitted to probate, no other proof is required than proof of the order admitting it, and if such proof is furnished it is final and conclusive. The rule, then, that a will cannot be used as a muniment of title until it has been probated is not a rule of evidence, but one simply that a certain adjudication in rem is required to establish its character as the valid last will of a decedent. The point in connection with the present discussion is that by sections 1292 and 1297, Civil Code, a will does not have to be the valid last will of a decedent in order to operate as a revocation of former wills.

We concur: SHAW, J.; LAWLOR, J.

52 Cal. App. 149

In re SENG'S ESTATE.

MOELLERING et al. v. HASKINS.

(Civ. 3732.)

(District Court of Appeal, First District, Division 1, California. April 1, 1921. Hearing Denied by Supreme Court May 31, 1921.)

On Hearing in Supreme Court.

Courts ⟸202(5) — Order of probate court fixing commissions for sale of real estate held not appealable.

Where several real estate agents were employed by executor under Code Civ. Proc. § 1559, to effect a sale, and one agent procured a bidder, and another agent subsequently procured a bidder at an advanced price, and the land was sold to the last bidder and the sale confirmed, the agent procuring the last bidder could not appeal from an order in the probate proceeding fixing the amount of commissions to be paid and providing that the first agent should receive 5 per cent. of the amount of his bid, and the agent procuring the subsequent bidder 5 per cent. of the difference between the first and second bids, as in probate proceedings appeals lie only as prescribed by statute.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Peter Seng, deceased. From an order fixing the amount of commissions of E. A. Moellering, J. A. Goodwin, and J. L. Haskins, as real estate agents for the sale of real property belonging to the estate, the first two named agents appeal. Appeal dismissed in the District Court of Appeal, and hearing denied in Supreme Court.

Fry & Jenkins, of San José, for appellants.

Maurice Rankin and Archer Bowden, both of San José, and H. W. A. Weske, of Santa Rosa, for respondent.

KERRIGAN, J. This appeal is from an order made in a probate proceeding fixing the amount of commissions to be paid to certain real estate agents for the sale of real property belonging to the estate.

The executor of the will of Peter Seng, deceased, employed the appellants Moellering & Goodwin, and also the respondent Haskins, all of whom were real estate agents, to effect the sale. The contract was entered into in conformity with the provisions of section 1559 of the Code of Civil Procedure, as amended by St. 1919, p. 1181. The respondent, Haskins, procured certain purchasers for the property for the sum of $7,000. The bid of these purchasers was duly returned to the court, but before the hearing on confirmation appellants also procured a purchaser. The bid of this proposed purchaser was received too late to be returned, but at the hearing in open court he offered an increase of 10 per cent. over the returned bid, whereupon the sale was confirmed to him for the sum of $7,700. The court thereupon found that 5 per cent. upon the purchase price secured for the property was a reasonable and proper amount to be allowed as a commission, and made the order, here appealed from, dividing such commissions on the sale between appellants and respondent, by giving to the respondent who procured the first bidder 5 per cent. on the sum of $7,000, the amount of his bid, and giving to appellants, who procured the second (and successful) bidder, 5 per cent. on $700, the additional amount procured.

It is the contention of the appellants that under the provisions of section 1559, Code of Civil Procedure, respondent is not entitled to the sum allowed him, or to any commission, but that appellants are entitled to the whole thereof.

Section 1559, Code of Civil Procedure, reads as follows:

"Any executor or administrator may enter into a contract with any bona fide real estate agent to secure a purchaser for any real property belonging to an estate, which contract shall provide for payment to such agent out of the proceeds of sale to any purchaser secured by him of a commission, the amount of which must be fixed and allowed by the court upon confirmation of the sale. If a sale to a purchaser obtained by such agent is returned to the court for confirmation and said sale be confirmed to such purchaser, such contract shall be binding and valid as against the estate for the amount so fixed and allowed by the court.

"By the execution of any such contract no personal liability shall attach to the executor or administrator, and no liability of any kind shall be incurred by the estate unless an actual sale be made and confirmed."

It appears from the record that the court in making the order in the manner indicated followed the custom and practice which ob-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tains in Santa Clara county to the effect that the broker who brings in the bid which is returned is allowed his commission on the amount of such bid, and the agent who procures a subsequent bidder is allowed a commission on the amount which his bid exceeds that of the one returned; and respondents claim that appellants contracted with this custom in view, and are bound thereby. It is further contended by respondent that the order directing the payment of commissions to real estate agents is not an appealable order, and further, even assuming it to be such, that the amount to be paid is purely a matter within the discretion of the trial court, and for that reason it is binding upon the appellants. Appellants' claim is based upon a literal construction of section 1559 of the Code of Civil Procedure. As pointed out by respondent, under such a construction neither party would be entitled to a commission. Respondent procured a purchaser, but his bid was not confirmed as required by the statute; and appellants' bid does not meet the requirements of the provision for the reason that it was never returned.

Whatever conclusion might be reached as to what is the proper construction to be given to the act we do not deem material. Nor do we consider a discussion of the other points raised necessary; for it seems plain to us that appellants are in no manner aggrieved by the order appealed from. Neither the estate nor the heirs are complaining of the amount allowed respondent for his services; and, if appellants have any claim against the estate for services rendered, their remedy is an appropriate proceeding for its recovery. What benefits respondent may have secured under the order is no concern of theirs.

The appeal is dismissed.

We concur: RICHARDS, J.; WASTE, P. J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied.

We are satisfied that the order appealed from is not an appealable order. In probate proceedings appeals lie only as prescribed by our statutes, and an order of the character here involved is not among those specified as appealable. The appeal, therefore, was properly dismissed by the District Court of Appeal. Our denial of the petition is, of course, not to be taken as indicating any view on our part as to the correctness of the practice of the trial court in the matter of the fixing and apportionment of commissions of real estate agents under section 1559, Code of Civil Procedure, or as to the allowance thereunder of a commission to an agent on account of a purchaser to whom the sale is not confirmed.

All concur.

52 Cal. App. 393

FERROGGIARO v. BOARD OF PUBLIC WORKS et al. (Civ. 3717.)

(District Court of Appeal, First District, Division 2, California. April 29, 1921.)

1. Dedication ⟸19(1)—Marking of streets on maps immaterial, where not dedicated and used as such.

Where certain streets were never dedicated and accepted or used as such, it was immaterial that they appeared as public streets on certain maps on file in the recorder's office.

2. Dedication ⟸19(5)—Complete when owner files map showing streets and sells lots accordingly.

Dedication is complete when the owner of land files a map for record delineating certain streets and thereafter sells lots in accordance therewith.

3. Dedication ⟸19(5)—Filing of maps insufficient, where no general sale of lots in accordance and streets not used as such.

Where certain streets had never been used as such during 54 years of plaintiff's occupancy, and the city made no attempt to show formal dedication or acceptance, but relied solely upon the filing of certain maps as an implied dedication, and evidence of only one sale in accordance therewith was offered, the rule that a dedication is complete when the owner of the land files a map for record delineating the streets and thereafter sells lots in accordance therewith was inapplicable.

4. Dedication ⟸63(2)—Nonuser for statutory period works abandonment.

Under Pol. Code 1872, § 2620, even if the filing of maps with certain streets delineated was a sufficient dedication, failure to use them as such for five years worked an abandonment; such statute being in effect during such period.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Proceeding by A. Ferroggiaro against the Board of Public Works and others. Judgment for plaintiff, and defendants appeals. Affirmed.

George Lull, City Atty., and D. S. O'Brien and Chas. S. Peery, Asst. City Attys., all of San Francisco, for appellants.

Devoto, Richardson & Devoto, of San Francisco, for respondent.

NOURSE, J. Plaintiff instituted this proceeding against the board of public works of the city and county of San Francisco, and the members thereof, and the city and county of

San Francisco, a municipal corporation, to restrain them from interfering with his possession of a certain strip of land situated in said city and county and appearing upon the map thereof as portions of Keith street and Egbert avenue. The complaint alleges that plaintiff is the owner of a lot of land which is described therein by metes and bounds, being bounded in part by the two streets in question, and referring to a map of the Bay View Homestead Association alleged to have been filed in the office of the county recorder of the city and county of San Francisco June 19, 1872. As to that portion of the land designated upon the map as Keith street and Egbert avenue, it is alleged that plaintiff is the owner in fee, and that he has been in the open, notorious and continuous possession thereof through himself and his predecessors for a period of 50 years last past. A windmill and some outhouses are alleged to have been constructed and maintained on those portions of the land designated as streets during all the period of plaintiff's possession, and the injunction was sought to restrain the defendants from removing these structures. The defendants answered, alleging, among other things, that the portions of said streets in controversy are parts of open and public streets of the city and county of San Francisco, duly dedicated and accepted as such. The court found that the land upon which the structures were erected was a part of what was designated on the map of the city and county of San Francisco as Keith street and Egbert avenue, and that said streets were never dedicated as public streets and never accepted or used as such by the city and county of San Francisco or the public thereof. The court also found that plaintiff had been in the open, notorious, and continuous possession of said property for a period of 54 years last past, and that during said period the plaintiff and his predecessors had occupied and used said premises and maintained thereon the outhouses and the windmill which the defendants were endeavoring to remove. From the judgment in favor of the plaintiff which followed these findings the defendants appeal.

[1] During the course of the trial defendants offered in evidence certain pages of a map book from files of the county recorder containing what purported to be copies of a map of the Bay View tract filed for record on May 23, 1867, and of the map of the Bay View Homestead Association filed for record June 17, 1872. Plaintiff's objection to the introduction of this evidence on the ground that a proper foundation had not been laid was sustained by the court. Thereupon defendants rested. It is now urged that the court erred in refusing to admit the map book in evidence, but even if error occurred it would not avail the defendants anything because the judgment must be affirmed upon the record. The trial court having found that the streets marked upon the map of the city and county as Keith street and Egbert avenue were never dedicated as public streets and never accepted or used as such, it is immaterial that they appeared as public streets upon the map filed in 1867 or upon the map filed in 1872.

[2, 3] Appellants' case rests upon the proposition that dedication to the public is complete when the owner of a tract of land files a map thereof for record delineating certain streets thereon and thereafter sells lots in accordance with said map. In support of the proposition reliance is had upon such cases as Davidow v. Griswold, 23 Cal. App. 188, 192, 137 Pac. 619; San Leandro v. Le Breton, 72 Cal. 170, 175, 13 Pac. 405; Berton v. All Persons, 176 Cal. 610, 615, 170 Pac. 151. No quarrel is had with this proposition as an established rule of law in this state, but the record here does not bring appellants' case within the rule. The only evidence of any sales having been made in accordance with the map filed is that of Gilmore to Gibbs some time after May 30, 1872. So far as the record shows, no evidence of any other conveyance was offered to prove dedication or acceptance of these particular streets. Respondent rested upon the showing that the streets had never been used as such during the 54 years of his occupancy. No attempt was made by appellants to show formal dedication or acceptance. Appellants relied solely upon the filing of the maps of 1867 and 1872 as evidence of implied dedication..

[4] But even if this was a sufficient dedication at the times when the maps were filed, failure to use the streets as such for a period of five years worked an abandonment under the provisions of section 2620 of the Political Code, which was in force until its repeal in 1883.

Thus, while this statute was the law of the state, applicable in the city and county of San Francisco as elsewhere, a five-year period of nonuser worked an abandonment of the street, and respondent having been in the adverse possession of the land during that period and continuously thereafter, as the trial court found, the judgment must be affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

52 Cal. App. 331

O'SHEA v. SICOTTE et al.

(Civ. 3665, 3666.)

(District Court of Appeal, First District, Division 1, California. April 21, 1921. Hearing Denied by Supreme Court June 20, 1921.)

1. Gifts ⟸71—Causa mortis not favored.

The law does not regard gifts causa mortis with favor because of the opportunity they afford for fraud and perjury.

2. Gifts ⟸64(1) — Donor must give donee means of obtaining control, which in case of chose in action must be by assignment.

To complete a verbal gift causa mortis, the donor at the time of making the gift must do something which has the effect of placing in the hands of the donee the means of obtaining the control and possession of the thing given, and, in case of a chose in action not evidenced by a written instrument, the only means of obtaining control recognized is an assignment in writing or some equivalent thereof.

3. Gifts ⟸66(1)—Execution of power of attorney held not to complete verbal gift of bank deposits.

Where a stepmother told a stepson while on her deathbed that in case anything happened to her she wanted him to have everything she had, the execution of powers of attorney constituting the stepson her general agent, under which possession of amounts on deposit in banks was not obtained by the stepson during her lifetime, did not effectuate the gift, especially as, even if the powers of attorney had been executed by delivery of the possession of the money to the stepson, his possession would have been as agent, and the money would not have been beyond the dominion of the donor.

Appeals from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Two actions by Irvine T. O'Shea against Margaret Sicotte and others. From judgments for defendants, plaintiff appeals. Affirmed.

J. L. Taugher, of San Francisco, for appellant.

Andrew F. Burke and Paul A. McCarthy, both of San Francisco, for respondents.

RICHARDS, J. The actions in which these two appeals were taken were by stipulation of the parties tried and submitted upon the same evidence, and the determinative principles of law applicable to each are the same. The facts are also substantially similar and are as follows: Mrs. Helen O'Shea was the stepmother of the plaintiff and appellant, Irvine T. O'Shea. She was an elderly woman and was possessed of the sum approximately of $20,000, which she had derived from a settlement with her stepchildren as to her interest in the estate of her deceased husband, Jeremiah O'Shea. This money she had been keeping on deposit in her own name in two San Francisco banks—the Mission Savings Bank, where she had on deposit $5,000 of said sum, and the San Francisco Savings & Loan Society, where she had on deposit $15,000 of said sum. On November 16, 1917, Mrs. O'Shea, while at the home of the appellant herein, had an acute attack of illness which rendered her unconscious, and while in said unconscious condition she was removed to St. Luke's Hospital, where she died three days later. On the morning of November 17, 1917, she had so far recovered consciousness as to be able to talk briefly with one of her attendant physicians, and also a little later with the appellant herein. The physician at this first interview advised her that her condition was serious and that she ought to have her affairs fixed up, and that it would be advisable for her to execute a power of attorney "so that some one would attend to things while she was sick." A short while thereafter the interview between herself and appellant occurred which is relied upon by him as forming the basis of the gift causa mortis to himself of the money on deposit in the two above-named banks. The words of said conversation touching said matter, as testified to by appellant, are as follows: Mrs. OShea said to him:

"In case anything happens to me, I want you to have everything I have got. Now you had better go and get some one to fix the affairs so that you can get the money out of the bank so that you will have it in case anything happens to me."

Thereupon the appellant went out and telephoned to a notary public to come out to the hospital, where, as he stated to him, his stepmother wanted some papers drawn up. When the notary arrived at the hospital he was taken to the room of Mrs. O'Shea and, after a brief conversation with her, proceeded to another room, where he drew up a general power of attorney constituting appellant Mrs. O'Shea's general agent. This power of attorney, in addition to those general clauses usual in such documents, also contained the following clause:

"In addition it is my express wish that if my present illness should prove fatal I desire that the said Irvine Thomas O'Shea take charge of all of my estate."

When the notary had drawn up this power of attorney, he returned to the room where Mrs. O'Shea was and she signed the same. At the time she did so the notary, according to his testimony, said to her:

"If you turn it (the power of attorney) over to Irvine O'Shea, you are giving him entire charge of everything and you are practically turning your property over to him."

One of her physicians present at this time testified that the notary explained to Mrs. O'Shea that the document was a "power of attorney giving Irvine O'Shea the power to take charge of her business while she was sick." The power of attorney when thus executed was turned over to the appellant, who went that afternoon to the Mission Savings Bank, arriving about closing time, and not having with him the passbook of Mrs. O'Shea, he asked the cashier to transfer the account of Mrs. O'Shea to him, exhibiting at the same time the power of attorney. The bank cashier declined to make the transfer of the account until he had consulted with Judge Matt I. Sullivan, who was the bank's attorney and was also the appellant's attorney, and advised the appellant to see him about the matter. The appellant saw Judge Sullivan that afternoon and exhibited to him the power of attorney, explaining the circumstances under which it had been made, and was advised by him that Mrs. O'Shea should make a will. Thereupon the appellant returned to the hospital, according to his story, and spoke to Mrs. O'Shea about making a will, and she consented to do so, whereupon he returned to Judge Sullivan's office, coming back to the hospital a little later with an assistant in said office for the purpose of having a will prepared for execution by Mrs. O'Shea. She was found to be in a semiconscious condition, apparently unable to make a will, and she remained in that condition until the Monday following, when another vain effort was made to have her make a will. In the meantime and shortly before she died, the appellant went again to the Mission Savings Bank and requested its cashier to pay over to him the money in Mrs. O'Shea's account there, which the cashier refused to do. No demand or request for the money on deposit in the San Francisco Savings & Loan Society was made by the appellant during Mrs. O'Shea's lifetime, nor, in fact, until about two months after her death, which occurred on the Monday following her attack of illness. Upon the death of Mrs. O'Shea a will executed by her about a year prior to her death was admitted to probate. By its terms her entire estate was bequeathed to her sister, Mrs. Margaret Sicotte, and her children. These two actions were commenced by the plaintiff and appellant herein against these beneficiaries under said former will and against the bank having on deposit the sums of money to which these suits respectively refer.

[1] The contention of the plaintiff in each case before the trial court and upon this appeal is that a completed gift causa mortis in his favor was made by Mrs. O'Shea by the transaction above detailed. We are unable to agree with this contention: The law does not regard gifts causa mortis with favor because of the opportunity they afford for fraud and perjury. Drew v. Hagerty, 81 Me. 231, 17 Atl. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255. The Supreme Court of this state thus states the well-established rule upon this subject:

"Gifts causa mortis are not regarded in the law with favor, since they are in contravention of the general rules * * * for the testamentary disposition of property, and therefore should in all cases be established by clear and convincing proof of the requisites of such a gift." Knight v. Tripp, 121 Cal. 674, 54 Pac. 267; Denigan v. Hibernia Sav. & Loan Society, 127 Cal. 137, 59 Pac. 389; Freese v. Odd Fellows Sav. Bank, 136 Cal. 662, 69 Pac. 493.

[2] It is not intended or intimated that the appellant herein is either charged or suspected of any wrongdoing in his assertions and evidence as to the existence of a valid gift causa mortis in the instant case, but only that the means by which he sought to make such a gift effective were inadequate under the form of our statute to accomplish the desired result. Section 1147 of the Civil Code provides as follows:

"A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

It is not necessary to go far afield in search of authorities construing this section of the Civil Code. The case of Adams v. Merced Stone Co., 176 Cal. 418, 178 Pac. 498, 3 A. L. R. 928, contains a very clear and comprehensive statement of the requisites to the validity of gifts causa mortis. It is there held that in order to the completion of such verbal gifts the donor at the time of making the gift must do something which has the effect of placing in the hands of the donee the means of obtaining the control and possession of the thing given; and in the case of a chose in action not evidenced by a written instrument the only means of obtaining control that is recognized by the authorities is an assignment in writing or some equivalent thereof. The donor must part with the dominion over the thing given, and unless that is done the gift is not complete. In announcing this view the court in that case quoted from the case of Pullen v. Placer County Bank, 138 Cal. 170, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19, which has special application to the instant case by reason of the similarity of its facts. In the case quoted a father had given to his son a check for a thousand dollars upon a bank with the intention of making him a gift of that amount of money. After deliver-

ing the check to his son the father stated that he wished that he would not present it until after his death. To this the son agreed, and upon the death of the father presented the check to the bank, where it was refused payment upon the ground that it had been revoked by his father's death. The court upheld the action of the bank in this respect, saying:

"In the present case the gift was verbal, and the property which the father intended to give to his son was money on deposit in the bank. The check was not itself the property which the father intended to give, but merely a direction to the defendant to pay one thousand dollars to the son. It indicated the amount to be given and the place at which the money was to be delivered. * * * The request of the father that the son would not present the check until after his death did not affect the sufficiency of the gift. If the gift were complete by the delivery of the check such request would not destroy its validity, and if not then complete this request would not have the effect to dispense with its presentation for the purpose of making it complete. By the failure of the son to present the check, there was no delivery of the money during the lifetime of the father, and the gift was not therefore complete."

[3] It is impossible to discover a distinction between the case last above cited and the case at bar. The appellant herein was given by the donor a power of attorney which would, if executed, have placed the money in the banks in question in each case within the appellant's custody; but this power of attorney was never executed to the extent of placing the funds in either of these banks within the appellant's custody or control. It was like the check in the case cited, in that it was merely an order for the delivery of the money which must have been executed during the would-be donor's lifetime in order to effectuate her gift; but it was unlike the check in one very essential respect, since even if executed it would not have removed the money in question beyond the dominion of the donor, since the possession of the money by the donee would have been simply the possession of his principal and not of himself. The donor would still through her agent have had complete possession and dominion over the thing which was the subject of the attempted gift, and, this being so, the power of attorney in question must be held to have been an ineffectual method of completing the gift causa mortis so as to make it valid in law. Edwards v. Guaranty, etc., Bank, 190 Pac. 57; Provident, etc., v. Sisters, etc., 87 N. J. Eq. 424, 100 Atl. 894.

The judgments are affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

52 Cal. App. 380

Ex parte ARATA. (Cr. 790.)

(District Court of Appeal, Second District, Division 1, California. April 29, 1921.)

1. Arrest ⟸70—Arresting officer must take accused before magistrate without delay.

Police officers, upon arresting a person on a criminal charge, must take him before a magistrate without delay.

2. Bail ⟸43—Detention because of criminal charge unlawful after order to release on bail.

Where accused was arrested without a warrant, and two days later a complaint was filed in police court charging her with prostitution, whereupon she was arraigned and pleaded not guilty, the magistrate acted as his duty required in fixing bail and ordering her release pending trial, and she could not be thereafter detained because of the criminal accusation against her.

3. Health ⟸24—Authorities may quarantine only for reasonable ground.

Health authorities may place under quarantine a person afflicted with an infectious or contagious disease, as defined in Pol. Code, § 2979a, only where reasonable ground exists to support the belief that such person is so afflicted.

4. Habeas corpus ⟸85(1)—Burden on authorities to show facts justifying quarantine.

Where a person restrained of his liberty by quarantine questions the power of the health authorities, the burden is on them to show facts in support of the order.

5. Health ⟸24—Mere suspicion will not justify quarantine.

A mere suspicion, unsupported by facts giving rise to reasonable or probable cause, will not justify depriving a person of his liberty under an order of quarantine.

6. Health ⟸24—Habitual indiscriminate sexual intercourse affords reasonable probability of venereal disease, justifying quarantine.

The fact that women of ill fame indulge in repeated and promiscuous acts of sexual intercourse affords a presumption based on a reasonable probability that such a person is infected with venereal disease, so as to justify quarantine.

7. Habeas corpus ⟸85(1)—Authorities claiming one quarantined because of likelihood of venereal disease is prostitute have burden of proof.

If the health authorities claim that a person quarantined is a prostitute, and hence likely to be afflicted with disease, the burden is on them to prove such fact.

8. Constitutional law ⟸82—No encroachments on liberty of citizen though result sought beneficial.

Encroachments on the liberty of the citizen cannot be tolerated even though the general result sought is a beneficent one.

9. Habeas corpus ⟸79—Narrative of facts in return to writ held not proof of prostitution, justifying quarantine.

Where petitioner, accused of prostitution, gave bail and was ordered released pending

trial, and at the hearing of the writ proof was not offered that at the time of her arrest she was a woman of ill fame, a narrative made in the return as to a police officer having been directed to petitioner's room wherein she offered to commit sexual intercourse with him and fixed a price therefor, which he paid, whereupon other officers, working with him, broke in the door and arrested her, could not be taken as proof that the charge of prostitution was true, so as to justify her detention in quarantine.

Application for writ of habeas corpus by A. Arata, directed to the Chief of Police of the City of Los Angeles. Writ granted.

James W. Groom, Frank Dominguez, and Rchard Kittrelle, all of Los Angeles, for petitioner.

Erwin W. Widney, City Prosecutor, by Harry A. Mock, Deputy City Prosecutor, both of Los Angeles, for respondent.

PER CURIAM. Habeas corpus to determine the right of respondent to detain petitioner and deprive her of her liberty. Upon return being made to the writ and hearing had thereon, petitioner's prayer was granted and her discharge ordered by decision heretofore made from the bench. That the reasons for the decision may be made to fully appear, this opinion is now filed.

In the petition filed herein it was alleged that respondent, chief of police, detained and confined in the city prison of Los Angeles the petitioner, and that said detention and imprisonment was without process of law or lawful authority. It was further alleged that petitioner was arrested without a warrant, by persons claiming to be police officers of the city of Los Angeles, on the 9th day of April, 1921, and that two days later a complaint was filed in the police court charging petitioner with a violation of the provisions of an ordinance of said city, which ordinance, stating its terms generally, was one making it an offense for a woman to commit an act of prostitution. The petition further set out that thereupon the petitioner was arraigned in said police court, entered a plea of not guilty, and that her trial was set for a certain date; that the bail was fixed in the sum of $50, which, it was alleged, petitioner furnished, and that she thereupon secured an order from said police court directing her discharge from custody pending said trial; that the written order of release so secured was presented to the jailer of the Los Angeles city jail; and that the jailer refused to discharge said person for the reason, as stated by him, that the health department of the city of Los Angeles had instructed the jailer and chief of police not to release petitioner until she had submitted to an examination desired to be made by said health department for the purpose of determining whether she was infected with a communicable, infectious, or quarantinable disease. In the petition it was further asserted that petitioner was not infected with any such disease; that the health department of the city of Los Angeles had no reason to believe that she was so infected; that she had never been theretofore arrested or charged with any crime; that she was not and never had been a prostitute, and did not commit the act charged against her by the complaint in the police court. Upon the alleged facts so stated no question can be made but that petitioner's detention by the chief of police was wholly unauthorized and without any warrant in law. In the return made to the writ respondent admitted that petitioner was being detained by him in said city jail, and then proceeded to narrate alleged facts in evidentiary form as to a certain police officer having been directed to a room occupied by petitioner wherein petitioner offered to commit an act of sexual intercourse with said officer and fixed a price therefor, which the officer paid, whereupon other officers, acting in conjunction with the first, broke in the door and arrested petitioner. The return next set out the terms of the ordinance which purports to make the commission of the alleged act an offense. The return further set forth that immediately upon being arrested said petitioner was "by order of the health department of said city" placed in a quarantine ward in the city jail, and there held "in qurantine to be examined by officers of the health department of said city, to determine her freedom from contagious or infectious quarantinable venereal disease, as provided by statute and the rules of the State Board of Health of the state of California." It was further stated in said return that a physician duly appointed as a medical examiner of women by the health department of said city and by order of the health commissioner visited petitioner for the purpose of making a medical examination to determine the existence of any such disease as has been described, and that petitioner refused to submit to the examination, and that the health commissioner ordered that she be held in quarantine pending the determination of her freedom from such disease. Further statement is made in the return that "the health department of the city of Los Angeles has determined from experience in a large number of cases that over 90 per cent. of all women apprehended in the commission of acts of prostitution are infected with contagious or infectious quarantinable venereal disease such as is enumerated in section 2979a, Political Code; that the rules of the State Board of Health adopted pursuant to section 2979, Political Code, require that the health commissioner of the city of Los Angeles cause examination to be made of all such persons to determine their freedom from such disease."

[1, 2] Referring briefly first to the duty of the chief of police and officers working under his direction, it is enough to say that the plain and unmistakable terms of the law require such officers, upon making the arrest of a person on a criminal charge, to take such person before a magistrate without delay, where the accused may be arraigned upon a sworn complaint and secure a judicial hearing. The magistrate, in the case of petitioner, acted strictly as his duty required of him in fixing bail and giving the order for release of petitioner pending trial, and, as we shall proceed to show, the right of the chief of police to further detain the petitioner must be justified on grounds having no reference at all to the fact that an accusation had been made in the police court charging petitioner with a crime.

[3] That the health authorities possess the power to place under quarantine restrictions persons whom they have reasonable cause to believe are afflicted with infectious or contagious diseases coming within the definition set forth in Political Code, § 2979a, as a general right, may not be questioned. It is equally true that in the exercise of this unusual power, which infringes upon the right of liberty of the individual, personal restraint can only be imposed where, under the facts as brought within the knowledge of the health authorities, reasonable ground exists to support the belief that the person is afflicted as claimed; and as to whether such order is justified will depend upon the facts of each individual case.

[4, 5] Where a person so restrained of his or her liberty questions the power of the health authorities to impose such restraint, the burden is immediately upon the latter to justify by showing facts in support of the order. It might be proved, for instance, that the suspected person had been exposed to contagious or infectious influences; that some person had contracted such disease from him or her, as the case might be. Such proof would furnish tangible ground for the belief that the person was afflicted as claimed. And we wish here to emphasize the proposition, which is unanswerable in law, that a mere suspicion, unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine.

[6] Coming then to a case where it is claimed that the person suspected is one whose habits are such as to warrant the belief that they are afflicted with a venereal disease: We may agree that in cases of persons who commit acts of prostitution—that is, acts that are commonly understood to fall within the "commercial vice" definition—such a majority of them may be afflicted with infectious venereal disease as to justify the health department in enforcing the preliminary quarantine measures as here shown against any such; in other words, that, based upon the experience of the health authorities as it is stated to be in the return, it is reasonably probable that a person found to be of the class mentioned is so infected with such disease. The presumption which this statement allows to be made as against the individual in the first instance has its foundation in the fact that women of ill fame, by the very nature of their occupation, indulge in repeated and promiscuous acts of sexual intercourse. We have held heretofore (Ex parte Dillon et al., 186 Pac. 170) that this inference which the health authorities seek to draw was not a fairly reasonable one to be deduced under proof of sexual acts between individuals charged under an ordinance of the city of Los Angeles forbidding intercourse between unmarried persons, which ordinance had as its intent the prevention of hotels and lodging houses being resorted to for such purpose. The distinction that is suggested between the two classes of cases is apparent and requires no argument to illustrate the reason for it.

[7] If the health authorities rely upon the claim that the person quarantined is a prostitute and hence likely to be afflicted with disease, then the burden is on the quarantine officers to establish the proof of the claim that the accused is of the class and character mentioned. If such person has been legally convicted of being of such class and character, the record of conviction may be relied upon to establish the important fact. In the absence of such conviction, the burden will be with the health authorities to establish the fact by sufficient evidence; for it is the existence of that condition in the person suspected that furnishes the ground for the belief, as an inference only, that the disease exists. It will not do to allow the inference of probable cause to be drawn from a mere suspicion.

[8] We have gone to the pains of making clear our view of the law in the case under discussion. The health authorities, with capable counsel at their elbow, no doubt are well advised of the limitations attached to their powers as they have been herein stated to be. One of the most important rights guaranteed under our Constitution, that of the liberty of the citizen, is involved and cannot be lightly passed over, nor can encroachments upon that right be tolerated even under the argument that, in the main, the general result sought is a beneficent one. The law may not be set at defiance, even to subserve the best-intentioned effort; much less by officers who have taken an oath to uphold it.

[9] At the hearing of this writ proof was not offered to be made that petitioner was at the time of her arrest a woman of ill fame. The narrative contained in the return of alleged acts in which the police officer took

part cannot be taken as proof that the charge made against petitioner in the police court was true.

No sufficient cause has been shown authorizing respondent to detain petitioner in his custody.

(52 Cal. App. 377)

CENTRAL IRON WORKS v. CALIFORNIA BAKING CO. (Civ. 3736.)

(District Court of Appeal, First District, Division 1, California. April 28, 1921. Rehearing Denied May 27, 1921.)

Appeal and error ⇐1011(1) — Judgment on conflicting evidence affirmed.

Where the only question presented by the record on appeal is the sufficiency of the evidence as to the existence of a contract sued on, and the evidence sharply and substantially conflicts on every point in which the execution and validity of the contract is involved, a judgment for defendant on finding in its favor by the trial court must be affirmed.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Central Iron Works against the California Baking Company. From judgment for defendant, plaintiff appeals. Affirmed.

Louis H. Brownstone, of San Francisco, for appellant.

tum Suden & tum Suden, of San Francisco, for respondent.

RICHARDS, J. This action was instituted by the plaintiff to recover damages from the defendant for its alleged breach of a contract by the terms of which the plaintiff was alleged to have had its aid for the steel work upon a certain structure in contemplation of erection by the defendant accepted, but performance thereunder prevented by the fact that the defendant did not construct the building for the steel work upon which the plaintiff's bid had been made. The defendant by its answer denied that such a contract had ever been entered into by it, and the cause went to trial upon that issue, in the course of which a large amount of evidence was presented pro and con by the respective parties; and the cause being submitted the court made general findings to the effect that those paragraphs of the plaintiff's complaint wherein it was alleged that the contract had been entered into between the respective parties to the action in substance as above stated were untrue, and that the paragraph of the defendant's answer wherein the existence of any such contract was denied, was true. Judgment was accordingly rendered in the defendant's favor, and from such judgment this appeal has been taken.

We have carefully examined the somewhat voluminous record herein with a view to ascertaining whether any other question is presented than that of the insufficiency of the evidence to sustain the findings and judgment of the trial court; and we are not only unable to find that any other question is so presented, but we are able to find that upon the single issue of the sufficiency of the evidence to sustain the findings and judgment of the trial court the evidence is so sharply and substantially conflicting upon every point in which the execution and validity of the contract in dispute is involved as to bring the case fully within the rule universally applied to such cases.

The appellant's two contentions are: First, that the defendant's secretary in indorsing upon the plaintiff's bid the words, "Accepted on behalf of the California Baking Company, M. Wiessenhutter, Secretary," had power to bind, and hence had bound, the corporation; and, second, that its board of directors by their subsequent conduct, with knowledge on the part of a majority of their number of the existence of such indorsement, had ratified the action of its secretary. On both of these questions the evidence is hopelessly in conflict. An instance of these irreconcilable conflicts in the testimony may be cited. The architect Righetti testified that a short while before the defendant's secretary came to his office and affixed said indorsement to the plaintiff's bid, he had received a telephone message from Mr. Loesch, the president and general manager of the defendant, that he was sending Mr. Wiessenhutter to sign the bid. Mr. Loesch himself was dead at the time of the trial, and hence his testimony was not available; but the secretary himself testified that he had not been so instructed nor so sent nor authorized, but had acted entirely upon his own initiative in the matter, and had affixed his signature to the bid in question without authority or direction so to do but under certain persuasions on the part of the architect. In the presence of conflicts in the evidence of which the above is but one of many examples, the trial court made its findings against the plaintiff's contention.

The attitude of this court with relation to cases wherein the evidence is substantially conflicting is set forth clearly and at length in the case of Anglo-American Land Co. v. Heine (No. 3734), 198 Pac. 1009, just decided, to which reference is made.

With the legal questions and cases presented by the appellant we have no present dispute, but the substantial conflicts in the evidence as to which these are sought to be applied leave no room for their application.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

52 Cal. App. 87

DANTON v. HAAS et al. (Civ. 3477.)

(District Court of Appeal, Second District, Division 1, California. March 26, 1921.)

Apprentices ⇐14 — Obligation to provide for indentured child ceases with master's death.

Under Domestic Relations Law N. Y. art. 8, § 121, and Laws 1872, c. 635, amending the charter of the New York Foundling Hospital, the obligation of the master to whom an orphan child is indentured to provide maintenance and instruction for the minor terminates with the death of the master, and any covenants as to maintenance, etc., must end with death, as does the correlative obligation to serve; hence there can be no recovery on behalf of a foundling indentured to a woman who agreed to maintain the child as her own during infancy and in event of returning the child to provide a full outfit, but, in case the child continued in her service until reaching majority, to provide a trust fund and make a bequest in her behalf, where the woman died during the infancy of the child.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Beatrice Danton, a minor, by the Title Insurance & Trust Company, her guardian, against Walter F. Haas and another, executors of the estate of Rosa Von Zimmerman, deceased, and others. From a judgment for defendants granted on motion for nonsuit, plaintiff appeals. Affirmed.

G. A. Gibbs, of Pasadena, for appellant.

H. L. Dunnigan and L. A. Lewis, both of Los Angeles, for respondents Walter F. Haas and others, executors.

Walter Loewy, of San Francisco, and Edward F. Wehrle, of Los Angeles, for respondents Klara Kombst and others.

CONREY, P. J. The New York Foundling Hospital is a corporation of the state of New York. Its charter was amended by chapter 635, Laws of New York of the year 1872, which statute was in force at all times herein mentioned. That law authorized the corporation to receive and keep under its care, charge, custody, and management certain classes of children. The corporation was given power, when children in their care attained a proper age, to place them at suitable employments and cause them to be instructed in suitable branches of knowledge, and had discretion to bind out or indenture such children as clerks, apprentices, or servants, to some profession, trade, or employment, for such time or period as they may deem proper, not exceeding, however, in the case of girls, the age of 18 years. Section 6 reads as follows:

"In the case of the death of any master to whom any child shall have been bound to service under the provisions of this act, * * * then such death shall have the effect to cancel and annul the indenture or contract of service; and thereupon the said corporation shall resume the charge and management of such child, and have the same power and authority with regard to it as before the indenture or contract of service was made."

On the 29th day of June, 1912, the hospital had in its care and custody the plaintiff, Beatrice Danton, then three years of age. On that day, by an agreement in writing entered into between said hospital and Rosa Von Zimmerman, the hospital, as party of the first part, placed and indentured the said Beatrice Danton to Rosa Von Zimmerman, as party of the second part, "as her own child in every respect until the said Beatrice Danton shall arrive at her legal majority, to live with, and be employed by, the said party of the second part in and about her house and household, and the affairs thereof, and to be instructed therein and also as hereinafter specified. * * *" The party of the second part agreed, among other things:

"I. That during all the time aforesaid Baroness Rosa Von Zimmerman will provide said Beatrice Danton with suitable and proper board, lodging, and medical attendance, and all things necessary and fit for any indentured child, and in all respects similar to what would ordinarily be provided and allowed by the said party of the second part, or one in her station of life, for her own child or children. If the said child is returned to the party of the first part when she shall reach her legal majority, then the party of the second part shall give to said child a new Bible, a complete suit of new clothes, together with all those she shall then have in use, and an outfit of at least the same in every respect as their own child."

II. To provide for the education and instruction of the minor, as stated, "and generally that said child shall be maintained, clothed, educated, and treated with like care and tenderness as if she were in fact the child of the party of the second part, and will provide for said child, financially and in every other way, as if the said child were adopted by the said party of the second part under the laws of the state of New York."

VIII. It was further provided that if the child be not returned to the party of the first part when she attains her legal majority, or before that time, and the agreement of indenture canceled and annulled by consent of both parties, the party of the second part agreed to provide for said child as follows: "If said child shall attain the age of 18 years, the party of the second part agrees, in consideration of this indenture and of being permitted by the party of the first part to keep said child, to create a trust fund or $15,000, said $15,000 to be deposited with I. & W. Seligman, of New York City, as trustee. The interest of said trust fund of $15,000 is to be devoted by the said trustee to the care and maintenance and education of said Beatrice Danton until the said Beatrice Danton shall attain the age of 30, at which time the principal and any accumulations of interest are to be paid over to her."

"IX. And the party of the second part further agrees that her last will and testament shall contain a provision giving and bequeathing to the said Beatrice Danton a further sum of $15,000. In the event of the death of the party of the second part before the said Beatrice Danton shall attain the age of thirty, said sum of $15,000 is to be deposited with the I. & W. Seligman, and the interest devoted to the care and maintenance of Beatrice Danton until she shall attain the age of 30, when the principal and any accumulations of interest shall be given to her."

After the indenture had been made, Rosa Von Zimmerman took Beatrice Danton into her possession and brought her to the county of Los Angeles, state of California, where they resided until the death of the Baroness Von Zimmerman, which occurred on the 25th day of April, 1917. The baroness left an estate of large value, apparently sufficient to satisfy the claims at issue in this action. After the 25th day of April, 1917, the Title Insurance & Trust Company, a corporation, was duly appointed guardian of the estate of said minor, and as such guardian presented two claims against the estate of Rosa Von Zimmerman, one for $50,000, to provide maintenance and care for said minor until she should reach her majority, and another for $30,000, $15,000 thereof to be placed in trust with I. & W. Seligman of New York, and $15,000, which it was alleged that under said agreement Rosa Von Zimmerman agreed should be provided in her will to and for the benefit of said Beatrice Danton. The claim for $50,000 was rejected. The claim for $30,000 was allowed and paid as to the $15,000 agreed to be provided by the will of the deceased, and as to the remainder of the $30,000 claim the claim was rejected. The will of Rosa Von Zimmerman made no provision for said Beatrice Danton. This action to recover upon the rejected claims was brought by the guardian against the executors and the beneficiaries named in the will of the deceased. Answer having been made denying all of the material allegations of the complaint, the case went to trial. At the close of the plaintiff's evidence a motion for nonsuit was granted and judgment entered in favor of defendants. From this judgment the plaintiff appeals.

The facts are not in dispute. The questions upon which the appeal rests are questions of law and of interpretation of the contract, the answers to which will determine the rights of the plaintiff to the relief demanded.

The terms of the indenture which provides for instruction to be given to the minor were placed therein pursuant to the statute mentioned above, together with certain other statutes, all of which were mentioned in the articles of indenture. These statutes were by stipulation introduced into the record as admitted facts of this case. Aside from the provisions of section 6 of chapter 635, which we have stated, the only other provision relating to the education of indentured children, in the statutes referred to in the contract, is contained in chapter 14 of the Consolidated Laws (Domestic Relations Law, art. 8, § 121) of the state of New York. In subdivision 9 of that section it is provided that if a minor is indentured by the authorities of an orphan asylum, the master or employer shall agree to cause the child "to be instructed in reading, writing and the general rules of arithmetic."

Concerning the first rejected claim, it was stated in the demand as presented to the executors, and is now claimed by the plaintiff, that the sum of $50,000 is the amount necessary to carry out the terms of the indenture, wherein the deceased agreed to provide said minor child with proper board, lodging, medical attention, and to maintain, clothe, and educate said minor, and to provide for said minor financially and in every other way until said minor shall reach her majority. As the minor was only seven years old at the time of the death of Rosa Von Zimmerman, this period of minority, unexpired at the time of said death, was about eleven years. In the statement of the case made by counsel for appellant, we fail to observe that any evidence or stipulation was introduced to prove that the sum required would amount to $50,000, or any other definite sum. But since no point is made concerning this, we shall assume that, if there had been no judgment of nonsuit, the court might have been placed in position to determine the reasonable amount necessary for the stated purposes. The inventoried value of the estate exceeded $2,000,000, and it was stipulated that, "if it becomes a matter for the court to decide," the exact value of the estate might be shown.

Under the laws of New York which apply to the case, the obligation of the master to provide maintenance and instruction for the minor terminates with the death of the master. In a New Jersey case arising under similar laws of New York it was held that the covenants on the part of the master were personal, and that the covenant for support must end with his death, as also did the correlative obligation to serve. Petrie v. Voorhees' Executor, 18 N. J. Eq. 285. We think that this is the true rule. It also seems clear that the contract in the case at bar was made upon the assumption that this was the law. Being willing, however, that the minor should be provided for beyond her minority, if until attaining the age of 18 years she remained with Rosa Von Zimmerman, the latter agreed that in that event she would create a trust fund, the interest whereof would be devoted to the maintenance of

Beatrice Danton until she became 30 years old, when the entire fund would be paid to her. And being further willing to provide for the support of said Beatrice Danton even in the event of her own death, Rosa Von Zimmerman further agreed to make a bequest in favor of the child, in the manner stated in the contract of indenture. This last provision would not have been necessary to accomplish the purpose stated, if the other obligations assumed were those claimed by appellant. Fulfillment of the condition upon which Rosa Von Zimmerman could have been required to create a trust fund available in her lifetime has become impossible. The demand for a fund of $50,000 to provide an income for appellant's support is based upon the same theory which the parties must have had in mind in making the agreement that the will of decedent should provide a fund of $15,000 for the ward's benefit. For that fund was to provide for her maintenance and support during her minority, although, in addition, she would have further support, and ultimately receive the entire fund. This express agreement having been made, no other may be raised by implication. Admitting it to be true, as contended by counsel for appellant, that the contract was far more generous than the statutes required in the case of such an indenture, and that "the baroness" undertook to treat the child as her own, the limits of the agreement are, nevertheless, fixed and determined. We think that those limits exclude the demands made in this action.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

52 Cal. App. 363

PEOPLE v. SPRAGUE. (Cr. 760.)

(District Court of Appeal, Second District, Division 2, California. April 27, 1921.)

1. Criminal law ⊂=351(1)—Conduct of suspected person showing consciousness of guilt is admissible.

The conduct of a suspected person charged with crime, when such as to show a consciousness of guilt, is always admissible.

2. Criminal law ⊂=351(1), 722(2)—Evidence of defendant's appearance and conduct when he met witness held admissible, and argument thereon proper.

Evidence that when defendant met a witness who he must have known was the occupant of the room adjoining that in which the crime was committed his face was disfigured and that he appeared blanched or somewhat excited was admissible, and it was permissible to argue therefrom that he did or did not behave as an innocent person would under similar circumstances.

3. Criminal law ⊂=448(11)—Evidence concerning defendant's appearance held admissible over objection that it was a conclusion.

Evidence that when defendant met a witness soon after a crime was claimed to have been committed his face was disfigured and he appeared blanched or somewhat excited was admissible over the objection that it was a conclusion, as the observations of an ordinary witness concerning the various mental and emotional aspects of humanity are admissible.

4. Criminal law ⊂=822(4) — Introductory statement in instruction stating prosecution's contention held not erroneous as assuming fact in dispute.

A statement by the court in the charge that the prosecution contended that the crime was rape because at the time it was alleged to have been committed the prosecutrix was under the age of 18 years was not erroneous as assuming as a fact that she was under 18, where it was but introductory to an instruction to convict only in case the jury found beyond a reasonable doubt that she was under 18, as no juror of ordinary intelligence could have understood it otherwise than as a mere statement of the prosecution's contention.

5. Criminal law ⊂=822(1)—Charge must be taken as a whole in determining correctness.

To determine whether or not the law was properly declared for the guidance of the jury, the charge as a whole, and not an isolated excerpt therefrom, must be looked to.

6. Criminal law ⊂=785(8)—Refusal to charge that witness may not be impeached by particular wrongful acts held not error.

Where witnesses who testified that defendant's general reputation for truth, honesty, and integrity was bad testified on cross-examination that their testimony was based on conversations with creditors who had difficulty in collecting debts, and the court charged that a witness might be impeached by evidence that his reputation for truth or honesty was bad, an instruction that a witness might not be impeached by evidence of particular wrongful acts was properly refused, as it was the duty of the jury to consider the testimony of the character witnesses in its entirety, including the cross-examination as well as the direct examination.

7. Criminal law ⊂=1186(4)—Judgment not reversed for refusal of instruction unless there has been a miscarriage of justice.

Under Const. art. 6, § 4½, the refusal of an instruction that a witness could not be impeached by proof of particular acts does not require a reversal where after reading the evidence the court is not of the opinion that a miscarriage of justice has been caused by the error.

8. Criminal law ⊂=829(1)—Refusal of instruction covered by those given not error.

The refusal of a requested instruction was not error where the subject-matter was completely and correctly covered in the charge to the jury, and the jury were clearly advised upon all the principles of law pertinent to the charge set forth in the information.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

J. A. Sprague was convicted of rape and he appeals from the judgment and from the order denying a new trial. Affirmed.

E. I. Feemster, of Visalia, for appellant.
U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant, who was convicted of the crime of rape, committed on the body of a young girl 16 years of age, appeals from the judgment and order denying him a new trial.

[1-3] A witness for the prosecution—a man who occupied a room adjoining that in which it was claimed the offense was committed—after testifying that he witnessed the criminal act and that he met defendant shortly thereafter, was asked by the prosecuting attorney on his direct examination what was defendant's appearance when he thus met him. Defendant's counsel objected upon the ground that the question called for the conclusion of the witness. The objection being overruled, the witness testified that defendant's face was rather disfigured, and that he appeared blanched or somewhat excited. The conduct of a suspected person charged with crime, when it is such as to show a consciousness of guilt, is always admissible. It was pertinent to show, therefore, how defendant behaved under the trying circumstances when he met, face to face, the man whom he must have known was the occupant of the room adjoining that in which he is alleged to have satisfied his lustful passions on the body of this young girl. It was permissible to argue that defendant did or did not behave as would an innocent person under similar circumstances. The weight of the testimony was for the jury, but it was not error to admit it. People v. Rowell, 133 Cal. 39, 65 Pac. 127; People v. Cole, 141 Cal. 90, 74 Pac. 547; People v. Weber, 149 Cal. 339, 86 Pac. 671. Nor was the question objectionable upon the ground that it called for the conclusion of the witness—the only ground of objection made in the court below. The observations of ordinary witnesses concerning the various mental and emotional aspects of humanity are admissible in evidence. Thus, when the subject-matter is relevant, it is permissible to ask a witness what was the appearance of another as to anger, fear, intoxication, etc.

"There are," says the court in Robinson v. Exempt Fire Co., 103 Cal. 5, 36 Pac. 956, 24 L. R. A. 715, 42 Am. St. Rep. 93, "many cases where a witness, though not an expert, may be permitted to state the result of his observation, notwithstanding it involves, in a sense, his opinion or judgment, such as the apparent state of health of a person, whether a person is drunk or sober, or other characteristic or state which manifests itself to the apprehension of the common observer."

See People v. Lavelle, 71 Cal. 351, 12 Pac. 226; People v. Monteith, 73 Cal. 7, 14 Pac. 373; People v. McCarthy, 115 Cal. 260, 46 Pac. 1073; People v. Sehorn, 116 Cal. 511, 48 Pac. 495; Holland v. Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231; People v. Arrighini, 122 Cal. 121, 54 Pac. 591.

[4, 5] Complaint is made of an instruction beginning:

"In this case the prosecution contends that the crime is rape, because at the time the offense is alleged to have been committed as set forth in the information, Grace ——— was under the age of 18 years."

It is claimed that this part of the instruction assumes as a fact that the prosecutrix was under the age of 18 years. We think the language is not fairly open to this construction. The clause we have quoted is but introductory to an instruction whereby the jurors were told, in substance and effect, that it is their duty to convict only in the event that they shall "find from the evidence beyond a reasonable doubt that at the time mentioned Grace ——— was under the age of 18 years." In the introductory sentence complained of by appellant—that which precedes the instruction as to what facts the jurors must believe beyond a reasonable doubt before they might justly find defendant guilty—the court was dealing solely with the prosecution's contention respecting its theory of the case, and was not declaring as a fact that the prosecutrix was under the age of 18 years at the time when it was claimed that the crime was committed. To determine whether or not the law was properly declared for the guidance of the jury, we are to look, not to an isolated excerpt from an instruction, but to the charge as a whole. People v. Besold, 154 Cal. 370, 97 Pac. 871. When the whole instruction is read and considered in its entirety, we are satisfied that no juror of ordinary intelligence could have taken the language complained of as being aught than a mere statement by the court that the prosecution was contending that the girl was under 18 years of age, and that for that reason it was further contending that the crime of rape had been committed.

[6] On rebuttal, and after defendant had testified as a witness in his own behalf, the prosecution put on the stand several witnesses, each of whom, on his direct examination, testified that he knew defendant's general reputation for truth, honesty, and integrity in the community in which he lived, and that it was bad. On the cross-examination of some of these witnesses defendant's counsel drew out the fact that their testimony as to defendant's general reputation, given on their direct examination, was based

upon conversations which they had had with some of defendant's creditors, wherein the latter had stated to the witnesses that they, the creditors, had had difficulty in collecting debts due them from defendant. The lower court instructed the jury that "a witness may be impeached by the party against whom he is called, by contradictory evidence or by evidence that his reputation for truth, honesty, or integrity is bad." The court refused to give, at defendant's request, a similar instruction with the additional admonition that a witness may not be impeached "by evidence of particular wrongful acts." It is argued that the requested instruction should have been given that thereby the jury might have been instructed to eliminate from their consideration the testimony respecting the difficulties defendant's creditors had had with him in the collection of their claims. The refusal to give the instruction was not error. There is no claim that the testimony of the character witnesses was not admissible. Their testimony, and all of it, was in the case for the jury's consideration. It was the jury's duty to consider the testimony of each of the character witnesses in its entirety in order to determine the weight to be given it. It was their duty to consider the facts brought out on the cross-examination as well as those adduced on the direct examination, in order to determine whether the prosecution had established the evil character of defendant's general reputation for truth, honesty, or integrity. And if, after such consideration, the jury believed defendant's reputation to be bad, they were at liberty to take that fact into consideration in determining the weight to be given this testimony. The jury's duty thus to consider the evidence accords precisely with that enjoined upon them by the court's instruction to the effect that a witness of an adverse party may be impeached by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad. See Steeples v. Newton, 7 Or. 110, 33 Am. Rep. 705, where the court upheld an instruction to the effect that evidence of misunderstandings that the impeached witness had had with his neighbors, if brought out on the cross-examination of the impeaching witnesses, may be considered by the jury as affecting the credibility of the impeached witness.

[7] Moreover, even if we should concede, though we do not, that it was error to refuse an instruction in the form requested by defendant, nevertheless the evidence in this case is of such a character that it satisfies us that no miscarriage of justice could result; and unless, after reading the evidence, this court shall be of the opinion that a miscarriage of justice has been caused by any error in giving or refusing instructions, the judgment cannot be set aside. Const. art. 6, § 4½.

[8] Complaint is made of the court's refusal to give two other instructions requested by defendant. The subject-matter of each of these was completely and correctly covered in the court's charge to the jury, who were clearly advised upon all the principles of law pertinent to the charge set forth in the information. The trial court, therefore, did not err in refusing to give the requested instructions.

The judgment and order are affirmed.

We concur: WORKS, J.; CRAIG, J.

52 Cal. App. 259

JACKSON v. WILDE, Mayor of City of San Diego, et al. (Civ. 3116.)

(District Court of Appeal, Second District, Division 2, California. April 15, 1921.)

1. Master and servant ⊂=364—Fireman an "officer" and not "employee" within Compensation Act prior to its amendment.

A regularly appointed member of a city fire department is an officer and not an employee in the sense that he is not in service of contract of hire, so that firemen were not included in the Workmen's Compensation Act prior to its amendment by statute of 1917, p. 835, so as to make the term employee include all elected and appointed paid public officers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Officer.]

2. Municipal corporations ⊂=199—Charter reference held to incorporate ordinance giving fireman sick leave with pay.

The amendment of San Diego Charter, art. 2, c. 1, § 2, in 1915 (St. 1915, p. 1828), expressly continuing in force an ordinance reorganizing the fire department and providing for a firemen's relief and pension fund, makes the ordinance, including the provision for leave of absence with pay in case of sickness contracted while on duty, a part of the city's organic law.

3. Municipal corporations ⊂=176(3) — Fixing compensation of fireman is municipal affair as to which freeholder's charter prevails over general law.

The fixing of the compensation to be received by city firemen under the authority given by Const. art. 11, § 8½, subd. 4, to provide for compensation for municipal officers and employees, is a municipal affair within the meaning of article 11, § 6, so that such provision is paramount to any general law respecting the matters dealt with in ordinance fixing compensation.

4. Municipal corporations ⊂=199—Officer is entitled to pay while disabled by sickness.

The salary of a public officer is an incident to the title of the office and not to its occupation or exercise, so that a fireman who is a public officer is entitled to compensation although he may be disabled by sickness from perform-

ing its duties if there is no law or regulation authorizing a discontinuance of compensation during disability.

5. Master and servant ⊂364—Municipal corporations ⊂199—Pay of fireman during sick leave is not "compensation for injury."

Payment of salary of fireman under the terms of the city ordinance for the period while he was on leave of absence for sickness contracted while on duty is not "compensation for injury" within the meaning of the Workmen's Compensation Act.

6. Mandamus ⊂71—Lies to enforce particular act clearly required by law.

Although mandamus will not lie to control the discretion of an inferior tribunal or officer, that is, will not lie to enforce a particular decision, it will lie to enforce action by the inferior tribunal or officer when the law clearly establishes a petitioner's right to such action with no room for the exercise of discretion.

7. Mandamus ⊂101—Issued to compel auditing board to allow claim which it had no discretion to reject.

Though mandamus will not issue against auditing body to allow a claim the determination of which involves the exercise of some quasi judicial or discretionary power, it will issue to compel the allowance of a claim with respect to which the auditing board has not discretion.

8. Municipal corporations ⊂1012—Auditing board held to have no discretion to disallow pay to fireman granted sick leave with pay.

Under a city ordinance authorizing the fire superintendent to grant a fireman leave of absence with pay during a sickness contracted while on duty, the determination by the superintendent that a fireman's sickness was so contracted is conclusive, and the auditing board has no discretion to disallow the fireman's salary during such lease, though the pay roll as made out and verified by fire chief must pass through the hands of the auditing committee in the ordinary course of business.

9. Municipal corporations ⊂199—Evidence held to sustain fire chief's finding fireman contracted sickness in the line of duty.

Evidence that a fireman was on duty 24 hours a day except for one day in every five or six, and that the nature of his duties made him peculiarly subject to colds, *held* sufficient to sustain the fire chief's finding that the cold contracted by a fireman which subsequently turned into influenza was contracted while on duty, though the particular time when it was contracted was not established.

10. Mandamus ⊂101—Fire chief's determination fireman's sickness was contracted in line of duty is conclusive.

In mandamus to compel allowance of a fireman's compensation during time he was absent on leave with pay, the fire chief's determination, in granting leave of absence, that the fireman's sickness was contracted while on duty is conclusive, if rendered in the exercise of his honest judgment.

11. Mandamus ⊂187(9)—Errors in rules of evidence as to question on which fire chief's determination was conclusive are not prejudicial.

In mandamus to compel allowance of fireman's salary for the time he was on sick leave with pay, where the fire chief's determination that the fireman's sickness was contracted while on duty was conclusive, error in rulings on questions asked the fire chief as witness relating to the fireman's sickness were not prejudicial to defendants.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Petition of A. L. Jackson for a writ of mandate to Louis J. Wilde, as mayor of the City of San Diego, and others. From a judgment granting the writ, defendants appeal. Affirmed.

T. B. Cosgrove, City Atty., of Los Angeles, S. J. Higgins, of San Diego, and Arthur F. H. Wright, of Bisbee, Ariz., for appellants.

Wright & McKee, of San Diego, for respondent.

FINLAYSON, P. J. This is an appeal from a judgment in favor of plaintiff, a member of the fire department of the city of San Diego, awarding a peremptory writ of mandate commanding defendants, as members of the city's auditing committee, to allow, approve, and order paid the city's pay rolls for the months of January and February, 1919, in so far as the same pertain to plaintiff's salary.

Since 1889, San Diego has been operating under a freeholders' charter. This charter provides for an auditing committee whose duty it shall be "to examine, allow, and order paid, or reject and disallow all claims, demands and bills of whatever nature (except monthly salaries of city officers as fixed by this charter) which may be presented against the city." It is further provided that "the auditor shall not draw a warrant for any bill unless the same has been approved by a majority of the whole auditing committee," and that "all demands, bills and claims which may arise against the city, including the pay roll of all employees of the city, whether under regular monthly salary or not (except salaries of city officers fixed by this charter), shall be duly verified as hereinafter provided, and shall be filed with the secretary of the auditing committee, who shall file and number the same in the order of presentation, and refer the same to the auditing committee for action, whose duty it shall be to allow or reject the same, in whole or in part, and if allowed, designate the particular funds from which they are to be paid. * * *" Stats. 1889, p. 704.

Plaintiff, for seven or eight years past, has been a fireman regularly employed in the city's fire department at a monthly salary of

$125, less the sum of $1 per month which the city treasurer is required to retain from the monthly pay of every member of the department to be paid into the firemen's relief and pension fund. In January, 1913, an ordinance numbered 4979, and entitled "An ordinance reorganizing the San Diego fire department and providing for a firemen's relief and pension fund," was regularly adopted. This ordinance provides that the city's fire department shall be under the management of the superintendent of fire, who, subject to the approval of the common council, shall organize the department, create such fire companies as he may deem necessary, prescribe the number and duties of the officers and employees, and exercise full power and authority over all appropriations made for the use of the department, subject to the approval of the common council. Section 8 of the ordinance provides:

"The superintendent of the department may grant such leave of absence with full pay, not to exceed one year, to any fireman who has contracted sickness or disability in the line of duty. * * * The chief of the fire department may grant such leave of absence, not to exceed thirty days, with full pay, or for other reasons, a leave of absence without pay."

In the months of January and February, 1919, one Louis Almgren was both superintendent and chief of the fire department. Plaintiff, some time shortly prior to January 26, 1919, contracted a cold. Upon the ground that plaintiff's cold was a sickness or disability contracted by him in the line of his duty as a fireman, Almgren, as superintendent and chief of the fire department, granted plaintiff a leave of absence, with full pay, from and including January 26, 1919, to and including February 8, 1919. Almgren made out the department's pay roll for each of the months of January and February. Each pay roll contained a provision to the effect that plaintiff was entitled to the full amount of his monthly salary of $125, less the $1 required to be deducted for the firemen's relief and pension fund. The pay rolls were duly approved and verified by Almgren, as provided by said Ordinance No. 4979, and on March 20, 1919, they were delivered to the secretary of the auditing committee for the committee's allowance and approval. On March 26th each of the pay rolls, so far as it related to plaintiff's salary, was disallowed and rejected by the auditing committee upon the ground that plaintiff's sickness and disability was not contracted in the line of his duty as a member of the fire department, and that therefore he was not entitled to any salary during the time he was absent from duty. The trial court found that plaintiff's sickness was contracted in the line of his duty, and adjudged that the writ issue commanding defendants, as members of the auditing committee, to allow, approve, and order paid each of the pay rolls in so far as they pertain to plaintiff's salary.

[1] Appellants' first contention may thus be stated: If plaintiff were allowed pay during the days he was absent from duty on sick leave, he, in effect, would be receiving from the city of San Diego compensation for "injury," within the meaning of the Workmen's Compensation, Insurance and Safety Act; that act, in section 6, declares that liability for the compensation provided therein for any injury sustained by an employee, arising out of and in the course of his employment, shall exist against his employer in lieu of any other liability for such injury (Stats. 1917, p. 834); the city's charter is silent respecting compensation to city employees for injuries sustained by them in the course of and arising out of their employment; therefore, so the argument runs, the case is within the rule that a city having a freeholders' charter is subject to general laws, even in municipal affairs, when the subject-matter is not covered by the charter; and plaintiff therefore is entitled only to such compensation for the sickness which he claims was contracted by him in the line of his duty as is provided by the Workmen's Compensation Act. In short, the claim is that the provision of the ordinance authorizing the superintendent or chief of the fire department to grant a fireman sick leave on full pay has been superseded by the Workmen's Compensation Act, and no longer is in force. Were it not for the amendment of 1917 to the Workmen's Compensation Act, there would be no possible basis for any such contention, for, prior to that amendment, the act was not applicable to "public officers" (Mono County v. Industrial Acc. Comn., 175 Cal. 752, 167 Pac. 377); and a regularly appointed member of a city's fire department is an "officer," and is not an "employee," in the sense that he is in service under a contract of hire (McDonald v. New Haven, 94 Conn. 403, 109 Atl. 176, 10 A. L. R. 193; see, also, Blynn v. Pontiac, 185 Mich. 35, 151 N. W. 681). In 1917, the statute was amended so as to cause the term "employee," as used in the act, to embrace "all selected and appointed paid public officers." (Stats. 1917, p. 835.)

[2] Appellants' argument assumes that the charter of San Diego is wholly silent upon the right of a fireman to sick leave on full pay. Such, however, is not the case. In 1915, section 2 of chapter I of article 2 of the city's charter was amended, so that subdivision "j" of that section now reads:

"Such manager of operation and superintendents shall be the executive heads of their respective departments and shall appoint and remove their assistants and employees, subject to such civil service regulations as this charter may provide, except that provisions now contained in the People's Ordinance No. 4979 and entitled 'An ordinance reorganizing the San

Diego fire department and providing for a firemen's relief and pension fund' shall continue in full force and effect." Stats. 1915, p. 1828.

Here is an express declaration in the city's charter that the provisions of the ordinance under which plaintiff claims the right to full pay for the two months during parts of which he was absent on sick leave "shall continue in full force and effect." To all intents and purposes the ordinance, including the provision that a fireman on sick leave shall be entitled to full pay notwithstanding his enforced absence, has become a part of the city's organic law.

[3] That provision of Ordinance No. 4979 under which plaintiff claims the right to a full month's salary for each of the months of January and February, 1919, relates to the "compensation" of the members of the city's fire department. By subdivision 4 of section 8½, art. 11 of the State Constitution, plenary authority is given to provide in any freeholders' charter, or in any amendment thereto, for the "compensation" that shall be received by every municipal officer or employee. The fixing of the compensation to be received by a city fireman is a "municipal affair," within the meaning of section 6, art. 11. It follows, therefore, that the amendment of 1915 to the charter, whereby it was declared that the provisions of Ordinance No. 4979 "shall continue in full force and effect"—an amendment adopted after section 6 of article 11 had been amended in 1914—is paramount to any general law respecting such matters as are dealt with in the ordinance.

For the foregoing reasons we fail to see how there can possibly be any room for the application of the rule that, with respect to a municipal affair upon which a freeholders' charter is silent, the provisions of any general law pertaining thereto shall control.

[4] Moreover, appellants' contention is based upon the erroneous assumption that if plaintiff receive pay for the time he was away on sick leave he will thereby be receiving compensation for "injury," within the meaning of the Workmen's Compensation Law. Plaintiff was not employed by the day, nor did he contract for or receive a per diem compensation. He was appointed for an indefinite period, at a fixed monthly salary. His compensation, provided, we assume, by ordinance duly adopted by the common council, was annexed to or was an incident of his office or employment. So long as he continues to fill the office of fireman he is entitled to the full amount of his monthly salary, regardless of any temporary absence from duty, save, of course, in so far as the ordinance in question contemplates that he shall not receive full pay if he be absent from duty without a leave of absence on account of sickness or disability contracted in the line of duty. It is well settled that a person holding a public office has a prima facie right to the salary thereof, although he be physically disabled from performing his duties; and if there be no law or regulation authorizing the discontinuance of the compensation during the disability, the only remedy is his removal. His right to compensation is not by virtue of contract, express or implied, but exists, when it exists at all, as a creature of law and as an incident to the office. Bates v. St. Louis, 153 Mo. 18, 54 S. W. 439, 77 Am. St. Rep. 701; Stratton v. Oulton, 28 Cal. 44; Burke v. Edgar, 67 Cal. 182, 7 Pac. 488; Cavanee v. City of Milan, 99 Mo. App. 672, 74 S. W. 408; O'Leary v. Board of Education, 93 N. Y. 1, 45 Am. Rep. 156; Bryan v. Cattell, 15 Iowa, 538; People v. Bradford, 267 Ill. 486, 108 N. E. 732. As said in Stratton v. Oulton, supra, the salary "is incident to the title to the office and not to its occupation or exercise." 28 Cal. 51. This rule has been held to apply to such public servants as policemen. People v. French, 91 N. Y. 265; State v. Walbridge, 153 Mo. 194, 54 S. W. 447; Frederick v. Peoria, 203 Ill. App. 486. If applicable to policemen, the rule must be equally applicable to firemen.

Plaintiff's title to the office of fireman is not disputed. To that office the law attaches a monthly salary, and to that salary he is entitled so long as the law creating it remains in force and he continues to hold the office. The legal right to the office carries with it the legal right to the salary, and his right thereto is not dependent upon the fact or value of services actually rendered.

[5] Ordinance No. 4979 contemplates the performance of services by a fireman only during such times as he is not incapacitated for duty by reason of sickness or disability. The monthly salary that goes with the office is the fireman's compensation for the services that are contemplated by the ordinance. The salary is not compensation for anything other than the services that are within the purview of the ordinance. In no sense, therefore, can a fireman's fixed monthly salary be regarded as compensation for "injury," within the meaning of the Workmen's Compensation Act, even though it be pay for a period of time during a part of which he may have been absent on sick leave.

For the foregoing reasons we conclude that there is no merit in appellants' first contention.

It next is claimed that mandamus is not the proper remedy. Appellants' argument is, in substance, this: The auditing committee, in passing upon the city's pay rolls, is vested with discretionary and judicial powers; in the instant case the committee was vested with power to determine whether plaintiff's alleged illness was contracted in the line of his duty; in deciding that question the committee exercised a discretionary or quasi judicial power; therefore, say counsel for appellants, mandamus will not lie.

[6] While it undoubtedly is true that mandamus will not lie to control the discretion of an inferior tribunal or officer, meaning by that that it will not lie to force the exercise of discretion in a particular manner, it will lie to force a particular action by the inferior tribunal or officer when the law clearly establishes the petitioner's right to such action. Where, by the express declaration of the Legislature or other lawmaking body, a given result must follow a given state of facts, with no room for the play of discretion upon the part of the inferior tribunal or officer, the writ may issue to compel the granting of specific relief. Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582. In Hensley v. Superior Court, 111 Cal. 541, 44 Pac. 232, the superior court had refused to make or enter an order or decree of due notice to creditors, upon the ground that the order for the notice was not in conformity with the law. The Supreme Court, in issuing its mandate, declared:

"Where, as here, the law affixes a right to specific relief upon certain facts, and there is no question made as to the existence of such facts, the court has no discretion to refuse the relief. In such a case the limit of the discretionary power of the court has been reached, and nothing but a clear duty remains; and if the relief is refused, and there is, as in this instance, no appeal or other plain, speedy, and adequate remedy, mandamus will lie to compel it."

[7] Though the writ will not issue against an auditing body to allow a claim where the determination of whether the claim should be allowed or rejected involves the exercise of some quasi judicial or discretionary power, the nature of the claim may be such as not to require the exercise of any judgment or discretion whatever. In that case the writ may issue to compel the committee or auditing body to audit and approve the claim. Lawrence v. Booth, 46 Cal. 187; Wood v. Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249; Hammel v. Neylan, 31 Cal. App. 21, 159 Pac. 618; Bryan v. Cattrell, supra.

[8] In the instant case, defendants, members of the auditing committee provided for by the San Diego city charter, were not called upon to exercise any legal discretion whatever. By the express terms of the ordinance under which plaintiff claims the right to a full month's salary for each of the months of January and February, Almgren, as superintendent and chief of the fire department, was vested with the whole power to grant leave of absence, with full pay, to any fireman who, in the chief's opinion, had contracted sickness or disability in the line of duty. Almgren, who at this time was both superintendent and chief of the fire department, alone had the right to pass upon the sufficiency of the cause of absence, and whether it had been produced by sickness or disability contracted in the public service; and the right of any fireman to sick leave rested solely and entirely in his discretion. See Santa Minto v. City of New York, 3 E. D. Smith (N. Y.) 386.

The superintendent and chief of the fire department having, in the exercise of the discretionary power with which he alone is vested, granted to plaintiff a leave of absence with full pay, on the ground that he had contracted sickness while acting in the line of his duty, the ordinance, upon that state of facts, steps in and declares, in effect, that plaintiff is entitled to his full month's pay without any deduction whatever, save, of course, the one dollar that goes to the firemen's relief and pension fund. No room, therefore, was left for the exercise of any discretion on the part of the auditing committee, and it clearly was the duty of the superior court to issue its mandate to defendants, that thereby plaintiff might be accorded the right to which the city's ordinances indubitably entitle him. Sullivan v. Gage, 145 Cal. 759, 79 Pac. 537, a case upon which appellants place much reliance, is nowise inimical to our conclusion that mandamus is a proper remedy. The claim that was presented to the state board of examiners in that case was one essentially calling for the exercise of the board's discretion and judgment. Discretion and judgment were exercised by the board, with the result that the claim was rejected. Here the only question involving the exercise of discretion or judgment was: Did plaintiff contract his illness while acting for the city in the line of his duty as a fireman? The power and authority to answer that question was lodged in the superintendent and chief of the fire department, where we naturally would expect it to be placed. The authority and power to determine whether plaintiff was ill, and, if he was, whether his illness was contracted in the line of duty, was an authority and power that had to be lodged somewhere. The ordinance, the provisions of which were incorporated into the city's charter by the amendment of 1915, lodges that power in the person who, by reason of his daily association and contact with the men under his supervisory care, is the one best fitted to exercise such discretionary powers—the superintendent and chief of the fire department. True, the pay rolls, when made out, approved, and verified by the fire chief, must pass through the hands of the auditing committee in the ordinary course of business; but the amounts of the salaries allowed by the committee can be no other than such as are fixed by the charter or by ordinance passed pursuant thereto. In the Sullivan Case our Supreme Court quotes from the opinion of the New York Court of Appeals in Osterhoudt v. Rigney, 98 N. Y. 223, as follows:

"The acts of a board of audit, within its jurisdiction, in the absence of fraud or collusion,

are final and conclusive, and cannot be questioned on a collateral proceeding. Whether the claim is a proper town or county charge, *in a case where it is doubtful, and rests upon disputed evidence*, and what amount shall be allowed when not fixed by statute, are questions which the statute commits to the determination of the board of audit; and however much it may err in judgment upon the *facts*, so long as it keeps within its jurisdiction, and acts in good faith, its audit cannot be overhauled, but is final, as well as to the taxpayers as to the claimant." (Italics ours.)

If plaintiff's rights be measured by this clear and correct statement of the law, it will be apparent that he has not mistaken his remedy. The fire chief, in whom the whole power is lodged, determined that plaintiff contracted illness in the line of his duty, and for that reason gave him leave of absence with full pay. The amount, therefore, to which plaintiff was entitled, was not doubtful, it did not rest upon disputed evidence, and it was definitely fixed by ordinance.

[9] Appellants contend that the evidence is insufficient to justify the finding that plaintiff contracted sickness and disability in the line of his duty as a member of the fire department. Fire Chief Almgren, the only witness in the case, testified that plaintiff had contracted a cold which later turned into influenza; that plaintiff was on duty 24 hours a day, except one day in every five or six, when he was given a day off duty under a regulation which allows every fireman one day off in every five or six; that firemen are peculiarly subject to colds by reason of their exceptional exposure when on duty; and that at the time in question a great number of the men had colds. Absolute certainty as to the time when plaintiff contracted the cold is not required. It is sufficient that it is more probable that he contracted it while on duty, when he was peculiarly exposed to the ordinary causes of such an illness, than that he "caught the cold," as the saying is, when off duty. See San Francisco v. Industrial Acc. Comn., 191 Pac. 26; Engels, etc., Co. v. Industrial Acc. Comn. (Cal.) 192 Pac. 845; Santa Minto v. City of New York, supra.

[10] Moreover, as we view the case, the question whether plaintiff contracted the cold while on duty was not a proper issue in the case. For reasons already stated, we think that was primarily a question for the fire chief, to be determined by him when he was called upon to decide whether plaintiff should be given a leave of absence with full pay. His decision upon that question, in the exercise of his honest judgment, was final and conclusive; for in him, and in him only, was that discretionary or quasi judicial power lodged. Of course, if he did not exercise an honest judgment, which is nothing other than to say no judgment whatever, then his mere arbitrary or fraudulent ipsi dixit would not vest plaintiff with the rights appertaining to a valid sick leave. But no claim has been made that the fire chief acted fraudulently, collusively, or arbitrarily. No issue of that kind was presented by appellants in their return to the alternative writ. The chief's determination, therefore, that plaintiff was entitled to sick leave on full pay, was final and conclusive.

[11] Finally, the claim is made that the lower court erred in sustaining certain of respondent's objections to questions propounded to the witness by appellants' counsel and in overruling certain objections interposed by appellants to questions put to the witness by respondent's counsel. These contentions are based upon the assumption that the discretionary power to grant leaves of absence, and to determine whether they should be granted with full pay on account of sickness contracted in the line of duty, is not wholly lodged in the superintendent or chief of the fire department, and that the chief's decision thereon is subject to review by the auditing committee. Since we think that the whole power is lodged exclusively in the superintendent and chief, and that an honest exercise of his discretionary power is final and conclusive, we do not think it necessary to consider these objections in detail. The rulings objected to certainly were not prejudicial.

There are no other points that merit consideration.

Judgment affirmed.

We concur: WORKS, J.; CRAIG, J.

52 Cal. App. 348

FANCHER CREEK NURSERIES v. LOESCHER. (Civ. 3685.)

(District Court of Appeal, First District, Division 1, California. April 22, 1921. Hearing Denied by Supreme Court June 20, 1921.)

Principal and agent ⊂63(3)—Contract making agent "personally responsible" for goods sold makes him directly and primarily responsible.

Contract between principal and selling agent providing that he would sell for cash only, and shall be "personally responsible" for all goods sold, makes him, where selling on credit, directly and primarily responsible to his principal, without any necessity of the principal's first resorting to the buyer.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Personally Responsible.]

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by the Fancher Creek Nurseries against E. F. Loescher. Judgment for plaintiff, and defendant appeals. Affirmed.

N. Lindsay South, of Fresno, for appellant.

Harris, Johnson, Willey & Griffith, of Fresno, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor in an action upon a contract by the terms of which the defendant was created the agent of the plaintiff to makes sales of nursery stock.

The contract, which was entered into on December 10, 1918, after providing for the appointment of the defendant as the plaintiff's agent for the purpose of selling and canvassing for the sale of nursery stock, contained a clause providing that the defendant as such agent agreed that he would sell nursery stock for cash only, would keep full and correct accounts of all sales made, and would make remittances promptly as sales and collections were made; the prices at which such sales were to be made were to be fixed from time to time by the principal; the defendant was to receive a commission of 20 per cent. on all sales of nursery stock except citrus and grafted grape vine stock, upon which his commissions were to be 10 per cent., which commissions were to be paid only on orders which had been actually closed and paid for in cash. The clause in said contract out of which this action arose was in the following words:

"The party of the second part shall be personally responsible for all goods sold and bills contracted under this agreement."

The complaint herein was in three counts, the first being a general count in assumpsit for a balance claimed to be due upon the entire amount of business transacted by the defendant as the plaintiff's agent, including an amount claimed to be due upon a direct purchase of nursery stock made by him on his own account. The second count was one to recover the sum of $287.50, the amount of the defendant's said personal purchase; while in the third count the contract was pleaded in full, and only the sum claimed to be due from the defendant for sales made by him to others as the plaintiff's agent was demanded.

The defendant upon the trial and upon this appeal admits his indebtedness in the sum set forth in the second count of the complaint springing from his personal purchase of nursery stock, and only complains of the findings of the trial court as to his liability under the personal responsibility clause in the contract above quoted for sales made by him to others as the plaintiff's agent. The sole question which he thus raises upon this appeal is as to the construction to be placed upon said clause; his contention being that under said clause in his contract he was only to be held liable for such sums as might remain uncollectible after the plaintiff had first had recourse to those whose orders had been taken and filled for nursery stock, and hence that, the plaintiff, not having alleged or proven any demand or attempted recourse upon the parties originally liable upon such orders, it had not shown the existence of a cause of action against the defendant and appellant herein.

We are unable to sustain this contention. The contract in question, when construed as a whole, clearly provides that the defendant, as the plaintiff's agent, should sell for cash only to such customers as he might succeed in obtaining orders from for the plaintiff's nursery stock; the plaintiff being required to fill these orders when so taken. It is quite evident that the principal inserted the clause in said contract providing for the personal responsibility of the defendant upon all orders taken by him for its own protection, and to our minds there is but one reasonable construction to be placed upon said clause, and that is that the agent, being authorized by the terms of his contract to sell for cash only, was bound, in the event of his accepting any orders for nursery stock other than cash orders, to make good such orders in cash directly to his principal.

The case of Fuerst v. Musical Mut. Protective Union (City Ct.) 95 N. Y. Supp. 155, upon which the appellant relies, must be read as to its interpretation of the phrase "personal responsibility" with its context; and when so read it is clear that its definition of that phrase as applicable to that particular case cannot be given application to the facts of the case at bar. The clause in the contract under review in this case would be meaningless if it was not intended to make the agent directly and primarily responsible to his principal upon all orders taken by him. The trial court correctly took this view in its findings and judgment, and, since this is the only question involved in this case, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

52 Cal. App. 142

A. R. G. BUS CO. v. WHITE AUTO CO.

(Civ. 3482.)

(District Court of Appeal, Second District, Division 1, California. April 1, 1921. Hearing Denied by Supreme Court May 31, 1921.)

1. Evidence ⟸442(6)—Parol evidence held inadmissible to show that 10 order contracts were but parts of a single transaction.

In an action for damages for failure to deliver auto trucks, parol evidence of the circumstances under which 10 order contracts were made, each one stating that it was a complete contract, *held* inadmissible for the purpose of showing that the order contracts were all but parts of a single transaction, under Civ. Code, §§ 1636, 1642.

2. Customs and usages ⟸17—Parol evidence of custom held inadmissible.

In an action for damages for failure to deliver auto trucks evidence that there was in the automobile business a general and well recognized custom and usage that where trucks were sold and the purchase price not paid in full at the time of the sale, automobile lease contracts in a certain form should be executed, was properly refused; it contradicting the written order contracts, providing that there was not between the parties any understanding or agreement with respect to the sale, "except such as are embraced in the terms therein."

3. Sales ⟸62—Held that there was no supplemental executed oral agreement concerning undelivered motor trucks.

In an action for damages for failure to deliver motor trucks, where defense was that plaintiffs refused to insure the trucks and execute lease contracts and notes, the fact that plaintiffs had executed lease contracts and notes and furnished insurance policies in connection with the delivery of three trucks, which were delivered by defendant, did not constitute an executed supplemental agreement, affecting the terms or performance of the separate and independent contracts involved.

4. Sales ⟸418(2)—Damage difference between contract price and market price on failure to deliver.

Where seller fails and refuses to deliver motor trucks, the measure of damages is the difference between the contract price and the market price of the trucks at the time when seller repudiates the contract, under Civ. Code, §§ 3308, 3354.

On Hearing in Supreme Court.

5. Evidence ⟸442(6)—Parol evidence inadmissible to show that purchaser of auto trucks was to execute lease agreement and take out insurance.

In an action for damages for failure to deliver motor trucks under written order contracts, which provided that there was not between the parties any understanding or agreement with respect to the sale "except such as are embraced in the terms therein," parol evidence was inadmissible to show an oral agreement that purchaser should execute a lease agreement and carry insurance on each truck for the benefit of the seller; there being no provision in the order contracts for the execution of such lease agreement, or any lease agreement at all, whether the order contracts for each truck were or were not parts of a single transaction.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by A. R. G. Bus Company against the White Auto Company. Judgment for plaintiff, and defendant appeals. Affirmed in the District Court of Appeals, and hearing denied in Supreme Court.

Herbert W. Kidd and Eugene D. Williams, both of Los Angeles (A. J. Verheyen and Rex Hardy, both of Los Angeles, of counsel), for appellant.

Alfred H. McAdoo and George E. Mills, both of Los Angeles, for respondent.

CONREY, P. J. On the 18th day of June, 1917 (defendant's corporate name at that time being Pioneer Commercial Auto Company), a contract in writing was entered into between plaintiff and defendant whereby the plaintiff agreed to purchase from defendant an automobile truck therein described, and to pay therefor the stipulated price of $3,383.90. The terms of the contract, so far as it is necessary to set them forth here, are as follows:

"To be paid on delivery $783.90, balance in 18 monthly notes, interest at 8 per cent. per annum. Or said deposit of $——— to be forfeited to the Pioneer Commercial Auto Company as their compensation for withholding sale. Title to above-described property to remain in Pioneer Commercial Auto Company until same is paid for in full. Approximate delivery date as soon as possible."

"It is understood that the car above ordered is subject to the warranty published in the catalogue of the manufacturer, and that no other warranty or guaranty is or will be given, and that there is no understanding or agreement whatsoever between the undersigned and the Pioneer Commercial Auto Company, or its agents, with respect to the above order, except such as are embraced in the terms therein."

The complaint alleged that on said day plaintiff and defendant entered into seven separate contracts, all of which are identical in their provisions and all containing the terms above stated; that under and by virtue of these contracts the plaintiff agreed to purchase from the defendant, and the defendant agreed to sell to plaintiff, seven Model GBBE White automobiles at a total price and consideration of $3,383.90 each; that defendant had wholly refused and failed to make delivery of said automobiles, notwithstanding demand therefor was made by plaintiff; that defendant had announced and declared to plaintiff that it does not intend to

and will not make delivery of said automobiles as aforesaid. The first count of the complaint, after stating the foregoing facts, alleges that by reason of the breach and failure of the defendant to deliver said automobiles under and pursuant to the terms of the said contracts, plaintiff has suffered damages in the sum of $9,472.40. There are seven other counts in the complaint, all of which are like the first count, except that each of them states a separate cause of action on one of the seven contracts, and claims damages on account of the defendant's failure and refusal to deliver the automobile described in the contract. Judgment was entered in favor of the plaintiff for damages in the sum of $2,500, from which judgment the defendant appeals.

The answer of the defendant, so far as denials of facts alleged are concerned, raises no issue except upon the fact of damage to the plaintiff and the amount thereof. But as a further and affirmative defense, it was alleged in the answer that on said 18th day of June, 1917, plaintiff and defendant entered into one certain contract, whereby the plaintiff agreed to purchase from the defendant, and the defendant agreed to sell to the plaintiff, 10 White automobile trucks at a price of $3,383.90 per truck, "plus the additional necessary cost of installing upon each of said trucks special bodies therefor." The terms of this alleged contract included a cash payment of $783.90 on delivery of each truck and the giving of 18 notes for the unpaid portions of the purchase price of each of said trucks, with the further provision that a written lease contract as to each of said trucks was to be entered into by plaintiff and defendant on delivery of each of said trucks, and that certain insurance was to be placed on each of said trucks in favor of the defendant at the time of delivery of said trucks to the plaintiff. It was alleged that three of the trucks were delivered, but that the plaintiff failed and refused to place insurance on any of them as required by the alleged contract, or to deliver to the defendant any insurance policies. Further allegations of the answer show that on or about October 1, 1917, the fourth automobile truck included in said contract was ready for delivery, and defendant offered to deliver it to the plaintiff "upon the payment by it to defendant of said sum of $783.90, and upon the furnishing of insurance upon said truck in the sum of $2,600, and thereupon notified plaintiff that unless said payment was made upon said fourth truck, and said insurance furnished thereon not later than October 9, 1917, defendant would refuse to deliver said truck, or any of the remaining six trucks contemplated to be sold and delivered under the terms of said contract"; that plaintiff failed and refused to comply with these demands, and that by reason thereof defendant notified plaintiff that it would refuse to proceed further with the filling of said orders or with the delivery of the remaining seven trucks contemplated to be delivered under the terms of said contract.

Appellant contends that the evidence is insufficient to sustain the court's finding that at the time stated the plaintiff and defendant entered into the seven separate written contracts mentioned in the complaint, and that each one thereof was an independent contract; and that the court erred in refusing to admit parol testimony and other evidence going to prove that the 10 order sheets constituted but one contract. This presents the most important question in the case. It should be noted, however, that the defendant sought, not only to prove that the 10 order sheets constituted but one contract, but also to prove by evidence extraneous to those writings that the plaintiff agreed to sign "lease contracts" and to furnish insurance on the trucks in favor of the defendant. All of this offered evidence was objected to by respondent and excluded by the court. In support of appellant's contention that the court erred in these rulings, we are referred to two sections of the Civil Code and to certain decisions, and especially to Torrey v. Shea, 29 Cal. App. 313, 155 Pac. 820.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civ. Code, § 1636.

"Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Civ. Code, § 1642.

In Torrey v. Shea, supra, the rule is approved that where an inspection of the instruments themselves is not sufficient to ascertain whether or not several writings between the same parties were intended to cover a single contract, the intention of the parties being either not expressed or doubtfully expressed, resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made, for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments. The rule was so applied in that case that the defendants were permitted to show in evidence a contemporaneous collateral oral agreement of the parties to the several instruments to the effect that the subject-matter of each instrument should be but a unit in a series of sales which as a whole were to constitute the subject-matter of a single transaction. It was pointed out that in that case the defendants did not seek nor were they permitted to contradict by parol proof the covenants of the particular instrument in suit, and that therefore the rule that parol evidence is not admissible to alter,

vary, or contradict a written instrument was not applicable. But the court further stated:

"Of course, this exception to the general rule can be invoked and applied to a written instrument which prima facie purports to embody the complete legal obligations of the parties, only where the established circumstances surrounding and attending its execution warrant the inference that the parties did not intend that it should be a complete and final statement of the whole transaction before them."

[1] In the case at bar, each one of the written contracts contains the following stipulation:

"That there is no understanding or agreement whatsoever between the undersigned and the Pioneer Commercial Auto Company, or its agents, with respect to the above order, except such as are embraced in the terms therein."

This is a direct declaration of intention that the writing is itself a complete contract. To have permitted appellant to prove by parol evidence that this was only part of a transaction wherein at the same time other trucks were sold by the defendant to the plaintiff, and that all of the sales constitute one transaction, would be a direct contradiction of the terms of each contract. To go further, and permit defendant to prove an addition to the agreed price by charging the purchaser with the duty of paying for insurance on the trucks for the benefit of the vendor, would constitute a further addition to and contradiction of the terms of the contract.

It is next contended that the court erred in refusing to receive testimony to explain ambiguity in the contracts. The illustrations offered by counsel related to items not relevant to the actual controversy between the parties. Appellant's refusal to perform its contracts did not in any instance grow out of any disagreement with respondent concerning the color of the automobile, or the extent of lengthening of wheel bases, or the meaning of the phrase "18 monthly notes." Appellant proceeded upon the theory that notwithstanding the terms of each contract to the contrary, it could treat them all as one transaction, and impose upon respondent conditions not specified in any one of the contracts as written. Its breach of the contract grew out of that assumption, and did not result from ambiguities in the specifications of the orders. As to the elements of contract which have any bearing upon appellant's claimed right to refuse performance, we think the court did not err in treating each contract as complete upon its face.

[2] We think that the court did not err in refusing to admit evidence of witnesses to the effect that there was in the automobile business, at the time when these contracts were entered into, a general and well-recognized custom and usage that where trucks were sold and the purchase price not paid in full at the time of the sale, automobile lease contracts in a certain form should be executed. This could not have been done without contradicting the agreement of the parties that there was not between them any understanding or agreement with respect to the sale "except such as are embraced in the terms therein."

[3] The conclusions already announced compel the further decision that the court did not err in refusing to receive testimony going to prove that defendant's refusal to deliver the fourth truck, or to make further deliveries, was warranted or justifiable. Neither did the court err in refusing to admit evidence proving that subsequent to the date of the execution of the contract, the same was supplemented by an executed oral agreement. The fact that respondent executed lease contracts and notes and furnished insurance policies in connection with the delivery of the three cars which were delivered to it by appellant in no wise constituted an executed supplemental agreement affecting the terms or performance of the other separate and independent contracts.

[4] The remaining point suggested is that the evidence does not sustain the finding establishing the amount of damages suffered by the plaintiff. The claim is that the evidence proved nothing more than a speculation or guess concerning the loss sustained. It is claimed that the only witness on this subject testified to nothing definite. In answer to the question:

"What in your opinion would have been the reasonable market value in Los Angeles on October 9, 1917, of a new truck exactly as any one of the three trucks that were delivered by defendant to plaintiff?"

—the answer was:

"Why, I would assume possibly $3,930 each."

But on cross-examination the witness stated that these figures were the result of a computation which he had made, and gave details which were sufficient to establish the difference between the contract price and the market price of such trucks at the time when appellant repudiated the contracts. There was other testimony tending to show that this computation was not excessive. The measure of damages was appropriately determined in accordance with sections 3308 and 3354 of the Civil Code. Connell v. Harron, Rickard & McCone, 7 Cal. App. 745, 95 Pac. 916.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the

district court of appeal of the second appellate district, division one, is denied.

[5] In denying the petition we would say that we withhold approval from the portion of the opinion of the district court of appeal holding that parol evidence of the circumstances under which the ten order contracts were made was inadmissible for the purpose of showing that the order contracts were all but parts of a single transaction. A decision of the question so presented was not necessary. The evidence was offered only for the purpose of laying the foundation for a further showing that it was agreed that upon the delivery of each machine the plaintiff should execute a lease agreement and that this lease agreement should contain a provision whereby the plaintiff would in effect carry insurance on the machine for the benefit of the defendant. There was no provision in the order contracts for the execution of any such lease agreement or any lease agreement at all. This being so, the attempt to show an understanding for the execution of the lease agreements was but an attempt to vary by parol or extrinsic evidence the terms of written contracts. This could not be done, whether the ten contracts were or were not parts of a single transaction.

OLNEY, J., SHAW, J., WILBUR, J., and SLOANE, J., concur. ANGELLOTTI, C. J., and LENNON, J., concur in the denial of the petition for hearing in this court.

52 Cal. App. 322

DILLINGHAM et al. v. DAHLGREN.

(Civ. 3688.)

(District Court of Appeal, First District, Division 2, California. April 21, 1921.)

1. Frauds, statute of ⟸158(4)—Evidence held insufficient to show complete written contract of sale.

In an action for the breach of an agreement to sell real estate, wherein the statute was urged as a defense, testimony taken in connection with a reference in the preliminary agreement to a contract to be completed *held* to indicate that the parties intended the execution of a new agreement with a preliminary agreement as a basis, and that the defendant never delivered to plaintiff for her approval a proper written contract, but that he delivered a proposed contract containing important features in addition to those contained in the preliminary agreement.

2. Frauds, statute of ⟸106(2)—Contract for transfer of realty must be complete.

Where the transfer of a piece of real estate is involved, the parties cannot leave to future oral agreement any of the essential parts of their contract.

3. Evidence ⟸158(27)—Frauds, statute of ⟸71—Agreement for transfer of realty cannot be proved orally.

In an action for the breach of an agreement to sell her real estate, wherein the statute of frauds was involved, and the case did not involve a lost instrument, the case did not come within the rule concerning secondary evidence as provided for by Code Civ. Proc. § 1855, but was covered by section 1973, providing that, where such an agreement is involved, evidence cannot be received without the writing.

4. Frauds, statute of ⟸158(3)—Defective recital may be cured but not created by parol evidence.

A description of land sought to be sold under a broker's contract can be cured, but not created, by parol evidence, and such rule applies with equal force to every other recital which the law requires to be in writing.

5. Contracts ⟸15—Consent of parties necessary.

It is essential to the validity of contracts that the parties should have consented to the same subject-matter in the same sense, and they must have contracted ad idem.

6. Contracts ⟸32—Agreements to be reduced to writing not binding until so reduced.

Preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself, and to be final the agreement must extend to all the terms which the parties intend to introduce, and there is no binding contract where, although its terms have been agreed on orally, the parties have also agreed that it shall not be binding until evidenced by writing; the same rule applying whether the preliminary negotiations were oral or written.

7. Contracts ⟸25—Agreement to make contract invalid.

An agreement that parties will in the future make such contract as they may then agree upon amounts to nothing, and cannot be made the basis of a cause of action; for, where a final contract fails to express some matter as time of payment, the law may imply the intention of the parties, but, where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Evelyn L. Dillingham and husband against A. L. Dahlgren. Judgment for plaintiffs, and defendant appeals. Reversed.

G. L. Aynesworth, L. N. Barber, and A. W. Carlson, all of Fresno, for appellant.

H. L. Meyers, Ray C. Wakefield, and H. F. Briggs, all of Fresno, for respondents.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for $1,350 for the breach of an agreement to sell to the plaintiffs a certain piece of real property situated at Fresno, Cal.

Appellant contends that the complaint, evidence, and findings are insufficient to sustain the judgment because they do not show a binding agreement between the parties for the sale of this property. The contract sued upon is brief, and is as follows:

"A. L. Dahlgren agrees to sell to Evelyn L. Dillingham the following described property.

"Lots 7 and E. ½ 8 Blk. 33 Belmont Add. for the sum of $3,750.00, to be paid as follows: $100.00 deposit, $400.00 on completion of contract, and $35.00 per month or more including interest at 7%.

"Seller agrees that he will paint woodwork in kitchen, varnish woodwork in dining and living rooms, also paint porch and steps. Seller agrees to pay for cement walk from house to street, buyer to pay for street work.

"A. L. Dahlgren.
"Evelyn L. Dillingham."

The case as made by the plaintiff contains two frailties: (1) Concerning the applicability of the statute of frauds; (2) concerning the making of contracts in general. These two frailties happen to run arm in arm under the facts of this particular case, but are not necessarily dependent one on the other.

First, we shall take up the consideration of the case as to how it measures up when we consider the clause of the statute of frauds.

The trial court found:

"That by the phrase 'on completion of contract' in said preliminary agreement (the document herein set out) the parties intended the execution of a more formal agreement in writing in accordance with the terms of said preliminary agreement."

It is the contention of appellant that this finding is not sustained by the evidence, and that it appears from the testimony of the plaintiff that it was not intended that the parties had completed their agreement, but that it was the intention of all parties to agree to enter into an agreement in the future embodying conditions which would be satisfactory to both parties. The testimony of the plaintiff certainly sustains this position. She testified as follows:

"Q. At the time this little memorandum which has been introduced in evidence was signed, was there any conversation between you and Mr. Dahlgren that some formal agreement would be drawn up for the sale and purchase of the lands? A. Mr. Dahlgren was to go ahead and complete a form of contract. Q. Now was anything said about what would be in the terms of that contract? As a matter of fact nothing was said as to what the terms of that contract would be, was there? A. No; only just there would be a mutual agreement. Q. And this little paper that has been introduced in evidence here, marked Plaintiff's Exhibit 2, was not intended to be an agreement at all, but simply something to be signed until the formal agreement was drawn? A. Well, it was an agreement. Q. But it wasn't to be an agreement that you people should buy and sell property? A. It was an agreement from which a contract was to be made. Q. But you were not going to sign just any agreement Mr. Dahlgren drew up, were you? A. Any reasonable form of contract; yes. Q. But you don't answer my question. Please answer the question. You wouldn't have signed just any agreement Mr. Dahlgren would have drawn up, no matter what its terms were, would you? A. I don't believe I quite understand. Q. In other words, if Mr. Dahlgren had drawn up an agreement for the sale and purchase of that land with terms and provisions in it that you didn't like, you wouldn't have signed it, would you? A. No. Q. In other words, whatever agreement he was to draw up would have to be one which you would agree to? A. I was perfectly willing to sign a regular form of contract. Q. Your idea was that any contract he drew up would have to be such as you would approve? Is that right? A. Yes; I think so. Q. In other words, if he had drawn a contract with terms which you thought were wrong or unfair to you, you would not have signed it. A. No. Q. And as to the matter of an agreement, neither you nor he had said anything about just what terms or provisions were to go into it, had you—hadn't been a word said about it? A. Not exactly, but Mr. Dahlgren handed me a contract which was perfectly all right with me and which I was willing to sign. Q. Was that before this little memorandum was signed? A. No; after. Q. That is the paper that was introduced in evidence? A. Yes sir. Q. But, now, Mrs. Dillingham, answer my question. Prior to the time that paper was drawn up and handed to you, you and he had had no discussion whatever as to the terms and conditions of the contract to be drawn. A. No. Q. And you didn't know what terms and provisions the contract he was to draw would have in it? A. No; certainly not, but I was certainly under the impression it would be a regular form of contract that is always used in real estate sales. Q. Now tell me what the regular form of contract in real estate sales contains. I want to say I have never seen one and I have been in the business for 12 years. A. I don't say I can explain exactly, but I think you have one in your hand. Q. No; I have not. I am sorry to say I have not. Now, Mrs. Dillingham, as a matter of fact there is no such thing as a regular form of contract, is there? A. Yes; in a way. Q. Well, you have never seen two contracts that were the same? A. Not exactly. Q. Now, as a matter of fact, you and Mr. Dahlgren didn't say a word about the drawing of a regular form of contract, did you? A. Well, no; but it was understood. Q. It was your intention whenever he submitted whatever form of contract he did submit to you that you should take it to your attorney for examination, wasn't it? A. Yes, sir. Q. And you did take it to your attorney for examination? A. Yes, sir. Q. And asked him if it was all right? A. Yes, sir. Q. And if he had not said it was all right, you would not have signed it? A. No. Q. Now, then, as a matter of fact, did he furnish you a certificate of title? A. No; he did not. Q. There was nothing in the agreement about his furnishing you a certificate of title, in that little memorandum of agreement? A. No, sir. Q. Wasn't anything said in it about furnishing you that, and you would not have gone ahead with the agreement if he had not furnished you one? A. No, sir.

Q. And he would have had to agree to put that in the contract before you would have gone ahead with the contract? A. Yes, sir. * * * Q. As a matter of fact, as far as you and Mr. Dahlgren are concerned, nothing was ever said between you at all prior to the submission to you of this particular memorandum in evidence about the terms that would go into the contract, other than what happens to be in this little memorandum about the price and description of the property, terms of payment, and things he would fix around the place and things you would fix and pay for; that was all that was discussed? A. Yes, sir. Q. And you left for future determination all the terms that should go into a completed contract, didn't you? A. Yes."

[1] The foregoing testimony, taken in connection with the reference in the preliminary agreement to a contract to be completed, indicates clearly that the parties intended the execution of a new agreement, with the preliminary agreement as a basis, but containing many additional provisions to be determined by future negotiations. The evidence does not show that the defendant delivered to the plaintiff for her approval, a contract in writing which embodied substantially the terms of the preliminary agreement, together with the conditions that would have been implied by law, but that he delivered to her a draft of a proposed contract to which was added many important features in addition to those contained in the preliminary agreement.

[2, 3] In the transactions between the plaintiff and defendant, involving as they did a transfer of a piece of real estate, the parties could not leave to future oral agreement any of the essential parts of their contract. The case does not involve a lost instrument, and therefore does not come within the rule concerning secondary evidence. Code Civ. Proc. § 1855. But the case is covered by Code of Civil Procedure, § 1973, which provides that in a case involving such an agreement as is here claimed evidence cannot be received without the writing. In Swisher v. Conrad, 76 Fla. 644, 646, 80 South. 564, 565, the Supreme Court of Florida said:

"The written memorandum for the sale of land required by the statute of frauds cannot rest partly in writing and partly in parol, but the written memorandum must disclose all the terms of the sale. Rhode v. Gallat, 70 Fla. 536, 70 South. 471."

In Klein v. Markarian, 175 Cal. 37 at page 40, 165 Pac. 3, at page 4, Mr. Justice Sloss, speaking of such a contract as this memorandum, says:

"Furthermore, the contract fails to provide how the obligation to make the deferred payments is to be evidenced or secured. The option was signed by the defendant alone. He was to convey his land upon payment of less than one-fourth of the purchase price. Thereupon he would have no writing signed by any one evidencing an obligation to pay the balance, nor any security for such balance beyond the inadequate security of a vendor's lien. If this was the intent of the parties, specific performance might have been properly refused upon the ground that the contract was not 'just and reasonable' as to the defendant. Civ. Code, § 3391; Godwin v. Collins, 3 Del. Ch. 196; Diamond, etc., Co. v. Todd, 6 Del. Ch. 163 [14 Atl. 27]. If, on the other hand, the parties contemplated that the purchaser should give some form of secured evidence of indebtedness to cover the deferred payments—and this the plaintiff's own conduct shows to have been his view—the agreement was entirely uncertain with respect to the manner in which the balance should be evidenced and secured. Marsh v. Lott, 8 Cal. App. 385 [97 Pac. 163]."

In the case of Co-op. Ass'n v. Phillips, 56 Cal. 539, the court refused to enforce an agreement because it appeared that it was not really the final contract between the parties, but the basis on which to conclude a contract for the sale of land. In the case of Wineburgh v. Gay, 27 Cal. App. 603, 150 Pac. 1003, the memorandum which was the basis of the action read as follows:

"I will lease to you the stores now occupied by the Union Title & Trust Co. for 5 years, beginning Jan. 1, 1911, $250 for the first two years and $275.00 for the following three years. Usual clauses in lease to rebuilding."

It was held that the last sentence in this memorandum was uncertain and that it was not a completed agreement. In this case the memorandum set forth was also a preliminary agreement, and the controversy arose over a failure to agree upon the provisions to be included in the formal contract between the parties. The court said, at page 605 of 27 Cal. App., at page 1005 of 150 Pac.:

" 'It is well settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; and the rule applies as well to price as to subject-matter and parties.' Talmadge v. Arrowhead R. Co., 101 Cal. 367, 371 [35 Pac. 1000]. 'To satisfy the statute of frauds a memorandum "must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties." 5 Browne on Statute of Frauds, § 371. In Breckinridge v. Crocker, 78 Cal. 529 [21 Pac. 179], the court said: "The memorandum must contain all the material elements of the contract." ' Seymour v. Oelrichs, 156 Cal. 782, 787, 134 Am. St. Rep. 154, 106 Pac. 88."

In the case of Poel v. Brunswick, 216 N. Y. at page 314, 110 N. E. at page 620, the court says:

"In order to satisfy the requirements of the statute of frauds, the written note or memorandum must include all the terms of the completed contract which the parties made. It is not sufficient that the note or memorandum may express the terms of a contract. It is es-

sential that it shall completely evidence the contract which the parties made. If, instead of proving the existence of that contract, it establishes that there was in fact no contract or evidenced a contract in terms and conditions different from that which the parties entered into, it fails to comply with the statute."

Rutenberg v. Main, 47 Cal. 213, involved a cash sale; Mann v. Higgins, 83 Cal. 66, 23 Pac. 206, involved an exchange in præsenti; Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123, involved a contract to sell on time, but the terms were stated in the memorandum except such terms as the law implies; Preble v. Abraham, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301, involved a defective description which it was held could be cured not by the introduction of the oral conversations, but by evidence showing ownership in the defendant to certain lands at the time of the contract, the location thereof, etc.; and as stated by Mr. Justice Lennon in Proulx v. Sacramento Valley Land Co., 19 Cal. App. 529, at page 534, 126 Pac. 509, at page 511:

"In short, a description of land sought to be sold under a broker's contract can be cured, but not created, by parol evidence."

[4] What was said by the learned justice in reference to a defective recital as to description applies with equal force to every other recital which the law requires to be in writing.

We will now take up a consideration of the case under the rules governing the creation of contracts in general, and in this behalf we will for the moment turn our backs on the statute of frauds.

[5, 6] "It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted ad idem." Breckinridge v. Crocker, 78 Cal. 529, 536, 21 Pac. 179, 181. In this connection one of the rules governing the creation of contracts in general is stated in 13 Corp. Jur. 289, § 100, as follows:

"The preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into. To be final, the agreement must extend to all the terms which the parties intend to introduce, and material terms cannot be left for future settlement; nor is there a binding contract where, although its terms have been agreed on orally, the parties have also agreed that it shall not be binding until evidenced by writing."

The same rule applies whether the preliminary negotiations were oral or in writing, if it manifestly appears that certain parts of the contract are later to be agreed upon and inserted in the formal draft. The writer has carefully selected all of the following cases as substantiating the foregoing proposition: Fuller v. Reed, 38 Cal. 99, 109; Co-operative Ass'n v. Phillips, 56 Cal. 539, 545; Pac. R. M. Co. v. Railway Co., 90 Cal. 627, 633, 634, 27 Pac. 525; Talmadge v. Arrowhead R. Co., 101 Cal. 367, 371, 35 Pac. 1000; Spinney v. Downing, 108 Cal. 666, 668, 41 Pac. 797; Jules Levy & Bro. v. A. Mautz & Co., 16 Cal. App. 666, 670, 117 Pac. 936; Las Palmas, etc., Distillery v. Garrett & Co., 167 Cal. 397, 400, 139 Pac. 1077; Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 469, 168 Pac. 1037; Durst v. Jolly, 35 Cal. App. 184, 190, 169 Pac. 449. The rule is general in California whether the question arises in a case of specific performance (Co-operative Ass'n v. Phillips, supra); or an action to foreclose a mortgage (Mercantile Trust Co. v. Sunset, etc., Co., supra); an action to quiet title (Durst v. Jolly, supra); or an action for damages (Talmadge v. Arrowhead R. Co., supra; Jules Levy Bros. v. A. Mautz & Co., supra; Las Palmas, etc., Distillery v. Garrett & Co., supra).

[7] An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon. Shepard v. Carpenter, 54 Minn. 153, 55 N. W. 906. See, also, Ridgway v. Wharton, 6 H. L. Cases, 263, 10 Reprint, 1297.

In the present case it not only appears that the agreement relied upon was silent as to many matters essential to a contract between the parties, but it further appears that it was not intended and did not purport to be a final contract between the parties, but only a preliminary agreement; that the parties intended further negotiations and mutual agreements as to numerous other matters involved in the transaction between them; that these matters when agreed upon were to be embodied in a final contract between the parties, but no agreement with reference to them was ever reached.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

(52 Cal. App. 336)

CHADBOURNE et al. v. WHITE.
(Civ. 2266.)

(District Court of Appeal, Third Distirct, California. April 22, 1921.)

Principal and agent ⊂=166(4)—Knowledge of agent's act necessary for ratification by principal.

For an alleged agent's warranties and representations to be ratified by the principal, the principal must have knowledge thereof.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by F. A. Chadbourne, Jr., and another, partners as Chadbourne Bros., against J. M. White. Judgment for defendant, and plaintiffs appeal. Reversed.

Harry Davids, of Chico, for appellants.
Bond & Deirup, of Chico, for respondent.

HART, J. This action is by the plaintiffs as copartners against the defendant upon a promissory note for the sum of $1,000, dated April 3, 1914, and due and payable on September 1, 1914. The complaint is in the usual form of such an action. In due time the defendant filed an answer, admitting the execution of the note by him, and that it was given as in part payment of a certain tractor, but defending himself against the validity of the note on the ground that the tractor failed to measure up to an alleged express warranty made by the seller as to the capacity of the machine to perform the work for which it was designed. The answer alleges that, immediately upon discovering that the tractor was not as warranted, the defendant rescinded the contract for its purchase and offered to restore the tractor to the plaintiffs, at the same time demanding the return to him of the note in suit; that plaintiffs refused, and ever since have refused, to accept the return of said tractor and to deliver to defendant the said note. In the same answer the defendant set up a second defense based upon false and fraudulent representations by the plaintiffs relative to the tractor and its capacity or power for doing the work it was intended for. That cause of action also contained, in the same language as it appeared in the first cause of action, the allegation that, in the month of July, 1914, the defendant first discovered the worthlessness of the tractor and then offered to return the same to plaintiffs and to place the latter in the same position as they were before the defendant entered into the contract for the purchase of the engine and demanded of plaintiffs the return of the note upon which the complaint declares, and that plaintiffs have at all times since said offer refused to accept the same and to redeliver said note to defendant. The answer prayed for the cancellation of the note and for the sum of $3,000 for loss of crop by reason of the failure of the tractor to perform the work essential to the growing and the harvesting of the crop for the year 1914.

The special defense or the counterclaim was answered by the plaintiffs, and on the day the cause came on for trial (December 4, 1918) the defendant made an application for leave to amend his answer, and the same was allowed. The effect of the said amendment was to exclude from the answer all the allegations as to false and fraudulent representations, and consequently to leave in the case as the sole ground for the rescission of the contract of purchase and thereupon the cancellation of the note in suit the fact, as alleged, that the tractor was not as warranted by the plaintiffs, alleging also that immediately upon discovery of that fact defendant offered to return the tractor, etc.

Upon the issues thus framed the case was tried, and on the 16th day of December, 1918, the case was taken under advisement.

On March 11, 1919, no decision then having been arrived at or declared, the defendant moved for leave to file another amended answer or counterclaim so that the same would "conform to the pleadings and the proof taken at the trial." The amended answer changed the allegation with regard to offering to return the tractor, etc., "immediately upon discovering that said tractor was worthless," by stating in lieu thereof that from the time of the delivery of the tractor to the defendant the same "proved unworkable," but that defendant believed and had faith that by making proper repairs on the same said tractor could be put in condition to perform the labor which the plaintiffs and their agent "warranted and represented that it would perform as aforesaid." The allegation goes on with the statement that defendant continued to have faith, etc., until the date he rescinded the contract of purchase; that the tractor could be put in workable condition, and that he employed many expert tractor engineers on such faith, at great expense, to work on and operate and repair the machine, to no purpose, however, since the parts of the tractor continued to get out of order or be broken; that thus the defendant tested and experimented with the tractor upon the belief that its defects could be so corrected as to render it capable of performing its work properly until the month of August, 1914, when he discovered that said tractor was inherently defective in its construction and not capable of being repaired so as to make it work as warranted, etc. The relief asked for by this amended answer, in addition to rescission and cancellation, was for damages, not for the crop, as was the prayer in the original pleading of defendant, but for money alleged to have been expended by defendant in repairing and attempting to operate the tractor.

The plaintiffs moved to strike out the second amended answer, and also filed a demurrer thereto, but the motion was denied and the demurrer overruled. These orders were made on the 8th day of September, 1919. Plaintiffs thereupon filed an answer to the answer and counterclaim of defendant. On the 15th day of September, 1919, the court filed a written decision against the plaintiffs, and on the 23d day of September, 1919, counsel for plaintiffs moved to reopen the cause before judgment. The principal ground upon which said motion was founded and pressed was that the second amended answer, filed, as seen, after the trial of the case—that is, after the proofs had been received and the case submitted for decision—contained "new and other matter than that contained in the amended answer and cross-complaint upon which said defendant relied when the said cause was tried and heard, and when the said cause was submitted to the above-entitled court for decision." This motion was denied.

Findings were made and judgment rendered and entered rescinding the contract of sale of the tractor and ordering the note in suit to be delivered to defendant for cancellation. The defendant was not awarded damages.

This appeal is by the plaintiff from the judgment so entered, and is supported by a transcript of the proceedings had at the trial, as prescribed by section 953a of the Code of Civil Procedure.

The assignment of error first discussed in the briefs involves the action of the court in allowing the defendant to file the amended answer after trial had been completed and in denying the motion of the plaintiff for a reopening of the case after the filing of said amended pleading, but we may waive consideration of this point, since we have concluded that the judgment must for other reasons be reversed.

In taking up the merits of the controversy it is deemed the more orderly first to state the facts of the transaction upon which this action is founded. One Joseph Peltier was in the year 1913, and down to the date of the sale thereof by him, the owner of a ranch not far from Suisun City, in Solano county, consisting principally, if not altogether, of tule lands. Either in the month of November or December, 1913, he purchased at Los Angeles two Buffalo-Pitts gas tractors, paying therefor the sum of $1,500 each; the price of said tractors later and at the time of the trial of this action having advanced to the sum of $3,000 each. Before completing the contract for the purchase of said tractors, Peltier had the machines examined by an expert "gas engine man" employed by him for that purpose. Peltier worked the tractors on his ranch satisfactorily from the time that they were delivered to him (either in the month of November or the month of December, 1913) for very close to two months and until the winter rains set in, causing the ground to become so soft that the engines could no longer be used for plowing purposes. When, for the reason just stated, the working of the tractors ceased, Peltier caused the magneto and electric parts of the machine in question here to be removed and the tractor to be covered at the place on the ranch where the work of operating it had ceased, and there allowed it to remain until it was sold and delivered to the defendant in the month of April, 1914, as will be later more fully explained.

Within four months, approximately, after the operation of the tractor had been stopped, as above explained, Peltier sold his ranch and all its equipments, including the tractors referred to, to Chadbourne Bros., the plaintiffs herein. The ranch and all the machinery—the agricultural implements, including, as stated, the tractors mentioned—on said ranch were sold by Peltier for a lump sum.

After Peltier had made arrangements to sell his ranch to the Chadbournes (this statement is based on the testimony of Peltier testifying as a witness for the defendant and is not contradicted), a man named Cline, residing in San Francisco, called on him (Peltier) and said to Peltier that he (Cline) had a client for one of those engines, and asked Peltier if he desired "to sell them." Peltier replied that the tractors were not then his property and referred Cline to the plaintiffs. Peltier, at the time of that conversation with Cline, had never met or seen White, the defendant. Peltier never at any time resided on the ranch, his residence having been in the city of San Francisco. His son, however, had lived on the ranch, having been in charge of the reclamation work thereon while his father was the owner of the ranch.

Fred A. Chadbourne, one of the plaintiffs, called as a witness by the defendant, testified that he had never met the defendant, White, prior to the transaction eventuating in the sale of the tractor to the latter; that shortly after they (the Chadbournes) had bought the Peltier ranch he was told by Peltier that he had a prospect for a buyer of one of the tractors, and Chadbourne was referred by Peltier to Cline, who, Peltier told Chadbourne, would give him "the details of what could be done with it"; that he (witness) thereafter called on Cline in San Francisco, and that the latter explained the proposition for the purchase of the tractor, the terms of payment and where and how the same was to be shipped to the defendant, the proposed purchaser; that the proposition made to him by Cline was satisfactory to him and he agreed to pay Cline, for his services in effecting the sale of the tractor for the sum of $1,500, 20 per cent. of the sale or purchase price.

The defendant White was, at the time of

the transactions involved herein, engaged in the business of farming in Butte County, then having under lease 2,000 acres of what was then known as the "Phelan ranch," in said county, and farming the same on shares. About a year prior to the time of the transactions involved herein the said Cline called on White at his ranch and undertook to sell to him (White) a Hart-Parr engine, but failed in the undertaking. Subsequently White received a letter from Cline in which the latter stated that "he had found an engine that would do my work, and all the trouble was that it was too heavy for the ground that it was in." Cline in said letter asked White to "come down and look it over." White shortly thereafter went to San Francisco, and on the day following that of his arrival in that city, he, accompanied by Cline, and a man named Spears, a friend of the defendant, and who, although a carpenter by trade, had had considerable experience in handling gas engines, went to the Chadbourne ranch and there inspected the tractor. This was in the month of February, 1914. White, when testifying, stated, in reply to a question by his attorney as to whether "there were any representations" made with regard to the tractor, replied that there were and that such representations were made "by Mr. Cline and by Mr. Peltier's son." Asked what those representations were, White answered:

"Mr. Cline told me the machine was in perfect condition and had never been run only to demonstrate it, and that the only objection to it was that it was too heavy, and that it would do my work here; that he knew that it would do my work on the Phelan ranch, and I asked him how it compared with the Rumley, and he said that it was three times as good an engine as the Rumley, and that is the kind that I hired to help me with the crop, and that is all I remember."

The witness Spears, who, as seen, went to the Chadbourne ranch with defendant to inspect the engine, testified as to the representations or warranty of the tractor made by Cline on that occasion as follows:

"After we went up to the engine he (Cline) explained to us what the machine was supposed to do and what it would do. He represented that the engine was in first-class shape and that it would develop 75 horse power on good ground such as we had up through our valley here, especially in Chico, and so forth, and he said the engine was new and in first-class shape, and up to the representations."

It appears that, before F. A. Chadbourne had seen Cline after having been told by Peltier that the former had a prospect for the sale of the tractor, Cline had arranged to get the tractor for White on the following terms: $100 cash down; $400 to be paid plaintiffs upon the delivery of the tractor to White at his ranch; and a promissory note to be executed and delivered by White to the Chadbournes for the balance, $1,000, said note to become due and payable on the 1st day of September, 1914. As seen, this arrangement was explained by Cline to F. A. Chadbourne, who accepted it. It further appears that White, before said Chadbourne had seen Cline, had paid Cline the cash payment of $100. This sum Chadbourne permitted Cline to retain as a part of his commission.

The tractor was shipped to and received by White some time in the month of April, 1914. From the time that the machine reached the ranch of White until the date on which the latter received a notice from a local bank that his note in favor of the Chadbournes for $1,000 was due and payable and at said bank for collection, the defendant, according to his testimony, as well as that of a number of other witnesses testifying for him (some of the witnesses were experienced in handling gas engines), experienced much difficulty in making the tractor work. Parts would break on every occasion on which he attempted to use it, and the breaks would, of course, have to be repaired and new parts installed in the machine, and all this at great expense and also resulting in delay in the preparation of his crop for that year. The defendant testified that the engine failed to develop the power which Cline represented that it was capable of developing; that, although it ought to have pulled at least twelve plows, it could not at any time pull a greater number than four or five; that he did succeed in plowing 160 acres of land with it, but this was accomplished with great difficulty, expense, and delay. A number of persons of more or less experience in operating and repairing gas engines, having been called by White to his assistance in efforts to make the engine work satisfactorily, corroborated White's testimony that the tractor would not do the work required of it on his ranch.

Some ten days or two weeks after the tractor had been delivered to White, F. A. Chadbourne went to the White ranch. This was the first time that said Chadbourne had ever met White. Chadbourne testified that White had either telegraphed or written to him, stating that he (White) was having trouble with the machine; that the ignition would not work. The witness said that he had no trouble in starting and operating the tractor. Chadbourne found that certain parts originally of the tractor had been removed and other parts substituted. On the occasion we are now referring to White did not say to Chadbourne that he desired to return the machine or rescind the contract of purchase, although he testified that the tractor did not work satisfactorily on that occasion.

As before suggested, the note from White to plaintiffs as in part payment for the tractor (dated April 3, 1914) was due and payable on September 1, 1914. A few days prior to the last-named date the plaintiffs placed the note in the hands of a bank for collection. The bank notified defendant that it

had the note and requested him to call and take it up. The defendant called at the bank and declared to a proper officer thereof that he would not pay the note; that the tractor was a mechanical failure and wholly worthless. On the 29th of August, 1914, a few days prior to the maturity of the note, and after defendant had been notified that the note was in the hands of the bank for collection, the defendant addressed the following letter to plaintiffs:

"I notified Mr. Cline two months ago I couldn't do anything with the engine and I intended to give it up. It has been a bill of expense to me and I could accomplish nothing. I have fooled with the damned thing until it has practically broke me up. It broke down at the beginning of harvest and I had to hire an oil pull to pull my machine, and by the time I got the extras from Buffalo, New York, I was through harvesting. I paid seven hundred dollars for the use of the engine 21 days, and getting extras and fixing the Buffalo tractor cost two hundred and fifty dollars to fix it up and it hasn't done anything since. I found it is first one thing breaks and then another. Now I don't intend to pay any more on the engine. The engine is here. If you want it—all right."

To the above statement is to be added the testimony of defendant to the effect that, when he inspected the tractor on the Chadbourne ranch prior to entering into the contract for its purchase, he came to the conclusion that the engine was worth the price he asked for it. It should also be stated, as the court in effect found, that the defendant, when testifying, offered as excuse for delay in rescinding the contract the statement that, notwithstanding the repeated "breakdowns" of the engine, he still had faith that it could finally be made to operate satisfactorily, and that he was encouraged to cherish such faith and belief until the month of August, 1914, when he discovered that the failure of the machine to operate properly was due entirely to its inherent defects, or defects which could not be remedied.

The foregoing statement, which embraces the salient facts of the transaction from the time of the purchase of the tractor by defendant to the time of his alleged rescission of the contract of purchase, is based entirely upon the testimony of witnesses called by and in behalf of the defendant. It should also be stated that neither Cline nor the younger Peltier testified in the case.

As the attorney for appellant correctly declares in his brief, to uphold his special plea in bar or defense, it was incumbent upon the defendant to prove these facts: (1) That Cline was the agent of the plaintiffs, with authority to sell the tractor; (2) that Cline, as such agent, warranted the tractor to be capable of performing saisfactorily the work for which such a machine is intended; (3) that the tractor failed to measure up to the warranty; and (4) that there was prompt rescission of the contract of purchase upon discovery of the alleged defects of the tractor rendering it incapable of doing the work as warranted. The plaintiffs contend that none of these essential elements to warrant a recovery by defendant was shown by the evidence to exist.

The theory upon which the defendant tried this case in the court below was that the alleged warranty or representations were made by Cline when he was prosecuting the alleged negotiations with Peltier for the tractor, and that the plaintiffs, having concluded the transaction already started by Peltier and Cline when the former was still the owner of the engine, and accepted the benefits thereof, must be held to have ratified the transaction as so begun, including whatever representations or warranty might have been made by Cline to defendant as to the quality, condition, and horse power of the tractor. The case is presented by respondent upon this appeal upon the same theory, and the proposition is thus stated in his brief:

"Respondent's theory is that Cline became Chadbourne's agent by ratification; that the tractor was bought on warranties, and that there was a sufficient and proper rescission."

There is, as we read the record before us, absolutely no warrant in the evidence for the position of defendant upon the question of the alleged ratification of the transaction so far as Peltier had anything to do with it; if as a matter of fact he may be said to have been a party to it at all. As seen, the testimony of Peltier is that, when Cline approached him with the proposition to buy or sell the tractor, he (Peltier) had sold the tractor with his ranch to plaintiffs, and that he referred Cline to the plaintiffs to make with them as owners of the machine such arrangements about selling or purchasing it as he might be able to. Peltier's testimony was not contradicted. It is true that defendant testified that Cline told him, when the latter first brought to his (defendant's) attention the tractor in question, that Peltier was then the owner of the engine, but that testimony was purely hearsay or at any rate is valueless in the face of the positive testimony of Peltier himself that he had sold the machine to the Chadbournes prior to the time at which Cline first spoke to him about selling it. Furthermore, if it be assumed that Peltier did own the machine at the time Cline first approached him with a proposition to purchase or sell the same, then there is no evidence of any kind or character showing or even tending to show that the plaintiffs, when accepting Cline's proposition for the sale of the tractor to defendant, had any knowledge of the facts characterizing the transaction between Cline and defendant, or, in other words, had any knowledge that the inducing cause of the sale of the tractor to defendant was the warranty made by Cline as to the character and

capacity of the engine while he was negotiating with Peltier. "Ratification necessarily presupposes a knowledge of the thing ratified." Huffman v. Knapp, 30 Cal. App. 759, 761, 159 Pac. 456.

The above considerations are, upon the theory upon which it was tried and is presented by the defendant, decisive of the case against the legal validity of the judgment appealed from. We may, however, with no impropriety, notice some other features of the case as it is presented here.

It is only a rational interpretation of the evidence to hold that Cline's position in the transaction was merely that of a broker. The defendant testified, as seen, that about a year prior to the date of the receipt by him of a letter from Cline that he (Cline) had found a tractor that would be suitable for his (defendant's) purposes, Cline made a futile attempt to sell him a Hart-Parr tractor; that subsequently the letter referred to was addressed to defendant by Cline. From this testimony the inference is reasonable, and indeed natural, that Cline had been looking about for a tractor for the defendant; that is, looking for an engine that he could sell to the defendant. F. A. Chadbourne testified as a witness for defendant (and there is no contradiction to this testimony) that, when he called on Cline in San Francisco for the first time after having been told by Peltier that the former had a proposition to make with respect to the sale of the engine, Cline said to Chadbourne that defendant would buy the tractor for $1,500; that he had already paid him (Cline) $100 down on the proposition; that he would make a further payment of $400 on the delivery of the engine to him (defendant) and give to Chadbourne his promissory note for the balance, $1,000, payable September 1, 1914. Chadbourne then agreed to pay Cline 20 per cent. of the purchase price as his compensation for negotiating the sale of the tractor, and also told Cline that he could retain the $100 cash payment as part of his commission. Thus it is clear that Cline had already arranged for the sale of the tractor before he had ever seen or communicated in any manner with Chadbourne about the proposed sale, and it would seem to be equally clear from this testimony that Cline was acting no less for the defendant than he was for the plaintiffs. In other words, the testimony just adverted to well affords the inference that Cline was a mere broker in the transaction, acting for himself and upon his own initiative. An agent of the Chadbournes he became, it is true, but only when, after laying the proposition of the defendant before them for the sale of the tractor, they accepted the proposition made by Cline for defendant, and he was then still no less the agent of the defendant than that of the plaintiffs. But he then became their agent only to the extent of being authorized to execute the terms upon which the sale was to be made. The proposition for the purchase of the tractor and the terms thereof having first come from defendant to the Chadbournes through Cline, and whatever representations Cline made to defendant as to the character of the tractor having been so made before Cline became the agent of the plaintiffs, it is manifest that the latter cannot be bound by the representations or warranty so made. However, we think the judgment should be reversed for the reasons first hereinabove given, and it is so ordered.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

(52 Cal. App. 368)

DAVIS v. MENE et al. (Civ. 3153.)

(District Court of Appeal, Second District, Division 2, California. April 27, 1921.)

1. Animals ⇐74(5)—Finding of knowledge of vicious propensities of dog justified.

In an action for damages from the bite of a dog, evidence that the animal was a bulldog, which was muzzled when at large and chained when at home, and that he was kept as a watchdog because of the presence of petty thieves in the neighborhood, *held* to justify a finding that defendants knew of the dog's vicious propensities.

2. Animals ⇐74(4)—Dog's reputation admissible.

In an action for damages from the bite of a dog, evidence of the general reputation of dog as to viciousness is proper to support the inference of the owner's knowledge of the dog's habits.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Arthur W. Davis against Louis Mene and another, copartners doing business as the Los Angeles Baking Company, for damages for personal injury. Judgment for plaintiff, and the defendants appeal. Affirmed.

C. P. Johnson, of Los Angeles, for appellants.

Frank W. Walden, of Los Angeles, for respondent.

WORKS, J. This is an action for damages caused by the bite of a dog. Plaintiff had judgment, and the defendants appeal. It is impossible to make a statement of the facts of the case, except from assertions made in the briefs of each of the parties and not denied by the other. Both counsel recite facts without reference to the record, and this fault is so frequent that we are unable to make a statement from that source.

From the meager material presented to us the facts appear to be these: Respondent went on a business errand to the house of one of the appellants. The dog was on the front porch of the dwelling, tied to a post by a chain nearly six feet in length, which allowed him to get to or near the entrance door. When respondent was at this point he was bitten by the animal.

[1] Appellants object to the sufficiency of the evidence to support several of the findings of the trial court. Most of these points depend upon the objection that there was no evidence to justify the finding that appellants knew of the vicious propensities of the dog. Counsel have afforded us enough of an insight into the facts to enable us to say that the animal was a bulldog, that he was muzzled when at large, that he was chained when at home, and that he was kept as a watchdog, because of the presence of petty thieves in the neighborhood. All of these matters were properly to be considered in determining the knowledge of appellants as to the proclivities of the animal (3 C. J. 118, 119; 1 R. C. L. 1117, 1118), and, as appellants indicate no contrary evidence in the record, the court could have made no other finding on the subject.

In discussing the sufficiency of the evidence to support a certain finding, appellants charge respondent with contributory negligence "in walking within the length of the 57-inch chain on which a vicious-looking bulldog was attached to one end thereof." Respondent, in his turn, claims that appellants were negligent "in chaining him so close to the door that he could bite an unsuspecting caller, as was done in this case." As the burden is on appellants to show error (Kellogg v. Kellogg, 170 Cal. 84, 148 Pac. 518), and as we are pointed to no evidence on this interesting subject by either counsel, we shall assume that respondent was not aware of the presence of the dog, and that the charge of contributory negligence is an unjust imputation upon him.

[2] Over the objection of appellants respondent was allowed to show the general reputation of the dog as to viciousness, and it is contended that the trial court committed error in receiving the evidence; but such evidence is proper to support the inference of knowledge on the part of the owner as to the habits of a dog kept by him. 3 C. J. 116. However, even if that were not true, in this case, as we have already shown on the other evidence alone the court could have made no finding but that appellants knew of the dangerous proclivities of the animal.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

52 Cal. App. 320

PEOPLE v. WILDER. (Cr. 552.)

(District Court of Appeal, Third District, California. April 21, 1921.)

1. Indictment and information ⊂=189(9)—Offense of petit larceny included in that of grand larceny.

The offense of petit larceny of which defendant was convicted was comprehended within that of grand larceny, with which he was specifically charged in the information.

2. Criminal law ⊂=1178—Where no appearance or brief for defendant, submission being on the record, all matters other than violation of fundamental rights are presumed waived.

On calling a criminal case for argument in regular order on the calendar, where there was no appearance for defendant and no oral argument made or being filed, and upon motion of Attorney General the case was submitted on the record, the Court of Appeals is required to examine the record only as far as is necessary to determine whether if in any of the trial proceedings any fundamental right of the accused was violated, and all other points involving other questions will be presumed waived.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Joseph H. Wilder was convicted of grand larceny, and he appeals. Affirmed.

N. A. Gernon, of Red Bluff, and C. H. Braynard, of Redding, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. [1] The defendant was, by an information filed in the superior court in and for the county of Tehama, charged with the crime of grand larceny, in that he unlawfully and feloniously stole and took away from the premises of one J. A. Noble, in said county, 30 chickens, of the "Rhode Island Red" variety or breed, of the alleged value of $2 each, or the aggregate value of $60. The jury found the accused guilty of petit larceny, said crime being comprehended within that specifically charged in the information, and he has appealed from the judgment of conviction and the order denying his motion for a new trial.

[2] The case was regularly placed on the calendar of the April, 1921, term of this court for hearing and argument, and counsel for the defendant and the Attorney General were duly and regularly notified thereof. On calling the case for argument in the regular order in which it appeared on the calendar, there was no appearance for the defendant, and therefore no oral argument in support of his appeal made to or before the court; nor has there been any brief filed in behalf of the accused. This being the state of the case

when called for hearing, the same, upon motion of the Attorney General, was ordered submitted upon the record.

When an appeal in a criminal case is thus submitted, we are required to examine the record only so far as it may be necessary to enable us to determine whether, in any of the proceedings of the trial, any fundamental right of the accused has been violated. All points involving other questions are, by reason of the failure to file a brief or present an argument in some other form in support of the appeal, presumed to be waived, or, at least, regarded by defendant of not sufficient force to sustain the appeal.

The information accurately, according to legal form, states the crime of grand larceny. We have carefully read the evidence, and upon its face it is amply sufficient to support the verdict. We have also examined the charge of the court to the jury, and therein the principles of law applicable to the offense and the evidence received as in proof of the crime charged are fully, clearly, and correctly declared.

The judgment and the order appealed from are affirmed.

We concur: FINCH, Presiding Justice pro tem.; BURNETT, J.

52 Cal. App. 350

HAGEMAN v. COLOMBET. (Civ. 3630.)

(District Court of Appeal, First District, Division 1, California. April 25, 1921.)

1. Evidence ⊂=434(9)—Where fraud is asserted, parol evidence is admissible, notwithstanding brokerage contract was in writing.

In an action to recover commissions for effecting an exchange of lands, where defendant asserted the transaction was tainted with fraud, and that writings did not show the true contract, parol evidence is admissible to show the real agreement between the parties.

2. Fraud ⊂=58(1)—Provable by circumstances.

Fraud may be proved by circumstances.

3. Brokers ⊂=67(1)—Broker who undertook to make secret commission from opposite party cannot recover.

Where plaintiff, engaged as a broker by defendant to effect an exchange of lands, undertook to collect compensation from the opposite party by insisting that defendant should pay a larger cash sum, it being agreed that as a commission from the opposite party he should receive the excess, plaintiff was guilty of such fraud as would deprive him of the right to collect commissions from defendant.

4. Brokers ⊂=66—Broker who entered into secret agreement with agents of opposite party to divide commission not entitled to recover.

Where plaintiff, acting as defendant's broker in an exchange of lands, agreed with brokers of opposite party to divide with them his commissions, he was guilty of conduct which deprived him of the right to collect commissions from defendant, for he was acting in a supposed confidential and advisory capacity towards defendant.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Joe Hageman against C. W. Colombet. From a judgment for defendant, plaintiff appeals. Affirmed.

R. C. McComish, of San Jose, for appellant.

Owen D. Richardson and J. B. Peckham, both of San Jose, for respondent.

WASTE, P. J. The plaintiff brought this action to recover the sum of $1,250, alleged to be due as a commission for effecting an exchange of real estate. The trial court held that the transaction was so tainted with fraud on the part of the plaintiff as to preclude a recovery, and gave judgment for the defendant. The plaintiff appeals.

[1] The appellant rested his right to recover upon certain writings signed and approved by the respondent. The respondent asserted that the agreements produced by appellant did not show the true contract, but had been fraudulently altered in material respects by the appellant after execution. During the course of the trial the court admitted, over the objection of appellant, evidence of verbal negotiations between the parties, for the purpose of ascertaining just what the parties had agreed to, and what was the real nature of the transaction between them. The evidence was properly admitted. In case of fraud no mere form of words of which the parties have made use can shut out inquiry as to the real facts. Brison v. Brison, 75 Cal. 525, 533, 17 Pac. 689, 7 Am. St. Rep. 189. While the testimony is conflicting in material matters, certain facts appear which, with the inferences to be drawn therefrom, are amply sufficient to support the judgment. The respondent engaged the appellant, a real estate broker, acting as his agent only, to effect an exchange of respondent's apartment house and property in San Jose for the ranch property of E. J. Lee near Watsonville, upon conditions set out in a written offer signed by respondent.

One of the terms of the exchange contained in the offer when it was signed by respondent was the payment by respondent to Lee of the sum of $5,000 cash, in addition to the other expressed consideration. The respondent testified that there was no provision in the offer at that time as to the payment of a commission to appellant by either Lee or the respondent. The appellant took this offer to Lee, who was willing to make the exchange upon the terms offered by respondent, and in-

duced Lee to pretend that he would not close the deal unless respondent paid him $7,500 cash, instead of $5,000 cash, as the offer stood, and to further agree to pay the additional $2,500 thus obtained from respondent to appellant as a commission for making the exchange. Lee agreed to the plan, and appellant, in the absence of respondent, and without his knowledge or consent, altered the written offer already signed by respondent, to read "$7,500 gold coin," instead of "$5,000 gold coin," as the amount respondent should pay in cash to Lee. He also inserted a stipulation that Lee should pay appellant a brokerage fee of $2,500, and that respondent should pay him a like fee of $1,250 for making the exchange. Lee then signed the altered agreement. Appellant then represented to respondent that Lee would not make the exchange unless he was paid $7,500 cash. Being anxious to consummate the deal, and believing the representations, respondent turned over to appellant $7,500, of which sum he paid Lee $5,000 only, retaining the balance of $2,500 for his purported commission. He later divided this amount with agents who represented Lee in the transaction. In this action he is seeking to recover $1,250 additional from respondent.

[2, 3] There is other evidence of the dealings between appellant and respondent and of the details of the entire transaction. But we think we have recited enough to show the nature of the fraud and bad faith, and the element of concealment on the part of appellant which characterized his dealings with the respondent. In all cases it is permissible to prove fraud by circumstances. In aid of the direct facts proved, legitimate inferences are permitted to be indulged in to establish other facts not directly in evidence. Maxson v. Llewelyn, 122 Cal. 195, 198, 54 Pac. 732.

Little need be supplied in this case, however, in addition to the facts proved. If the appellant was acting solely as agent for respondent, as the court found, he was bound in the exercise of the utmost good faith to use every endeavor to make the best bargain fairly obtainable for his principal. He admitted on the stand that he "was to make the best deal possible" for respondent. When he deliberately set about forcing respondent to pay $2,500 more to Lee than Lee was willing to accept in the exchange, in order that he might enrich himself to that extent under the guise of collecting a commission from Lee, he was guilty of such bad faith that his right to compensation from respondent was lost. 9 Corp. Jur. 566, and cases cited.

[4] Appellant was undoubtedly endeavoring to act in the matter of the exchange of properties for both Lee and the respondent, without respondent's knowledge or consent. The lower court also found that, during the course of his employment by respondent, and without his knowledge, the appellant entered into a secret agreement with the agents of Lee to pay them one-third of any commission he might receive making the exchange. He was not a mere middleman whose duty was ended when he brought appellant and respondent together. He was acting in a supposed confidential, advisory capacity for the respondent, who relied upon his advice and assistance. For these reasons, also, he was not entitled to recover in this action. Clark v. Allen, 125 Cal. 276, 278, 57 Pac. 985; 9 Corp. Jur. 568, 571.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

52 Cal. App. 152

LOS ANGELES TITLE INS. CO. v. CITY OF LOS ANGELES et al. (Civ. 3492.)

(District Court of Appeal, Second District, Division 1, California. April 4, 1921. Rehearing Denied June 3, 1921.)

1. Injunction ⟸105(1)—Insurer of titles cannot restrain enforcement of inapplicable municipal license tax ordinance.

Where a municipal ordinance imposing license taxes on various businesses, including the business of preparing abstracts, excepted companies insuring titles, a title insurance company will not be granted an injunction restraining municipal authorities from enforcing the ordinance as to it, though not applicable, and though such companies were exempted by Const. art. 13, § 14; for equity will not enjoin a criminal prosecution on the ground of insufficiency of evidence of guilt.

2. Injunction ⟸85(1)—Enforcement of ordinance not restrained on theory that it imposed excessive penalties so that it could not be tested.

Although equity by injunction proceedings may determine the validity of a statute or ordinance which imposes such extreme or cumulative penalties that the persons affected are practically prevented from resorting to the courts to determine the validity or the applicability of the law, the proposed enforcement of a license ordinance which imposed a fine of $500 and imprisonment against violators, and declared that each day business was conducted without the payment of a license should be a separate violation will not be restrained on that ground, at the suit of a title insurance company which, though not within the terms of the ordinance, asserted that the municipal authorities were about to enforce the same against it.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by the Los Angeles Title Insurance Company against the City of Los Angeles and others for an injunction to restrain enforcement of a license tax ordinance. From a judgment for plaintiff, defendants appeal. Reversed.

Jesse E. Stephens, Wm. P. Mealey, and Julius V. Patrosso, all of Los Angeles, for appellants.

Tom C. Thornton and O'Melveny, Millikin & Tuller, all of Los Angeles, for respondent.

CONREY, P. J. From the complaint in this action it appears that the city council of the city of Los Angeles adopted an ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations. It was provided in the ordinance that on and after January 1, 1920, it shall be unlawful for any person, etc., to carry on any of said occupations without having first procured a license from the city so to do. Certain fees are to be paid for each license. Among the businesses specified is that of searching titles to real property and issuing abstracts, statements, or certificates purporting to show the condition of the title to any particular property, "but which abstract, statement, or certificate does not insure or purport to insure the title to real property, or any interest therein." Violation of the provisions of the ordinance is made a misdemeanor punishable by a fine of not more than $500 or by imprisonment in the city jail for a period of not more than six months, or by both such fine and imprisonment.

"Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance."

The complaint further shows that the plaintiff is engaged solely in the business of issuing for a premium certain classes of documents (which are set forth as exhibits to the complaint) relating to the title of real property. The plaintiff does not issue any abstracts, statements, or certificates relating to the condition of title to any property, or purporting to show or certify to the condition or state of title to any property, excepting only the said documents. It is further alleged:

"That under and pursuant to the terms and provisions of art. 13, § 14, Constitution of the state of California and acts of the Legislature of the state of California passed pursuant thereto, plaintiff is compelled to pay to the state of California as a tax a certain percentage of its gross premiums. Plaintiff alleges upon its information and belief that by the terms and under the force and effect of said section 14, art. 13, of the Constitution of the state of California it is not subject to any taxation by the defendant city of Los Angeles either in the form attempted by said purported Ordinance No. 39600 (New Series) or otherwise or at all, and that said city of Los Angeles has no jurisdiction to impose upon this plaintiff the tax or so-called license fee provided in said ordinance."

It is alleged that the city of Los Angeles threatens to, and will, unless restrained and enjoined therefrom, endeavor to enforce the terms of said purported ordinance against the plaintiff; that, if plaintiff fails or declines to secure a license and to pay therefor the fees as fixed and provided in the ordinance, the city will institute criminal proceedings against the plaintiff and its officers for alleged breach of the purported ordinance and will cause the plaintiff and its officers to be prosecuted therefor, and will endeavor to collect from the plaintiff the fees provided in said ordinance. Further facts are stated to the effect that such adverse proceedings against plaintiff will result in great and irreparable injury and damage to the plaintiff and its business; that plaintiff has no plain, speedy, and adequate remedy at law.

By reason of the facts so alleged, the plaintiff prayed for a judgment decreeing that said purported ordinance has no operation or effect as to the plaintiff, that the plaintiff has a right to conduct its business without procuring the license provided for in the purported ordinance and without paying the fees fixed therein, and that the defendant city, its officers and agents, be enjoined from attempting to enforce any of the provisions of said purported ordinance against the plaintiff.

The defendants demurred to the complaint upon the grounds that the court has no jurisdiction of the subject of the action, and that the complaint does not state facts sufficient to constitute a cause of action against the defendants or any of them. The demurrer having been overruled, defendants declined to answer, and a decree was entered in favor of the plaintiff in accordance with the prayer of the complaint. The defendants appeal from the judgment.

[1] Aside from the contention (which will be considered later herein) that the ordinance is void by reason of excessive penalties provided therein, no attack is made upon its validity. If it be true in fact that the plaintiff in the course of its business limits itself to the business of an insurance company, then it is not subject to the provisions of the ordinance, or, in other words, the ordinance does not apply to the plaintiff and its business. The ordinance does not in any way disregard the provisions of the Constitution to which reference has been made. This being so, the plaintiff's action is one wherein it seeks to enjoin certain officers of the defendant city, charged with the enforcement of its laws, from wrongfully prosecut-

ing the plaintiff by accusing it of the commission of a misdemeanor in that it has violated the provisions of a valid ordinance. The case is practically the same as it would be if these officers were threatening to prosecute the plaintiff for conducting a grocery business without obtaining a license required by the ordinance, when in fact the plaintiff was not conducting or proposing to conduct a grocery business in the city of Los Angeles. It seems very clear that an injunction will not be granted to protect any person from prosecution for the alleged commission of a criminal offense by proving to a court of equity that he is not guilty of such offense. The court having jurisdiction over criminal offenses is the forum in which such questions of fact must be determined.

"Courts of equity will, in proper cases, enjoin the attempt to enforce a law or ordinance making certain acts a criminal offense and imposing a punishment therefor, where the law or ordinance is invalid and its enforcement will injure or destroy the plaintiff's property or property rights. * * * These however, are all cases where the penal law was considered invalid. * * * We know of no principle of jurisprudence which authorizes a court of equity, on the ground that it will prevent a multiplicity of actions, or that it will prevent an injurious interference with plaintiff's business, to proceed to investigate as to the truth of criminal charges that have been or may be preferred against him, to hear the evidence in regard to his guilt or innocence, to determine, in advance of the decision of the lawfully constituted criminal courts, the question of his guilt or innocence of pending charges and his probable guilt or innocence of future charges, and, if found in his favor, to forestall the action of the law courts and enjoin the enforcement of a constitutional and valid law against him, on the sole ground that there is not, and never will be, sufficient evidence of his guilt." Sullivan v. San Francisco Gas, etc., Co., 148 Cal. 368, 83 Pac. 156, 3 L. R. A. (N. S.) 401, 7 Ann. Cas. 574.

[2] Respondent, while conceding the validity of the ordinance in all other respects, contends that by reason of severe and rigorous penalties imposed thereby, its enforcement against the plaintiff will constitute a denial of due process of law and of the equal protection of the laws. The doctrine relied upon, in so far as it has the support of judicial authority, is declared in Ex parte Young, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. This decision has been approved in many later cases, some of which are mentioned in the brief of respondent herein. As stated by counsel for respondent:

It was determined in Ex parte Young "substantially as follows: That when the penalties for disobedience of a law are by fines or imprisonment so heavy and severe that the persons affected thereby are as a practical proposition prevented from resorting to the court *for the purpose of determining the validity of the statute*, they are thereby denied the equal protection of the law and their property rendered liable to be taken without due process of law, and that such statute is therefore void as being in conflict with the Constitution of the United States."

We have underscored the clause in counsel's statement which differentiates that decision, and those which have followed it, from the case at bar. There is nothing in the present action evincing a purpose of, or necessity for, determining the validity of the provisions of the ordinance whereby license fees are imposed upon persons conducting the businesses specified therein. In Ex parte Young, supra, the Supreme Court of the United States quoted from its earlier decision in Cotting v. Godard, 183 U. S. 79, at page 102, 22 Sup. Ct. 30, at page 39, 46 L. Ed. at page 106, as follows:

"It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

This was very far from a declaration that one who is not challenging the validity of a statute upon any other ground will by reason of the severity of the penalties prescribed by the statute be entitled to a decree restraining the officers of the law from prosecuting him for alleged violation of such statute.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

52 Cal. App. 116

FAVORITE et ux. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN BERNARDINO COUNTY et al. (Civ. 3524.)

(District Court of Appeal, Second District, Division 1, California. April 20, 1921.)

1. Mandamus ⟸154(2)—Petition, not showing what parties appeared or what objections were urged to order complained of, is insufficient for a peremptory writ.

In a proceeding for writ of mandate against the superior court to enforce contempt proceedings, where the petition merely showed that the matter was heard and the order dismissed, and not whether the adverse parties appeared, or what objections might have been urged against the order, if any, a peremptory writ was properly refused.

2. Contempt ⟸21—Court held without jurisdiction to order corporation to exhibit its books to plaintiff in action for damages.

It was the duty of plaintiffs, in an action against a corporation and others for damages caused through defendant's acts in obtaining contracts with plaintiffs, and because of frauds committed in connection therewith, to have secured all information essential to the designation of the parties, including the stockholders' names and shares held by each before commencing their action, so that the court was without jurisdiction to make an order requiring the corporation to exhibit its books to plaintiffs, so that a contempt order should not be enforced.

3. Discovery ⟸96—Order requiring corporation to exhibit books should not be granted upon ex parte application, but only after notice.

In an action against a corporation for damages in procuring contracts from plaintiffs and for fraud, *held* that an order that the corporation exhibit its books to the plaintiff to furnish information as to stockholders and the amount of stock held by each was not an order to be granted in the first instance upon ex parte application under Code Civ. Proc. § 166, declaring that such may be made at chambers by judges of the superior court, but could only be secured after notice to the opposite party, in the same manner as prescribed for securing of inspection of documents by the provisions of section 1000.

4. Mandamus ⟸181(4)—Peremptory writ to compel contempt proceedings denied, where order violated was erroneously made.

Where an order of the superior court that a corporation exhibit to plaintiffs certain books was improper, the court had authority to vacate it as having been inadvertently made, and to dismiss the proceeding, and where the facts were presented in answer to the order to show cause why the circuit court should not be compelled by mandamus to proceed against the officers of the corporation for contempt for violation of such order, the peremptory writ should be denied.

Petition by O. J. M. Favorite and wife for writ of mandate against the Superior Court of the State of California in and for San Bernardino County and J. W. Curtis, Judge thereof. Alternative writ was issued. Peremptory writ denied.

D. B. Chapin, of Los Angeles, for petitioners.

Adair & Winder, of Riverside, for respondents.

JAMES, J. Petitioners prosecute this proceeding for the purpose of obtaining a writ of mandate to compel the respondent superior court to enforce contempt proceedings against the secretary of the Security Investment Company, a corporation, the alleged contempt consisting in the refusal of said secretary to obey an order requiring that he exhibit to the petitioners the stock books of the corporation in order that they might ascertain the names of the stockholders and the number of shares owned by each. Petitioners had insisted upon that right under the terms of section 378 of the Civil Code, as alleged creditors of the corporation. By the petition filed herein petitioners show that at the time of the commencement of this proceeding there was pending in the superior court of the county of San Bernardino an action wherein these petitioners were the plaintiffs and the Security Investment Company and others defendants, which action was one to secure judgment for a large amount of damages alleged to have been caused to the plaintiffs through certain acts of the defendant corporation in obtaining the contracts of the plaintiffs, and because of acts of fraud committed in connection therewith. The petition shows that in the action referred to there were named as defendants more than 100 persons and corporations fictitiously designated, whose connection with the action was shown by an allegation in the complaint that such fictitiously named parties were stockholders in the corporation defendant, and that the particular names and the amount of stock held by each were unknown to the plaintiffs. The petition herein further recites that the superior court in that action made its order requiring the plaintiffs to amend their complaint and show the true names and the number of shares of stock held by the various persons and corporations therein fictitiously designated; that in order to obtain that information plaintiffs made a written application, and filed the same in the court wherein the action was pending, which application set forth that plaintiffs were creditors of the defendant corporation; that they had demanded leave to inspect the books of the corporation for the purpose of obtaining the names and number of shares of the stockholders, and that such demand had been refused; further stating that in order to comply with the direction of the court requiring

an amendment to be made to the complaint it was necessary that the information be secured. The petition further shows that upon the filing of that application, which was presented ex parte and without notice to the corporation or its officers, the superior court made its order requiring the stock books of the Security Investment Company to be exhibited to the plaintiffs. The petition further shows that the order so made was served upon the secretary of the corporation, and that the secretary refused to comply therewith; that thereafter these petitioners applied to the superior court for an order requiring said secretary to appear and show cause why he should not be punished for contempt in disobeying the order of the court. In the petition it is then alleged.

"That on, to wit, the 14th day of February, 1921, said order to show cause came on for hearing before said court and judge, and said court and judge then and there made and entered an order dismissing the same, and refused and still refuses to enforce said order. That the said judge had no discretion to grant or refuse an order for an attachment for the contempt in said matter, but was bound in law to issue it."

Alternative writ was issued herein. In response thereto respondent demurred to the sufficiency of the facts stated in the petition, and upon the issue of law so raised the matter was submitted for final determination.

[1] In order to determine whether the action of the trial judge in dismissing the order to show cause was without justification, it is necessary that it be made to appear what particular matters were before the court upon the hearing of the order to show cause. The petition shows merely that the matter came on for hearing, and that the order was dismissed. Whether the adverse parties appeared, and as to what objections might have there been urged against the order as made, if any, we are not advised, and this condition of the petition affords sufficient reason in itself why peremptory writ should be withheld.

[2] However, several points are urged on behalf of respondent in opposition to the prayer for the writ, chief of which are: First, that the court in the action referred to had no jurisdiction to make an order requiring the corporation to exhibit its books to plaintiff; second, that if jurisdiction to make an order of that purport be conceded, that such order could not be granted upon an ex parte application, but could only be secured after notice to the opposite party, in the same manner as is prescribed for the securing of inspection of documents by the provisions of section 1000, Code of Civil Procedure. We are inclined to agree with respondent as to both of these positions. It was the duty of plaintiffs in the action referred to, to have secured all information essential to the designation of the parties, to wit, the names of the stockholders and the number of shares held by each, before commencing their action. That suit in no way involved an issue to obtain a disclosure of the names and stock holdings of the fictitiously designated defendants. It was an action purely for damages and does not fall within the holding of State ex rel. Watkins v. Donnell Mfg. Co., 129 Mo. App. 206, 107 S. W. 1112, where the Missouri Court of Appeal said:

"When a proceeding in equity is pending between the same parties at the time of the application for mandamus, in which suit the relief sought by mandamus could be fully administered, it is entirely proper for the court to decline to issue the writ."

This authority was cited by petitioners in response to respondent's claim that the plaintiffs in the superior court action should have proceeded by mandamus to obtain the inspection desired, that remedy being declared a proper one in Johnson v. Langdon, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156.

[3] Under respondent's second point we are of the opinion that the order made was not one to be classified as of the kind "usually granted in the first instance upon ex parte application," as section 166, Code of Civil Procedure, declares may be made at chambers by judges of the superior court. The corporation and its officers, had they been given notice, might have resisted the application for the order by a showing, for instance, that there were no stockholders in any number other than those particularly named in plaintiff's complaint, and that would have been a complete answer to the application.

[4] As before stated, we are unable to determine from the petition what, if anything, was presented to the trial court on the return day of the contempt order. If the order was improper to be made upon ex parte application, as we think it was, the court had authority to vacate it as having been inadvertently made, and to dismiss the proceeding. Section 937, Code Civ. Proc. If facts were presented in answer to the order to show cause, furnishing reason why the court should refrain from further proceeding against the officers of the corporation, the order of dismissal would again be fully justified. For these reasons we think that this court should decline to issue the writ.

Peremptory writ is denied, with costs to respondent.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 452

PORTER v. PORTER. (Civ. 2834.)

(District Court of Appeal, Second District, Division 1, California. May 2, 1921.)

Divorce ⊂=37(14)—Facts insufficient to show "willful neglect of husband to provide wife the common necessaries of life."

Where, shortly after their marriage, the husband enlisted in the United States Army, the nation then being at war, and some months after enlistment arranged an allotment out of his army pay so that the wife received $30 per month, and it did not appear that the husband was able to pay anything more, there was no "willful neglect to provide for the wife the common necessaries of life" within Civ. Code, § 105, so as to warrant divorce.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action for divorce by L. Mae Porter against Ross O. Porter. From a judgment denying divorce, plaintiff appeals. Affirmed.

C. P. Johnson, of Los Angeles, for appellant.

CONREY, P. J. Appeal by the plaintiff from judgment denying her application for a divorce from the defendant. There were two causes of action set out in the complaint, one being on account of willful desertion and the second on account of willful neglect. The parties were married on April 11, 1917, at Los Angeles, California. On April 9th defendant had enlisted in the United States Army. On the 13th he was required to report for duty, and was still absent in that service on May 6, 1918, when the complaint in this action was filed. Personal service of the summons and complaint was made upon the defendant in the county of San Diego. His default on nonappearance was duly entered. Nevertheless, an attorney appointed by the court appeared to represent defendant at the trial.

Appellant contends that the court erred in denying a decree of divorce "for the reason that desertion is purely a matter of intent, and our contention is that the intent to desert was clearly shown in his case." The evidence consists of the testimony of the plaintiff and of her mother, together with a letter of the defendant to the plaintiff dated April 7, 1918. The testimony entirely fails to show any abandonment of the plaintiff by the defendant at the time when he responded to the call for service in the army. The letter shows that at the time of writing defendant had decided that he would not again live with the plaintiff, but it likewise indicated that he had very recently arrived at that decision.

The evidence is equally insufficient to prove willful neglect of the husband in failing to provide for his wife the common necessaries of life, he having the ability to do so. Civ. Code, § 105. In November, 1917, the defendant arranged for an allotment to her out of his army pay, and from the time when that went into effect until the trial of this action, she was receiving that allotment, amounting to $30 per month. There is no evidence that defendant was able to pay anything more. Willful desertion or willful neglect must continue for one year before either is a ground for divorce. The plaintiff failed to establish a case on either of the grounds stated. The appeal is entirely without merit.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

52 Cal. App. 389

HANNA v. DE KOCH. (Civ. 3275.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1921.)

1. Venue ⊂=56—Petition for change of place of trial must be accompanied by written demand.

In addition to petition for change of place of trial and moving papers, a demand must be made in writing as required by Code Civ. Proc. § 396.

2. Venue ⊂=66—Affidavit of merits must state facts showing good defense.

Affidavits of merits filed with a petition for change of place of trial was not sufficient, where it was to the effect that appellant had stated "her" case to her counsel and that he had advised her that she had a good defense; a statement of "her" case not being "the" case under Code Civ. Proc. § 396.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by W. H. Hanna, doing business under the firm name and style of the Santa Barbara Realty Company, against Serena De Koch. From an order denying motion for change of venue, defendant appeals. Affirmed.

J. W. Smith, of Santa Barbara, and J. Mack Love, of Los Angeles, for appellant.

Balaam & Balaam, of Santa Barbara, for respondent.

WORKS, J. This is an appeal from an order denying a motion for a change of place of trial. The motion was denied upon the grounds that appellant had failed to demand, in writing, that the trial of the cause be had in the proper county, and that she had filed no sufficient affidavit of merits, both as required by Code of Civil Procedure, § 396.

[1] The appellant concedes that she presented no "demand" in terms, but she con-

tends that demand was substantially made in other papers filed in the proceeding. She refers to her petition for change and to a certain notice that the matter would be heard at a stated time. We discover nothing in these papers to differentiate them from others of their kind, and to determine that their contents obviated the necessity for a demand would be to hold that no demand is necessary in any proceeding for change. A petition, or motion, in such a proceeding will always acquaint the other party with the fact that a change is desired, but that is not sufficient. The statute specifically requires that, in addition to the moving papers, a demand be made (Code Civ. Proc., § 396; Pennie v. Visher, 94 Cal. 323, 29 Pac. 711), and we cannot legislate the provision out of existence.

[2] The affidavit of merits was to the effect that appellant had stated her case to her counsel and that he had advised her that she had a good defense. Such affidavits have been held insufficient, times almost without number. People v. Larue, 66 Cal. 235, 5 Pac. 157; Martin v. Superior Court, 176 Cal. 289, 168 Pac. 135, L. R. A. 1918B, 313. A statement of her case is not a statement of the case, but only a statement of her defense.

The order is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

52 Cal. App. 385

PEOPLE v. MARSIGLIA. (Cr. 750.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1921.)

1. Criminal law ⊂⊃1129(3)—Leading questions objected to must be pointed out in assignments of error.

Where, in assignments of error, accused asserts that the court erroneously permitted the prosecution to ask leading, suggestive, and impeaching questions, but the questions complained of are not pointed out, the appellate court is not required to consider such assignments.

2. Witnesses ⊂⊃380(5)—State's witness, unexpectedly failing to identify accused, could be questioned as to his testimony at preliminary examination.

Under Code Civ. Proc. § 2052, where witnesses for the prosecution failed at the trial to identify accused as the person who committed the crime, it was not error for the prosecuting attorney to read from the transcript of testimony given by such witnesses at the preliminary hearing, which identified accused, and to ask them if they so testified; no objection being made at the time on the ground that the transcript was not shown to the witnesses before they were questioned concerning it, nor that the prosecuting attorney did not indicate surprise at their failure to identify accused.

3. Witnesses ⊂⊃380(5)—Whether party surprised at testimony of one witness a question for trial court's discretion.

Whether a party is so surprised at the testimony of his own witness at the trial as to justify allowing the party to show prior inconsistent statements or testimony of the witness *held*, discretionary with the trial court.

4. Criminal law ⊂⊃1035(3)—Timely objection must be made to prejudicial remarks by court.

Upon objection to the admission of accused's written confession, the court's statement that it did not appear to him that the confession had been procured by force, threats, or promises *held*, not reviewable, where no objection was made at the time, for misconduct on the part of the court is not considered on appeal unless the party complaining promptly made assignment of misconduct thereon so that the court was given opportunity to prevent prejudice, especially where the remark, as here, was not such that any prejudicial influence therefrom could not have been removed if timely objection had been made.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Gaspard M. Marsiglia was convicted of robbery and also of rape, and appeals. Affirmed.

Le Roy D. Barnett, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

CRAIG, J. The defendant was convicted of the crime of robbery and also of the crime of rape. The cases were consolidated and tried together. The appeal is taken from the judgment and order denying motion for new trial. On the night of February 17, 1920, it was charged that Marsiglia and his two codefendants, Mike B. Gonzales and Frank Macchiaroli, at the point of revolvers, held up and robbed Leon Esquerre and Marie Gracienne and committed the crime of rape against Marie Gracienne. On the trial Esquerre and Marie Gracienne testified to the facts constituting the offenses, and a written confession signed by all three of the defendants was introduced in evidence. The defendant Marsiglia alone appeals at this time.

[1] Appellant has made three assignments of error. In the first two it is asserted that the court erroneously permitted the prosecution to ask "leading, suggestive, and impeaching questions." The questions complained of are not pointed out, and under such a circumstance the record is not in such a condition as to justify a consideration of these assignments of error upon appeal. People v. McLean, 135 Cal. 306, 67 Pac. 770; People v. Cebulla, 137 Cal. 314, 70 Pac. 181; People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833.

However, from the discussion in appel-

lant's brief and a careful perusal of the record we conclude that the rulings complained of were those permitting the prosecuting attorney to ask of certain witnesses for the prosecution questions concerning testimony given by them at the preliminary examination. This was done in connection with the witness Marie Gracienne and also the witness Esquerre. Section 2052 of the Code of Civil Procedure provides:

"A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of time, places, and persons present, and he must be asked whether he made such statements, and, if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

Esquerre was called as a witness for the prosecution. He testified that he could not identify the defendant Macchiaroli as one of the men who committed the offenses charged. Whereupon the prosecuting attorney, over the objection that the question was "argumentive, leading, and suggestive" and "incompetent, irrelevant, and immaterial, and not proper direct examination, leading and suggestive," and also tending "to impeach his own witness," was permitted to read from the transcript of the testimony of Esquerre given at the preliminary hearing in the same case as follows:

"Q. Now, what two took her out of the machine and across the street? A. Those two over there. Q. Referring to Gonzales and Marsiglia? A. Yes, sir."

And the witness was asked if he so testified. Other similar excerpts were read from the transcript which clearly contradicted the testimony of the witness then on the stand to the effect that he could not identify Marsiglia as having been present and having taken part in the commission of the robbery and rape.

[2, 3] None of the objections made by counsel were meritorious. It was not objected that the witness was not shown the transcript of the testimony given by him at the preliminary examination before being questioned concerning it, nor that the prosecuting attorney did not indicate surprise at the testimony of the witness in failing to identify Marsiglia. Had these matters been called to the attention of the trial court by proper objections, no doubt the prosecuting attorney would have been required to lay a more complete foundation before his impeaching questions would have been permitted. However, in so far as the preliminary question of surprise is concerned, that is a matter addressed to the sound discretion of the trial court. Zipperlen v. So. Pac. Co., 7 Cal. App. 206, 93 Pac. 1049. In this instance the complete change in the witness' testimony was properly regarded by the trial court as sufficient indication of the prosecuting attorney's surprise.

It is claimed by respondent that the questions addressed to the witness Marie Gracienne were merely to refresh her memory. But construing them favorably to the defendant, the most that can be said is that this witness was impeached by the prosecuting attorney who had called her in the same way and on the same point and under the same circumstances as was Esquerre.

[4] The third ground of appeal is based upon a statement of the trial court made in the presence of the jury. Appellant contends that the court invaded the province of the jury. The statement made by the trial court of which complaint is made is as follows:

"It does not appear to me that the alleged confession or the so-called statement was procured by force or by threats or by promises."

Objection to the admission of the written confession had been made and the quotation from the court occurs in the transcript at the point where the objection was about to be passed upon. The court's language to which exception is taken was not objected to at the time. It is well settled that misconduct on the part of the court will not be considered on appeal unless the party complaining promptly made assignment of misconduct thereon, so that the court might be given an opportunity to correct the irregularity and prevent prejudicial ruling. It cannot be said that the remark complained of in this case was of such character that any influence which it might have had upon the minds of the jurors could not have been removed if timely objection had been made by counsel for the defendant. Under such circumstances it is well settled that the assignment of misconduct cannot be given consideration on appeal. People v. Osborn, 12 Cal. App. 148, 106 Pac. 891; People v. Walker, 15 Cal. App. 400, 114 Pac. 1009; People v. MacDonald, 167 Cal. 545, 140 Pac. 256.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

52 Cal. App. 472

ANGLO-AMERICAN LAND CO. v. HEINE et ux. (Civ. 3734.)

(District Court of Appeal, First District, Division 1. California. May 3, 1921.)

1. Evidence ⊂=595—In case of conflicting evidence, trial court may indulge in inference from evidence.

Where the evidence was conflicting, it was proper for the court, having accepted the evidence of one party as true, to indulge the legitimate inferences and deductions arising from such evidence in arriving at a proper understanding of the facts considered directly approved.

2. Appeal and error ⊂=1012(2)—Finding of trial court supported by evidence not disturbed as against weight of evidence.

Where there is evidence sufficient to support the fact findings of the trial court, the appellate court cannot disturb the judgment on the ground of insufficiency of evidence, though it may be of the opinion that the weight of the evidence is against the finding.

3. Mortgages ⊂=319(3)—Evidence held to establish satisfaction of mortgage by payment.

In an action on a deficiency judgment where the property which was subject to several incumbrances had been conveyed to plaintiff's assignor, evidence *held* to show that the conveyance was pursuant to an arrangement between the parties whereby the note secured by the mortgage was discharged and paid.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Anglo-American Land Company, a corporation, against Frederick F. Heine and wife. From a judgment for defendants in an action on a deficiency judgment, plaintiff appeals. Affirmed.

Gerald C. Halsey, of San Francisco (Frederic T. Leo, of San Francisco, of counsel), for appellant.

Walter H. Linforth, of San Francisco, for respondents.

WASTE, P. J. The plaintiff brought this action to recover from the defendants, husband and wife, the sum of $6,000, alleged to be due as a deficiency after sale of real property under a deed of trust given to secure a promissory note. The trial court held that the note had been paid, satisfied, and discharged, and gave judgment for the defendants, from which the plaintiff appeals. Insufficiency of the evidence to support the above finding of the court, and errors in admitting evidence, are the grounds relied upon to secure a reversal of the judgment.

[1] In presenting the question of the sufficiency or insufficiency of the evidence to support the court's finding that the promissory note, on which was based the right of the plaintiff to recover, had been paid, satisfied, and discharged on May 28, 1914, counsel for the respective parties have each presented a careful analysis of the testimony. These discussions only serve to emphasize what clearly appears from the record; that there is an irreconcilable conflict in the testimony of the two real parties to the action. It was the province of the trial court, under such circumstances, to accept the evidence of one or the other as true, and, if satisfied therewith, to decide the issues in the light of such testimony. In doing so it was proper for the court to indulge the legitimate inference and deduction arising from the testimony in arriving at a proper understanding of the facts it considered directly proved. Maxson v. Llewellyn, 122 Cal. 195, 198, 54 Pac. 732.

[2] When there is evidence in the record which, if believed and accepted as true by the trial court, is sufficient to support its findings and judgment, the appellate court cannot disregard the lower court's decision and reverse the judgment on the ground of the insufficiency of the evidence. And this is so even though the appellate court may be of the opinion that the weight of the evidence is against the finding. Lewis v. Covillaud, 21 Cal. 179, 190. The motives which may have impelled the parties to testify as they did, the circumstance that certain lines of defense may have been drawn very late in the case, and the probability, or improbability, of the facts established, were matters for the consideration of the trial court, and not for this court on appeal.

The relations between J. W. Wright, whom the court found to be the real party plaintiff in the action, and the defendant, Frederick F. Heine, began in 1913, when Heine, through Wright, acting as his agent, purchased an unimproved lot in the city of San Francisco. In dealing with the property and making arrangements for erecting a building thereon, Heine mortgaged the easterly half of the lot to one Murdoch for $18,000, and arranged with Wright to advance him certain additional sums of money, not exceeding $6,000, as a building loan on the same property. He and his wife thereupon executed the promissory note which forms the basis of this suit for the sum of $7,500 to the J. W. Wright & Sons Investment Company, and secured its payment by the execution and delivery of a deed of trust of the one-half of the real property. Heine erected a building on the half of the lot at a cost of $31,000. In May, 1914, he gave to the J. W. Wright & Co., Inc., an option for the entire property agreeing to sell it, free of all incumbrances, for $56,000. Within the time limited Heine and wife executed a deed to Walter J. Rowley, a clerk, who seems to have been working indiscriminately for Wright and the two companies bearing his name.

On September 1, 1917, alleging that only $500 of the principal of the $7,500 note had been paid, the substituted trustee under the deed of trust proceeded to sell the half of the property covered thereby to satisfy the indebtedness. At the trustee's sale, of which the defendants had no notice, Wright purchased the property for the sum of $1,000, subject to the Murdoch mortgage, and received the trustee's deed therefor. After crediting this $1,000 upon the note, Wright caused the J. W. Wright & Sons Investment Company, ostensibly the holders of the obligation, to transfer the note to this plaintiff, and thereupon commenced this action to recover from plaintiff $6,000, alleged to be due by reason of the facts we have related.

Defendants base their defense to the action upon their contention that the note had been fully paid, satisfied and discharged by Wright at the time of the agreement and transfer of the property by defendants to Rowley. Incidental to the main issue there arose a controversy as to the amount received on the note by the defendants from Wright. The contract under which the note was executed specified that, notwithstanding the fact that the note was drawn for $7,500, no more than $6,000 should be advanced by J. W. Wright & Co. It was, and is, admitted that only two amounts, aggregating $4,500 in cash, were actually paid by Wright during the erection of the building. Wright and the plaintiff sought to maintain in the court below that, in addition to the $4,500 cash advanced, Heine was indebted to Wright at the time of the execution of the note on another promissory note for $2,500, which was included in the new obligation, which increased Heine's indebtedness to $7,000. Heine unequivocally denied the execution or the existence of any such note, and Wright was unable to produce it. The plaintiff further alleges that, prior to the commencement of the present action, defendants had paid the sum of $500 on account of the principal of the $7,500 note. This allegation was positively denied, and the court found that it was not true. On the issue thus presented, the trial court found that at no time was there ever more than $4,500 due, owing, and unpaid on the note secured by the deed of trust.

[3] On the main issue raised by defendants' contention that their obligation to J. W. Wright & Sons was actually paid and discharged at the time of the transfer of the property to Rowley, and as a part of that transaction, the testimony was equally conflicting. By the terms of the three-day option given to J. W. Wright & Co., Inc., by the defendant Heine, the latter engaged to sell the entire property, free of all incumbrances, for $56,000 and agreed to pay Wright & Co., as their compensation, all over that sum that might be obtained. As a matter of fact, Wright bought the property at the price mentioned for one of his companies. Defendant Heine testified that it was agreed between Wright and himself, as a part of the transaction, that the $7,500 note executed by himself and wife was to be paid off immediately, and that he was to be relieved of any future financial responsibility in reference to the incumbrances on the property, of which there were three, including the Wright deed of trust securing that note.

While Wright strenuously denied that there was any such agreement, certain features of the transaction brought out by the evidence tend to support the defendants' contention and, no doubt, had the serious consideration of the trial court. When the deed passed from the defendants to Rowley under the agreement with Wright, it contained a stipulation that the conveyance was "subject to an indebtedness of $34,000." The indebtedness on the property at that time included the trust deed to Murdoch, $18,000; the trust deed to one Unna, $9,000, and the trust deed to Wright & Sons, now claimed by Wright to have amounted to $7,000 at that time, the total aggregating $34,000. The trial court found, however, that the defendants were only indebted to Wright, or to his companies, at that time in the sum of $4,500. Taking the determination of the trial court in that regard, the aggregate indebtedness on the property was but $31,500. This amount subtracted from the net selling price of $56,000, leaves remaining $24,500 due to the defendants. The significant fact appears that that is the exact sum for which Wright & Co. accounted to the defendants in closing and settling the transaction. We cannot but think this fact sheds much light upon the position of the parties, and tends strongly to corroborate the contention of the defendants, and to support the finding of the trial court to the effect that the note of the defendants was in fact paid and discharged.

Basing its argument on a portion of the testimony of defendant Frederick F. Heine to the effect that, under his agreement with Wright, he was to be released from future financial responsibility on the various incumbrances, the appellant contends that such agreement, even though it were made, did not release the joint debtor, defendant Agnes Heine, the wife. But there is other testimony of the respondent to the effect that the agreement was that the amount due on the note "was to be paid off immediately by Mr. Wright." When that was done, as was found by the trial court, the obligation of both debtors was extinguished.

The deed from the defendants to Rowley recited that the property was conveyed subject to an indebtedness of $34,000. Appellant contends that this aggregate amount was intended to include $7,000 due from the defendants. It attempts to argue that the court was, therefore, in error in admitting evi-

dence to the effect that only $4,500 was due as a matter of fact on the promissory note here sued on, asserting that such evidence tends to vary the terms of a written agreement, the deed. We do not think the contention merits consideration.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

52 Cal. App. 370

LONGUY v. LA SOCIETÉ FRANCAISE DE BIENFAISANCE MUTUELLE.

(Civ. 3787.)

(District Court of Appeal, First District, Division 1, California. April 27, 1921. Hearing Denied by Supreme Court June 23, 1921.)

1. Hospitals ⟸7—Student nurse, volunteering to look after patient at hospital, held within the scope of her employment.

In an action against a hospital for the death of a child burned while being treated, while cared for by student nurse, who had volunteered to do the work for that night, where the head nurse had given permission for student to care for the child, *held* that such student was directly engaged within the scope of her employment at time of the injury.

2. Witnesses ⟸386—In an action against hospital for death of a patient resident physician's certificate of death held not admissible to impeach undertaker.

In an action against a hospital for the death of a child patient from burns alleged to have been received through neglect, the certificate of the hospital's resident physician that the child died of pneumonia was not admissible to discredit testimony of the undertaker as to condition of child's body from burns, on the ground that he, as well as the attending physician, had signed such certificate, required by law, for the undertaker merely certified to the interment and place of burial, and not the cause of death.

3. Appeal and error ⟸1058(1)—Evidence ⟸157(8), 383(4)—In an action for death of hospital patient from burning it was error not to admit a certified copy of the death record, but error was harmless in view of other evidence.

In an action against hospital for the death of a child from negligent burning where the defendant claimed the child died from pneumonia, the certificate of death of resident physician is prima facie evidence of the cause of death under Deering's Gen. Laws, p. 2006, St. 1915, p. 575, but failure to admit certified copy of death record resulted in no harm to defendant, since the testimony of the physician, who was a witness, was the best evidence.

4. Hospitals ⟸8—In action for death of patient burned by inhalator, evidence of inhalators used in other hospitals held incompetent.

In an action against hospital for damages for the death of a patient, accidentally burned from an inhalator for vaporizing eucalyptus oil while being treated for pneumonia, it was error to admit and refuse to strike evidence of the kind of inhalators used at two other institutions, admitted to show defendant's negligence, there being no testimony of the general custom as well as practice of well appointed and managed hospitals in the matter of inhalators.

5. Evidence ⟸110—Evidence of party's falsehood or fraud in attempting to procure witness to testify differently held admissible.

In an action against a hospital for damages for death of plaintiff's child from accidental burning, it was error to exclude proof that plaintiff attempted to procure defendant's resident physician to testify favorably as to death being caused from the burns, and not from pneumonia, since evidence of a party's falsehood or fraud in the preparation and presentation of the case is receivable.

6. Evidence ⟸544, 571(9)—Nurses held competent to state opinion whether death was caused by burning or disease.

In an action against hospital for the death of plaintiff's minor child from being burned while being treated for pneumonia, the exclusion of evidence of graduate nurses with long and varied experience as experts as to whether in their opinion the child would have died of disease at about the time she did die if not burned, and also of undergraduate nurses, was error, since they were competent, and the fact that some were undergraduates was merely a matter going to the weight of testimony.

7. Trial ⟸252(8)—In action against hospital, an instruction that student nurses were not allowed to work more than 8 hours held properly refused.

In an action against hospital for damages for death of a child pneumonia patient from burning by fire set by an inhalator, where the child was being cared for by student nurses voluntarily working overtime, an instruction that the law does not allow a female student employed in hospital to work more than 8 hours during any day was properly refused.

8. Appeal and error ⟸843(2)—Where case must be reversed for error pointed out, other assignments need not be considered.

Where a case must be reversed for error pointed out, it becomes unnecessary to consider the contention of the appellant that the verdict for damages is excessive.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Frank Longuy against the La Société Francaise De Bienfaisance Mutuelle for damages for death of a child. Judgment for plaintiff, and defendant appeals. Reversed.

Chickering & Gregory, and Evan Williams, all of San Francisco, for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

WASTE, P. J. The defendant, a corporation commonly known as the French Hospital

of San Francisco, appeals from a judgment after a verdict in favor of the plaintiff, rendered in an action brought by plaintiff to recover damages for the death of his infant child, caused, it is alleged, by being fatally burned while an inmate and under the care of the defendant. Liability of the defendant is predicated upon the alleged carelessness and negligence of one of the student nurses of the defendant placed in charge of the child by the hospital superintendent. Trial was by a jury, which rendered verdict in plaintiff's favor in the sum of $5,134.

The little girl, 2½ years old, and her mother, were members of a mutual association, paying certain monthly dues for the privilege of membership, which entitled them to surgical and medical treatment gratis at the French Hospital. During the influenza epidemic in October, 1918, the child was very ill with bronchial pneumonia, probably induced by influenza. She was taken to the hospital by the mother and remained there until her death, which occurred about two weeks later. During the latter part of the period oxygen was administered on two occasions to keep the baby alive, and she was in a cyanotic, or blue, condition. The mother remained with the child, occupying the private room with her in the hospital, until the morning of October 26th, when she returned to her home. Before leaving the hospital the plaintiff and his wife endeavored to secure the services of a trained nurse, but, due to the epidemic, such service was not to be had. Thereupon two student nurses, who were then in training at the hospital, volunteered to take care of the baby during the night, dividing the time between them. As the state law forbade them working more than 8 hours, they went to Miss Murphy, head nurse of the hospital, and asked her permission to take care of the child, stating that it was purely a voluntary act on their part, but as the child was very ill and needed watching, they were willing to take care of the patient during their extra hours. Miss Murphy stated she did not want them to work all day and all night too, and that the rules of the hospital forbade their working overtime, but that under the circumstances it would be all right for them to do so.

One of these nurses took care of the patient until midnight when the other relieved her. The child had great difficulty in breathing, and an awning was constructed over its bed, within which was placed a lighted alcohol inhalator, containing eucalyptus oil, the purpose of which was to diffuse a vapor which would relieve the respiration. About 3:30 a. m. the nurse then in charge left the room where the baby was lying for a few minutes. When she returned she found the bedclothes on fire. She lifted the child from the bed; the fire was extinguished, and a doctor was immediately summoned, who administered first aid.

There is an irreconcilable conflict in the testimony as to the extent and nature of the burns the child received. Doctors and nurses who saw the baby after the fire testified that the burns were, for the most part, slight, first degree burns, limited to the face, one knee, and the arms. The parents of the child and the undertaker who prepared the body for burial testified that the burns were very deep, extending over more than one-third of the body. The child died some 16 hours after the fire. Whether or not her death was due to the effect of the burns, or to bronchial pneumonia induced by influenza, is one of the issues of the case.

[1] It is first contended by the appellant that the act of the nurse in caring for the child on the night of the fire was purely voluntary and an act of mercy, outside of her regular duties and did not come within the scope of her employment by the defendant, and was something which the hospital in no way could have required her to do, and from which it in no way profited. On this ground it disclaims any responsibility in the premises. We think, however, that there was no mere unwarranted assumption by the nurse of a duty not assigned to her, but that she was directly engaged within the scope of her employment in caring for the patient and ward of appellant, and with the authorization on the part of appellant as to amount to an assignment. Consequently, appellant is liable for all actual damage resulting from the nurse's negligence in the course of such employment. Turner v. N. B. & M. R. R. Co., 34 Cal. 594, 599. The facts bring this case squarely within the construction of section 2338 of the Civil Code adopted by the Supreme Court in Johnson v. Monson (Sup.) 190 Pac. 635. The refusal of the trial court to instruct the jury contrary to this view was not error.

[2, 3] During the trial defendant offered in evidence a properly certified copy of the death certificate of the child, which the court refused to admit. The exhibit, among other things, contained the required medical certificate of death, signed by Dr. Juilly, resident physician of the hospital, that he attended the deceased, and that the cause of death was "bronchopneumonia, contributory influenza." Appellant contends that the certified copy should have been admitted, because it is by law made prima facie evidence in all courts of facts therein stated. Stats. 1915, p. 575, Act 4302, Deering's Gen. Laws. Among other reasons why the certificate should have been admitted, the defendant asserts, is that it tended to discredit the testimony of the witness Godeau, the undertaker who prepared the body of the child for burial. He testified that the burns of the infant were so serious as to expose the ribs, and covered about one-third of the body of the child. The statute provides that the undertaker, as well as the attending physi-

cian, shall sign the certificate, and shall file the same with the local registrar, and it is the contention of appellant that as Dr. Juilly had certified that the death was due to bronchopneumonia, Godeau either testified to an untruth when describing the gravity of the burns, or connived at an attempt by the attending physician to hide the real cause of death. In either case, argues the appellant, his credibility as a witness would have been destroyed. But the undertaker made no statement in the certificate as to the cause of death. He merely certified to the interment and the place of burial. As to him the certificate was properly excluded. Dr. Juilly was a witness at the trial. He testified that the child probably had influenza, and in substance and effect that her death was caused by bronchial pneumonia; that she did not suffer any shock from the burns, but would have died at about the time she did die. The failure to admit the certified copy of the death record in evidence to establish the cause of death, therefore, resulted in no harm to the appellant. At the most the certificate would only have been prima facie evidence of the facts therein stated. The best evidence was the testimony of the physician himself, the only inference from which was that the cause of death was as stated in the certificate.

[4] Certain rulings of the court on the admission and exclusion of evidence during the trial are specified as error by appellant. Respondent contended that appellant did not use ordinary care in the selection and use of an inhalator, in which eucalyptus oil was vaporized by means of an alcohol lamp. In support of his contention he called Dr. Margaret Bigby of the Children's Hospital, and Louis C. Levy, superintendent of Mt. Zion Hospital. Over the objection of the appellant, these witnesses were allowed to testify as to the kind of inhalators used at those institutions, neither of which was the kind used by the appellant, and neither of which was in common use in the community. Appellant objected to the introduction of the evidence in the first instance upon the ground that it was incompetent, irrelevant, and immaterial, and did not tend to prove any issue in the case, and upon the further ground that what one particular hospital used or did not use did not tend to prove in any way safety in the use of any other appliance. After further cross-examination of the witnesses, appellant moved to strike out their testimony upon substantially the same grounds. The court denied the motion. We think the action of the trial court in admitting the evidence over the objection of the defendant, and refusing to strike it out, was error. Testimony as to the general custom and practice of well appointed and managed hospitals in the matter of the use of inhalators, would have been competent on the question of care and diligence exercised in the premises by the appellant. 6 Thompson on Negligence, § 7882; Burns v. Sennett & Miller, 99 Cal. 363, 373, 33 Pac. 916; Hennesey v. Bingham, 125 Cal. 627, 58 Pac. 200; Pederson v. Spreckles, 87 Fed. 938, 944, 31 C. C. A. 308. But such evidence, to be competent, must amount to something going to establish the general custom and practice in the business under investigation. Standard Oil Co. v. Swan, 89 Tenn. 434, 15 S. W. 1068, 10 L. R. A. 366; 29 Am. & Eng. Ency. of Law, 419. Consequently the evidence in this case did not satisfy the rule. Neither of the witnesses testified as to the general practice, usage, or custom of hospitals in San Francisco or elsewhere, but only as to the conduct of the particular institution with which she and he were connected. Their evidence should have been excluded. Barnes v. Zettlemoyer, 25 Tex. Civ. App. 468, 62 S. W. 111, 112; Blanchette v. Holyoke St. Ry., 175 Mass. 51, 54, 55 N. E. 481.

[5] While the witness Dr. Juilly was testifying on direct examination he stated that a conversation took place at his office shortly before the trial at which the plaintiff, another person, and the doctor were the only persons present. Counsel for appellant asked the witness to state the conversation. The question was objected to by respondent's counsel, and the court asked the purpose of the question, whereupon counsel for appellant offered to show by the witness that an attempt was made during the conversation to have Dr. Juilly testify that in his opinion the burns caused the death of plaintiff's daughter, and that Dr. Juilly said he did not "intend to commit perjury for anybody." The court sustained the objection, and refused to permit appellant to make its further offer of proof along the same lines. Whether the alleged attempt on the part of plaintiff to procure Dr. Juilly to testify favorably in plaintiff's behalf took the form of threat, bribery, or solicitation does not appear, but we think the trial court should have at least permitted the further offer of proof, for evidence of a party's falsehood or fraud in the preparation and presentation of his case is receivable against him. People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; Luhrs v. Kelly, 67 Cal. 289, 7 Pac. 696; People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833.

[6] Appellant sought to elicit from the nurses at the hospital, who were familiar with the condition of Emma Longuy during the time she was in the hospital, whether or not in their opinion the child would have died from disease at or about the time she did die if she had not been burned. The court sustained the plaintiff's objection to the testimony. Two of these witnesses were graduate nurses, with long and varied experience. The other two were student nurses at the hospital. We think the court was in error in rejecting this testimony. There can be no doubt that one who is shown to be a graduate nurse, and to have been constantly

engaged in the calling of a professional nurse for years, may properly be called upon as an expert to give evidence of the character of that sought to be elicited by appellant. Kimic v. San Jose Ry., 156 Cal. 379, 391, 104 Pac. 986; Barsi v. Simpson, 31 Cal. App. 612, 614, 161 Pac. 127. The fact that two of the witnesses had not yet graduated would be a matter for the jury to consider in determining what weight should be given to their testimony. One of the vitally important issues in the case was whether the little girl died as a result of the burns, or from bronchial pneumonia, from which she was suffering. Evidence introduced on behalf of the plaintiff strongly tended to support the former theory, while the theory of the defense was that the child died as the result of the disease. In this view of the case the testimony sought to be elicited from the professional nurses who were familiar with the baby's condition became very material, and should have been admitted.

[7] Appellant requested the court to charge the jury that it is the law in this state that no female student nurse shall be employed in any hospital more than 8 hours during any day, and that the purpose of this law is for the protection of such female employee. We are unable to follow appellant in its argument, as to its competency and relevancy, and we think the instruction was properly refused.

[8] As the case must be reversed for the errors pointed out, it becomes unnecessary for us to consider the contention of the appellant that the verdict in this case was excessive.

Judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

53 Cal. App. 405

In re ISER'S ESTATE.

BAKER et al. v. KELLER.

(Civ. 2202.)

(District Court of Appeal, Third District, California. April 30, 1921. Rehearing Denied May 28, 1921. Hearing Denied by Supreme Court June 27, 1921.)

1. Executors and administrators ⟹510(10)—Allowance of attorney's fees not error unless so disproportionate to value of services as to constitute abuse of discretion.

To constitute reversible error, an allowance of attorney's fees for services for an executor must be on its face so far out of proportion to the value thereof as to constitute a manifest abuse of judicial discretion.

2. Executors and administrators ⟹506(3)—Court not bound by opinions of professional witnesses as to value of attorney's services.

The court, in exercising its discretion in allowing attorney's fees for services in behalf of a decedent's estate, is not bound by the opinions of professional witnesses.

3. Executors and administrators ⟹506(3)—Evidence held insufficient to show fee fixed by court inadequate.

On appeal from an order allowing attorneys for an executor insufficient fees, evidence *held* insufficient to show the compensation awarded so grossly in adequate as to indicate the court transcended its legal discretion, in the absence of a showing that the court was prejudiced; the divergence of views between the attorney's expert witnesses and the court affording no proof of bias.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

In the matter of the estate of Conrad Iser, deceased. Proceeding by C. W. Baker and another against Adam Keller, executor, for allowance of attorney's fees for extraordinary services for John Gerber, coexecutor. From an order allowing a fee, plaintiffs appeals. Affirmed.

C. W. Baker and R. Platnauer, both of Sacramento, for appellants.

White, Miller, Needham & Harber and C. E. McLaughlin, all of Sacramento, for respondent.

HART, J. This is an appeal by C. W. Baker and Platnauer, attorneys for John Gerber, as one of the executors of the last will of Conrad Iser, deceased, from an order allowing said attorneys a fee "for extraordinary services" professionally rendered by them for said Gerber, as such executor.

It appears that Adam Keller, coexecutor with said Gerber of the last will of said Iser, deceased, brought an action in the superior court in and for the county of Sacramento, against said Gerber, as such executor, upon two claims against the estate of said deceased aggregating the sum of $10,380, of which the sum of $10,140 was for services for nursing the deceased during the last few years of his life, he being aged and an invalid during said years, and the sum of $240 was for "looking after and attending to the business and financial affairs of the decedent." The appellants were employed by Gerber to represent him, as the executor of the will of the deceased, in said action.

The trial of the action resulted in a judgment in favor Keller in the sum of $5,070, or $5,310 less than the amount for which he sued. A motion for a new trial was in due time made and the same was denied. An appeal from the judgment was prosecuted by appellants on behalf of said Gerber, as such executor, through the appellate and Supreme Courts, and the judgment was affirmed.

One of the appellants testified before the court in this proceeding respecting the amount of labor performed by them in the

defense of the action and in prosecuting the appeal to a finality through the appellate and Supreme Courts. Thus it was made to appear that, prior to the trial of said action, many important and "intricate" legal questions were raised by them preliminarily to the actual trial, that the preparation necessary to a proper presentation of said questions required much time and labor, that said legal questions having been decided by the court against their position, many persons were thereafter interviewed with a view to their introduction as witnesses at the trial on behalf of defendant, that the trial of the action consumed four days, that they (appellants) succeeded in securing a judgment therein reducing the amount sued for to approximately one-half thereof, and that an appeal, with the necessary incidental labor thereof, was taken and prosecuted by appellants, with the result as above stated. The record of the action on appeal was also received in evidence.

In addition to the above testimony, two attorneys, members of the Sacramento bar, and of high personal and professional character, were called by the appellants as witnesses, and testified that, having heard the statement before the court of one of the appellants, setting forth in detail the amount of labor which had been performed by them in the case, in their opinion the value of the services rendered by appellants in said action was from $1,250 to $1,500. There was no other testimony than this as to the value of the services of appellants offered or received before the court in this proceeding.

[1] The question which we are required to determine upon this appeal upon the record as made herein, and of which the above is in substance a recapitulation, is whether, in making the order from which this appeal is prosecuted, the court below abused its discretion. In other words, to justify us in holding that the court below erred to the prejudice of appellants in its allowance of attorneys' fees for professional services rendered by appellants in the action referred to, we must be prepared to say that such allowance is, upon its face, so far out of proportion to the value of the services rendered as to constitute the making of the order of allowance a clear or manifest abuse of judicial discretion. After a painstaking consideration of the question thus propounded, we have not been able to satisfy ourselves that it can justly be held that the order complained of involved an abuse of the discretion with which trial courts are invested in disposing of such matters as the one now before us. If the application for the allowance of attorneys' fees had been directly made before and the evidence directly heard by us, we might have ordered the payment of a fee in excess of that allowed. But we are here reviewing an order in the making of which, as is declared by the Supreme Court in Freese v. Pennie, 110 Cal. 467, 42 Pac. 978, the trial court is clothed with a "large discretion," which is always regulated or controlled by a showing directly made before the court to which it is committed.

[2] It has repeatedly been held that the trial court, in exercising its discretion in the matter of the allowance of attorneys' fees for professional services rendered in behalf of estates of deceased persons, is not bound by the opinions of professional witnesses as to the value of such services. In Estate of Dorland, 63 Cal. 281, the court said:

"The [trial] court was authorized to compare its own judgment as to such value with the opinions of witnesses and make such allowance as should be just."

In Spenser v. Collins, 156 Cal. 298, 306, 307, 104 Pac. 320, 323, 20 Ann. Cas. 49, the court said:

"The position of the appellants is, apparently, that before a court can find the value of professional services it must have before it the testimony of experts to the effect that certain services are of a certain value. But this is not the law. The testimony of experts is, of course, admissible to prove the value of attorneys' services. Forsyth v. Doolittle, 120 U. S. 73, 7 Sup. Ct. 408; Louisville v. Wallace, 136 Ill. 87, 26 N. E. 493. But the opinions of the experts in such cases are not binding upon the jury, who may apply to the testimony 'their own experience and knowledge * * * of such services.' Head v. Hargrave, 105 U. S. 45; Forsyth v. Doolittle, 120 U. S. 73, 7 Sup. Ct. 408; Estate of Dorland, 63 Cal. 281; Schlesinger v. Dunne, 36 Misc. 529, 73 N. Y. Supp. 1014. * * * If the jury may form a judgment as to the value of services in opposition to the opinions of experts, it necessarily follows that the testimony of experts is not essential. And so it has been held in cases tried before a jury (Bourke v. Whiting, 19 Colo. 1, 34 Pac. 172; Gibbons v. Missouri Pac. R. R. Co., 40 Mo. App. 146), as well as with respect to issues determined by a court or referee (Noftzger v. Moffett, 63 Kan. 354, 65 Pac. 670; Dempsey v. Schawacker, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100). If this doctrine is applicable to jury trials, there is much more reason for applying the doctrine in cases tried before a court. The value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and nature of such services, its own experience furnishes it with every element necessary to fix their value."

In Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028 (erroneously cited in respondent's brief as in the 150 U. S. 45). was an action to recover the sum of $2,000, alleged to be due the plaintiffs from defendants for professional services as attorneys. The action was tried by jury, who gave plaintiffs a verdict for $1,800. There were several attorneys who testified at the trial and gave their opinions

as to the value of the services rendered by plaintiffs for defendants. The opinions of these witnesses upon the question of the value of the services were widely divergent, the highest estimate being $5,440 and the lowest $1,000. The trial court in effect instructed the jury that, in determining the question before them their judgment was to be controlled by the opinions of the attorneys testifying upon the question of the value of the services rendered by plaintiffs, thus foreclosing the right of the jury to exercise their own "knowledge or ideas" upon the value of such services. Upon appeal, the case was reversed because of the giving of said instruction, the higher court declaring that, while the jury in such a case, as in all cases, should be confined, in determining such an issue, to a consideration alone of the evidence adduced before them, at the same time they were not to be precluded from exercising their own judgment of the facts upon which the opinions of the experts were founded. In other words, it was therein, in effect, held that, while such expert testimony is admissible in the trial of such an issue, it was within the legal province of the jury to set up and act upon their own judgment, even in opposition to the opinions of the experts, upon the question of what the evidence showed would be the reasonable value of the services rendered.

The rule stated in the authorities referred to above has been so frequently applied in the cases and so definitely settled that further citation is unnecessary. Many of the cases are named in the briefs, both of the respondent and the appellants.

In the instant case, as we have seen, the facts relative to the nature and the extent of the services rendered by the appellants for the estate of the deceased, Iser, were given in detail before the court, and the latter, equally with the attorneys who gave their opinions as to the value of the services performed by appellants, had available to it an opportunity to consider and weigh those facts by means of the usual tests whereby the weight of testimony can alone well be determined and so form its own judgment upon the question of the value of such services as so shown. The court had the right, as the authorities conclusively establish, to form a judgment regarding the matter at variance with the opinions of the expert witnesses. Indeed, it was within its province to reject entirely the opinions of the experts as a determining factor of the issue before it, not arbitrarily, of course, but in the exercise of the ample discretion with which it is invested in disposing of such questions. And here it is proper to observe that it is not to be assumed that the court, in fixing the value of appellants' services at a figure below those which the said attorneys were of the opinion were reasonable for the amount and the character of the services performed, intended to cast any reflection upon the integrity or question the good faith of the attorneys in the expression of their judgments as to such value. We assume, rather, that the court merely concluded, after due reflection upon the evidence addressed to the question of the nature and extent of the services performed, that the opinions of the lawyers were based upon a misconceived notion of the value of the services shown to have been rendered. In fact, with the knowledge which we know the trial judge must possess of the recognized enviable professional attainments and the known high personal character of said attorneys, we cannot and will not permit ourselves for a moment to encourage the belief that the judgment of the court below upon the value of the services was intended to carry with it the slightest imputation against the sincerity and honesty of the opinions ventured in this proceeding by the gentleman in question.

[3] As before stated, however, it is plain to our minds that, while this court has just reason to express the highest regard for the learning and the untiring industry of the appellants, and each of them, and are not ourselves prepared to say whether they were or were not actually paid enough for their labor, we cannot justly declare, upon the record before us, that the compensation awarded is so grossly inadequate, when compared to the services performed, as shown to and understood by the court below, as to justify us in holding that, in fixing the same, said court transcended the bounds of a sound or reasonable legal discretion in the matter. There is no showing, nor was there any attempt to show, that the court or the judge thereof, in arriving at the conclusion as to the value of said services, was influenced or motivated by bias or prejudice against the appellants; nor, it is clear from what has been said above, are we justified in declaring that the wide divergence of views as to the value of appellants' services between the experts and the court, as the views of the latter are evidenced by its finding of value, affords proof of such bias or prejudice.

We conceive it to be our duty to affirm the order, and it is so ordered.

We concur: BURNETT, J.; PREWETT, Presiding Justice pro tem.

52 Cal. App. 396

WILLIAMS v. COSTA et al. (Civ. 2225.)

(District Court of Appeal, Third District, California. April 30, 1921.)

1. Waters and water courses ⊂130—No valid appropriation of water where land was not public land for purposes of entry for appropriation and diversion.

Title to certain riparian lands having passed from the government to defendants in 1875, there could be no valid appropriation by plaintiff in 1879; the land embracing the place of her diversion of the waters and for a considerable distance down the course of the ditch not being public land on which one might enter to make an appropriation and diversion of the water.

2. Waters and water courses ⊂130—Lower riparian owner may not acquire prescriptive rights against upper.

While the right to take water from a stream as against riparian owners may be acquired by prescription, no such right may be acquired either by prescription or by appropriation by a lower as against an upper riparian owner in the same stream.

3. Waters and water courses ⊂40—All riparian owners equally entitled.

The general rule is that all riparian owners are equally entitled to a reasonable use of the waters flowing along or through their lands.

Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by Catherine J. Williams against Manuel Costa and others. From judgment for plaintiff, defendants appeal. Reversed.

Nilon & Nilon, of Nevada City (A. E. Cheney, of Reno, Nev., of counsel), for appellants.

Jerome L. Van Derwerker, of Reno, Nev., and W. I. Redding, of Downieville, for respondent.

BURNETT, J. This is an action to determine conflicting claims to the waters of Purdy creek, sometimes known as Long Valley creek, in Sierra county, Cal. Plaintiff also claims damages on account of defendants' alleged wrongful diversion of these waters. The trial court made its findings and rendered its decree giving to plaintiff the right to the use of two-fifths, and to defendant Catherine L. Lemmon three-fifths, of the waters of said creek, enjoining all the defendants from interfering with the right of plaintiff to the use of said two-fifths of said waters, awarding plaintiff damages against defendant Costa for $1,654, and allowing plaintiff her costs and disbursements taxed at $377.05 against all of the defendants. The appeal comes to this court upon the judgment roll and a bill of exceptions.

The facts relative to this litigation as found by the court are as follows:

"That the plaintiff now is and for more than 42 years last past she and her grantors and predecessors in interest have been the owners of all that certain ranch situated in Long Valley, county of Sierra, state of Cal., and more particularly described as follows: The W. ½ of N. E. ¼ of section 13; all that portion of the N. W. ¼ of the S. E. ¼ of said section 13, which lies north of the division fence between the Williams and Purdy ranches, and all that portion of the N. E. ¼ of the S. W. ¼ of said section 13, which lies north of the division fence between said Williams and Purdy ranches, in township 21 north of range 17 east, M. D. B. & M., and known as the Williams ranch; that Purdy creek is a natural water course with well-defined bed and banks, having its source on the western slope of the Sierra Nevada Mountains, in Ball's Canyon, in the county of Sierra, state of California, and flowing through said Ball's Canyon, to, upon and across the lands of plaintiff and the said defendant, Cathrine L. Lemmon; that during the winter and spring months a large and irregular amount of water flows down said stream; that the period of high water in said creek usually ends about the first of May when the quantity of water flowing in said stream greatly diminishes, and that the lowest stages are usually in August and September; that the said W. ½ of N. E. ¼ and all that portion of the N. W. ¼ of the S. E. ¼ which lies north of the division fence between the Williams and Purdy ranches, of section 13, in township 21 north of range 17 east, M. D. B. & M., aggregating not to exceed 100 acres, border on the said Purdy creek and are riparian thereto, and are the only lands in said Williams ranch riparian thereto; that plaintiff now is and continuously for more than 30 years last past she and her grantors and predecessors in interest have been entitled to the beneficial use of two-fifths of the waters of said Purdy creek for the irrigation of the said lands comprising said Williams ranch and for domestic, culinary and household purposes and watering live stock thereon; that continuously during all of said time, except since on or about the 8th day of July, 1916, the plaintiff and her grantors and predecessors in interest have used said two-fifths of the waters of said Purdy creek for said beneficial uses at and upon said Williams ranch, and in the irrigation of 88 acres of the said lands; that said two-fifths of the waters of said Purdy creek were appropriated by the grantors and predecessors in interest of plaintiff, by diverting the same from said Purdy creek by means of a certain ditch known as the Williams Ditch and having its head dam on said Purdy creek in the S. E. ¼ of the S. W. ¼ of section 13, township 21 north, range 17 east, M. D. B. & M., and conveying said waters to and upon said Williams ranch through said ditch and two other ditches known as the Williams East Ditch and the Williams West Ditch; that all of the waters of said Purdy creek are not necessary for the irrigation of the lands comprising said Williams ranch and for domestic, culinary and household purposes and watering live stock thereon; that two-fifths of the waters of said stream, but no greater amount, are necessary for said purpose.

"That on or about the 8th day of July, 1916, said defendant, Manuel Costa, diverted all of the waters of said Purdy creek, to the extent of the capacity of the flume crossing said creek, during the irrigating season, against the will and without the consent of the plaintiff, and continues so to divert the same during the whole of the irrigating seasons of the years 1917 and 1918, except about four miner's inches thereof, which he allowed to flow, during a portion of said time, into said Williams Ditch; and that during much of said time there was more than 50 miner's inches of water flowing in said Purdy creek; that neither of said defendants, A. Jensen, Russell Jensen nor Catherine L. Lemmon, counseled, aided, abetted, ordered or directed said defendant, Manuel Costa, to so divert the waters of said stream; that the lands comprising said Williams ranch are fertile and have been rendered very productive by plaintiff and her grantors and predecessors in interest, by irrigating the same with the waters of said Purdy creek by means of said ditches and the overflow, seepage and percolation of the waters of said creek; and that continuously for more than 30 years last past and until the year 1917, plaintiff and her grantors and predecessors in interest raised large crops of hay thereon; that the damage to plaintiff's hay crop in the year 1917 was the sum of $450 caused by the said diversion of the said waters of Purdy creek by said defendant, Manuel Costa; that the damage to plaintiff's hay crop in the year 1918 was the sum of $1,204 caused by the said diversion of the said waters of Purdy creek by said defendant, Manuel Costa; that there was no damage to plaintiff's hay crop in the year 1916, and she was not damaged by being deprived of water for domestic purposes, or for watering her garden, or fruit trees, or by being required to purchase feed for her stock, or in feeding or caring for the same, or by being required to procure pasturage therefor, or for injury or damage for inconvenience or loss or expense caused by said diversion of said waters of said Purdy creek by said defendant, Manuel Costa; that the defendant Catherine L. Lemmon is the owner of the legal title of the lands and premises described in defendants' cross-complaint, filed in this action on the 10th day of August, 1918, except those portions of the N. W. ¼ of the S. E. ¼and N. E. ¼ of the S. W. ¼ of section 13, township 21 north, range 17 east, M. D. B. & M., above expressly found to be owned by the plaintiff; that all of said lands are not upon or along the banks of said Purdy creek and are not riparian thereto; that the only portion of said lands which border on said Purdy creek and are riparian thereto are the following, viz.: The N. E. ¼ of the N. W. ¼ of section 24, and the S. E. ¼ of S. W. ¼; S. W. ¼ of S. E. ¼ and all that portion of the N. W. ¼ of S. E. ¼ of section 13 which lies south of the division fence between the Williams and Purdy ranches, aggregating not to exceed 145 acres riparian to said stream.

"That said defendant, Catherine L. Lemmon, is the owner of the right to the use of three-fifths of the waters of said Purdy creek, and of the right to divert the same from said stream to and upon the lands owned by her and described in the cross-complaint of defendants filed herein on the 10th day of August, 1918; that the defendants, or each of them, are not and they, or their grantors or predecessors in interest, or each or any of them, have not been for more than 10 years last past, or for many years last past, or since December, 1862, the owners of the prior right during the irrigation season of each year, or from April 1st to November 1st, of each year, entitled to the use of 200 miners inches, or to the equivalent of 200 miners inches measured under a 4-inch pressure, or any other quantity, except as hereinafter stated, of the waters of said Purdy creek for the irrigation of their said lands or for stock or domestic purposes, and did not divert from said stream, or use for the irrigation of said lands, or the crops growing thereon, or for stock or domestic purposes, or under a claim of the exclusive right so to do, or openly, notoriously, continuously, or uninterruptedly, or adverse or hostile to everybody, or especially to all claims or rights of the plaintiff, said miners inches of the waters of said Purdy creek, except when three-fifths of the waters of said stream equalled said 200 miners inches; and that 200 miners inches of the waters of said stream were not necessary for the proper irrigation of said lands and the crops growing thereon and for stock and domestic purposes.

"That all of said lands of plaintiff and defendant, Catherine L. Lemmon, require irrigation in order to produce crops thereon; that the defendants and their grantors and predecessors in interest have paid all taxes, state, county and municipal, which have been assessed upon the lands and the water rights appurtenant thereto and described in their said cross-complaint; that the irrigation of the lands comprising said Williams ranch by the plaintiff and her grantors and predecessors in interest was not subsequent to the irrigation of the lands of the defendants by the grantors and predecessors in interest of the defendants, and any use made of the waters of Purdy creek by the plaintiff, or by her grantors or predecessors in interest, was and is not subject to the appropriation and use of the waters of said stream by the grantors or predecessors in interest of the defendants, or each or any of them, and is not inferior to the right of the defendants, or each or any of them, to divert or use the same upon their lands for irrigation, or for stock or domestic purposes; that as to the defendants John Doe, Jane Doe, Richard Roe and Sarah Roe, said action should be dismissed.

"As conclusions of law from the foregoing facts, the court finds: That the plaintiff is the owner of the right to the use of two-fifths of the waters of said Purdy creek, and of the right to divert the same from said stream at the head of the Williams Ditch thereon, in the S. E. ¼ of the S. W. ¼ of section 13, township 21 north, range 17 east, M. D. B. & M., and to convey the same to and upon said Williams ranch through said Williams Ditch and said two other ditches known as the Williams East Ditch and the Williams West Ditch, and that she is entitled to have said amount of said water flow down said stream to the head of said Williams Ditch; that said defendant, Catherine L. Lemmon, is the owner of the right to the use of three-fifths of the waters of said Purdy creek, and of the right to divert the same from said stream to and upon the lands

owned by her and described in the cross-complaint of defendants filed herein on the 10th day of August, 1918; that the plaintiff is entitled to a judgment for damages against said defendant, Manuel Costa, in the sum of $1,654; that the plaintiff is entitled to an injunction against said defendants and each and all of them, their agents, servants and employees, restraining and enjoining said defendants and each and all of them, their agents, servants and employees, from in any manner interfering with the right of the plaintiff to the use of two-fifths of the waters of said Purdy creek, and from diverting from said creek more than three-fifths of the waters thereof, or from in any manner preventing two-fifths of the waters of said stream from flowing down said creek to the head of said Williams Ditch; that plaintiff have and recover from said defendants her costs and disbursements herein."

Various objections to the judgment are made by appellants, and many interesting questions relating to water rights are discussed in their briefs; but only a few of them require specific notice.

[1] It is to be observed that in the complaint reliance is had upon appropriation and also the status of a riparian owner. These appeared in separate counts, but there was no finding that plaintiff was entitled to the use of the water by reason of the location of her land upon the natural water course, but the judgment is based entirely upon appropriation by means of the Williams Ditch. This excludes the idea that respondent had any other appropriation. This ditch was constructed in 1879; therefore the finding is equivalent to a determination that plaintiff's right had its origin in an appropriation made in 1879. It is true that the complaint alleged that an appropriation was made 55 years before the action was begun, that is, in 1861; but the trial court rejected this theory and fixed the time of the appropriation and localized it as before stated. However, the evidence is clear that prior to 1879 the government's title to appellants' lands had become vested in their predecessors in interest who were beneficially using practically all the water of Purdy creek both as appropriators and riparian proprietors. This use began in 1862 and continued through subsequent years. Indeed, in 1875, Solomon Purdy, a predecessor in interest of appellants, posted and recorded a notice of appropriation of 200 inches of the waters of Purdy creek, measured under a 4-inch pressure, and publicly declared his uninterrupted possession and use of the waters for 12 years previously. This was followed by the construction of a ditch and flume, or measuring box, having a capacity of 200 inches, and an actual diversion and use of the water for beneficial purposes. The regularity of said appropriation and said beneficial use are both undisputed, and hence we pursue this branch of the inquiry no further. It would necessarily follow that respondent by her appropriation in 1879 could gain no water right prior in time or superior in rank to the rights already vested in appellants. But the court's finding in effect is that respondent's said attempted appropriation must supersede and nullify the vested interest of appellants, there being no claim that anything like 200 inches will be left for them if respondent is awarded two-fifths of the flow.

In answer to this view respondent says:

"If respondent had made her original appropriation of the waters of Purdy creek through the so-called west ditch, which it is admitted was not constructed until 1879, there might be some merit in appellant's claim; but we have seen that Mrs. Williams and her husband, Enyart, made their original appropriation in 1861, and that respondent continued to use the waters of said stream, in the irrigation of the Williams ranch, to the time of the commencement of this action, except when prevented by the appellants."

It may be admitted that there is some evidence to support said claim of respondent, but we are dealing with the findings of the court, which are based upon the theory that respondent's right originated in 1879. If it may be claimed that some general language is used in said findings pointing to the position that respondent's title may be supported by some earlier proceeding, the answer is that it is too vague and indefinite to support the judgment and, besides, it is limited and controlled by the particular determination to which we have referred.

Moreover, there could be no valid appropriation by respondent in 1879. The land embracing the place of diversion and for a considerable distance down the course of the ditch was not public land upon which one might enter to make an appropriation and diversion of the water, the title having passed from the government to appellants, as we have seen, in 1875. In section 221 of Weil on Water Rights (3d Ed.), it is said:

"Despite any difference under the Colorado and California doctrines as to rights in water, both agree to-day that an appropriator must have lawful access to the stream before he can exercise water rights. * * * An appropriation cannot be initiated unlawfully by a trespass upon private land, and no rights can be obtained thereby against the landowners whose land is trespassed upon, in any jurisdiction."

And in section 222 it is declared:

"The general principle was early established in California that the law of possessory rights (that is the law of appropriation) applied only to vacant, unoccupied public domain, and must infringe nothing to which private rights had already attached at the time of the appropriation."

[2] Again respondent is a lower riparian owner (at least as to a part of the water claimed), and as said by this court in Pyramid Land & Stock Co. (a corporation) v. Scott, 197 Pac. 398:

"It is settled law in California that, while the right to take water from a stream, as against riparian owners, may be acquired by prescription (Gallaher v. Montecito Valley Water Company, 101 Cal. 245, 35 Pac. 770; Bothgate v. Irvine, 126 Cal. 144, 58 Pac. 442, 77 Am. St. Rep. 158; Arroyo D. and W. Co. v. Baldwin, 155 Cal. 280, 285, 100 Pac. 874), no such right may be acquired either by prescription or by appropriation by a lower as against an upper riparian owner in the same stream."

From an examination of the whole record, we do not conclude that respondent is entitled to no use of any of the water that flows in said Purdy creek, but we are satisfied that the particular findings and judgment herein cannot be upheld. It is admitted, indeed, by appellants, that respondent has at least a co-ordinate right to four inches of water which has flowed to the Williams premises for household and domestic purposes and the watering of live stock, but it is claimed that her right to the use of the water for other purposes is subordinate to that of appellants.

[3] The determination of this question may properly be left to another trial, but we deem the suggestion not inappropriate that whatever rights plaintiff may have to the use of the water would seem to be measured and controlled by the law applicable to lower and upper riparian owners. Stated generally, the rule is that—

"All the riparian owners are equally entitled to a reasonable use of the waters flowing along or through their lands."

In Weil's work, supra, in section 739, it is said:

"The water in the stream belongs to no one—it is not, and cannot be, while flowing in its natural course, the subject of ownership by any one. But each riparian owner has a right to the use of his own land, and since all riparian proprietors, by their natural situation in contact with the stream, have an equal right of access to the water they have an equal right of use for their own lands, which no one of them may unreasonably violate. * * * The rights of the riparian proprietors are correlative as contrasted with the exclusive right obtained by appropriation."

The subject, however, has been so often discussed by the courts of this state that further consideration herein would be futile.

It may be remarked, though, that considered as a practical question it must be manifest that the right of the lower riparian owner is somewhat subordinate to that of the upper, since the latter's use of the water may so diminish the flow of the stream as to prevent the former from receiving a supply commensurate with his wants.

But, as before suggested, the principles that govern riparian rights have been so thoroughly settled in this state that the parties to the action will be fully advised as to what facts they must present if a new trial is had upon this theory.

We think the judgment must be reversed, and it is so ordered.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

52 Cal. App. 428

BOARDMAN v. CRITTENDEN. (Civ. 3714.)

(District Court of Appeal, First District, Division 2, California. May 2, 1921.)

1. Attorney and client ⊜123(2)—Experienced client could deal with attorney without receiving other legal advice.

Where an attorney's client was an experienced business man, accustomed to drawing contracts and attending to many details of his business commonly intrusted only to attorneys, it was not an indispensable necessity to a contract between such client and his attorney, whereby the client transferred securities in settlement of the attorney's claim for fraud upon him in inducing an investment, that the client receive advice from another attorney.

2. Attorney and client ⊜123(1)—Principles relative to dealings between attorney and client do not apply, where attorney assumes hostile attitude of pressing creditor.

Though it is true that in a transaction between attorney and client the burden is on the attorney to prove the transaction was fair, and that he made a reasonable use of the confidence reposed in him and gave honest advice to his client concerning himself, such principles are applicable only to cases in which the client was dealing with the attorney under the influence of the confidence which he had reposed in him, and do not apply to a case where the attorney assumes openly the hostile attitude of an urgent and pressing creditor, and where the parties are held at arm's length.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Wilbur F. Boardman against William C. Crittenden. From a judgment for defendant, plaintiff appeals. Affirmed.

Fitzgerald, Abbott & Beardsley of Oakland, and Chickering & Gregory, of San Francisco, for appellant.

Stanley Moore and Wm. A. Nunlist, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action in which he sought to rescind a certain agreement entered into between him and the defendant, and to have restored to him certain instruments, and to have other instruments canceled. Said instruments were delivered by plaintiff to defendant in pursuance of the terms of said agreement here-

in sought to be rescinded. The ground relied upon for rescission of said contract is that the defendant induced the plaintiff to make the agreement in question by means of duress, menace, fraud, and undue influence. The case was tried without a jury, and the findings and judgment were in favor of defendant.

Briefly, the facts show that the plaintiff and defendant had known each other since about 1908. Plaintiff was a business man, engaged in numerous enterprises, among which was the promotion and building of gas plants on the Pacific coast. Defendant was an attorney at law, and some 20 years younger than plaintiff. During the first few years of the acquaintance, defendant was engaged to attend to a few business matters for the plaintiff, but none of these seem to have been of much importance. Mr. Boardman, the plaintiff, had many diversified business interests, and they were conducted by corporations in which the W. F. Boardman Company held large amounts of stock. Mr. Boardman was the principal stockholder in the W. F. Boardman Company. In 1911 the Boardman Company owned all the stock in the Rogue River Valley Gas Company, a corporation. The principal asset of this last-mentioned company was a gas plant near Medford, Or., which plant had originally been constructed by the Boardman Company. In March, 1911, Mr. Boardman proposed to Mr. Crittenden, the defendant, that a new corporation be organized, and that all of the stock and bonds of the Rogue River Company be transferred to the newly organized company, which was to be known as the Oregon Gas & Electric Company. Payment was to be made to the Boardman Company in stock and bonds of the new company, and in the transaction the value to be given to the Boardman Company in exchange for its holdings in the Rogue River Company was agreed to be $175,000. At the time Mr. Boardman submitted this proposition, he made certain statements to Mr. Crittenden regarding the character of the gas plant, its manner of construction, its actual cost, operating facilities, and future earning power. The particular representation out of which the real controversy arose was that the plant had been constructed by the Boardman Company at an actual cost of $126,000, without any commissions, discounts, or engineering fees of any kind, and that all the materials used in the construction of said plant had been estimated at actual cost to the Boardman Company, which was in a position to secure such materials at a lower figure than contractors generally.

According to the findings, Mr. Boardman stated that, because no engineering fees or commissions or expenses of supervision, etc., had been included in the estimated cost of the plant, the Boardman Company should receive a $50,000 profit on the construction of the plant, and its selling price to the new company should be fixed, therefore, at $175,000. It was also represented to Mr. Crittenden that it was necessary to procure a certain amount of capital for operating expenses and future extensions of the plant, and it was suggested that Mr. Crittenden invest in the securities of the new company. The new company was organized, Mr. Crittenden attending to the legal details, and thereafter, in reliance upon Mr. Boardman's representations as to the construction cost of the plant, Mr. Crittenden invested about $50,000 in the bonds of the Oregon Gas & Electric Company. These bonds, of the par value of $1,000, were sold at $900, and there was a certain amount of stock given as a bonus with the bonds. Later, by reason of assessments levied upon the stock, Mr. Crittenden's investment was increased until it was something over $67,000.

From the time of the formation of the Oregon Gas & Electric Company, in 1911, until the execution of the contract out of which this action arose (January 16, 1916), Mr. Crittenden was the secretary of the said company and was its attorney. He was also the attorney, in various matters, for other corporations in which either Mr. Boardman or the Boardman Company held controlling interests, and in some matters, during that period of time, he represented Mr. Boardman personally. The testimony and the correspondence between the parties show that a close business and social relation came to exist between them. Mr. Crittenden testified that it was not until some time in December, 1915, that he came to understand fully that Mr. Boardman had misrepresented to him the cost of the gas plant, which, at the trial of this action, he claimed was something between $67,000 and $80,000. At the time he realized that misrepresentations had been made to him, he was representing the Boardman Company as its attorney in certain litigation then pending in the Supreme Court of this state, entitled Boardman v. Petch, and in that case the question of the actual cost of his gas plant was one of the subjects of inquiry. It appears that it was through his examination of the documents and files in this case against Petch, and through his conversations with the defendant Petch, that he became aware of the alleged misrepresentations. Upon this discovery, he determined to bring an action against Mr. Boardman for damages sustained by reason of the false representations, and also to bring suits for accounting and for other relief the details of which are immaterial here.

On Saturday, January 15, 1916, Mr. Crittenden telephoned Mr. Boardman, who was then in Los Angeles. He told Mr. Board-

man that he desired to discuss some business matter with him and that he would come to Los Angeles for that purpose. Mr. Boardman stated that he was leaving that night for his home in Berkeley, and it was agreed that a meeting should be had on Sunday morning, at Mr. Boardman's office in San Francisco. Mr. Boardman went to his office to keep the appointment, but, upon discovering that he had forgotten his keys, telephoned to Mr. Crittenden and arranged to come to Crittenden's office. Upon his arrival there Crittenden immediately, according to the testimony of both parties, stated in effect, that all business and social relations between them were at an end; that he (Crittenden) was through with Boardman, and intended to act only for himself and protect himself; that he would deal with Mr. Boardman, not as his attorney, but as a coinvestor in Oregon Gas & Electric Company. The negotiations between the parties continued all day and late into the evening, and were finally consummated upon the following morning by the execution of the contract and delivery of the instruments now sought to be avoided.

There is a sharp conflict in the testimony as to the details of the interview and negotiations culminating in the contract. Mr. Crittenden and his associate, Mr. Nunlist, who was later called into the conference, and other witnesses testified in a manner which amply supports the findings. It is true the testimony of Mr. Boardman and his business associate, Mr. Eckert, who was also called into the negotiations, as well as that of other witnesses produced by the plaintiff, contradict the testimony of defendant's witnesses; but this conflict in the testimony makes it necessary for us to accept the findings upon all disputed matters. Therefore, although we have carefully read the voluminous record, the findings are set forth herein as a statement of the disputed facts. It was found:

"That there was no relationship of attorney and client existing between the plaintiff and the defendant upon January 16 or January 17, 1916 (the dates when the agreement was negotiated and concluded), with respect to the Oregon Gas & Electric Company, or the stock and bonds held by either the plaintiff or the defendant therein; that the relationship existing between the plaintiff and the defendant on said dates with respect to the Oregon Gas & Electric Company was that of coinvestors only; that the defendant had acted as the attorney for the plaintiff and the W. F. Boardman Company in some specific matters during the time of their acquaintance, and on said January 16 and January 17, 1916, all of said matters had not been finally terminated and closed, but that the services therein had been substantially rendered some time previous thereto, and that at no time was the defendant the general attorney for the plaintiff, except during a portion of the year 1914, nor authorized to represent the plaintiff, excepting with respect to matters forming the specific subject of his employments; that at no time was the defendant employed as an attorney at law by the plaintiff to represent the plaintiff with respect to his interests in, or connection with, the Oregon Gas & Electric Company, either as a stockholder therein, or otherwise; and that the defendant never acted as a general legal adviser, either sole or otherwise, of the plaintiff."

The facts regarding the representations of Boardman to Crittenden are also found as recited hereinbefore, and it is found:

"That the defendant reasonably believed the said statements and representations of the said plaintiff. * * * That he was then ignorant of the falsity of said statements as to the cost of said plant and the condition thereof. That in entering into the transaction proposed by the plaintiff * * * he relied upon the truth of said statements, * * * and that but for them, and his belief in them, and in each of them, he would not have entered into this transaction. That acting in reliance upon the truth of the said representations, and of each of them, the defendant in the said month of March, 1911, agreed with the said W. F. Boardman, in effect, that the plaintiff, or the said W. F. Boardman Company, or both of them, would sell to a corporation to be formed the said property of the Rogue River Valley Gas Company, or all of their interest in that said property, at a price which would be equal to the cost of the construction of the said property, plus a profit of $50,000, and take in payment therefor bonds of the new company at $900 each and 15 shares of stock with each bond as a bonus, and the said defendant would purchase 55 of the bonds of the new company on the same terms, and pay for the said bonds the sum of $49,500 cash. * * *

"That on January 16, 1916, the defendant stated to the plaintiff as follows: That all matters between them were at an end, and that he (the defendant) was 'through' with the plaintiff; that he had been requested by a certain banker to see the plaintiff before filing suit against the plaintiff, and to give the plaintiff an opportunity of settlement; that he (the defendant) had been informed and believed that the cost of the construction of the Rogue River Valley plant * * * was not the sum of $125,000, or any other sum in excess of approximately $80,000; that defendant then and there further stated that the plaintiff had, prior to and at the time of the investment by the defendant in the Oregon Gas & Electric Company, represented that the construction cost of said plant was $125,000, exclusive of commissions, discounts, and engineering fees, and that said plant was a well-constructed plant, and that said representations were, and each of them was false; and defendant further stated that, at the time of the making of said representations by plaintiff, said plant was not in good condition, was not well constructed, but was poorly and improperly constructed; and defendant further stated that the true and actual cost of said plant was known to said plaintiff at the time of the making of said representations by him as aforesaid; and defendant then and there further stated that the true and actual cost of said plant was deliberately and intentionally misrepresented to the

defendant by the plaintiff, with the purpose of fraudulently inducing the defendant to invest his money in the Oregon Gas & Electric Company and to join in paying a purchase price of $175,000 for said Rogue River Valley plant; that defendant then and there further stated to plaintiff that he intended to bring suit against plaintiff on account of said misrepresentations and that he (the defendant) desired the plaintiff to read over the complaints which he (the defendant) had already prepared; and that he (the defendant) believed the plaintiff had been guilty of looting and mismanagement of the Oregon Gas & Electric Company, and that he (the defendant) proposed to see to it that the plaintiff was put out of the presidency and the management of said company; * * * that the defendant then handed to plaintiff the three complaints received in evidence; * * * that the plaintiff read over one of said complaints in its entirety and glanced through the other two; that thereafter plaintiff offered to pay the defendant the amount of the latter's investment and interest for the stock and bonds in the Oregon Gas & Electric Company owned by the defendant, providing the defendant would accept certain other securities in payment therefor; * * * that defendant believed that all of the allegations contained in said last-mentioned complaints were true, and that he would be able to make legal proof of the same, at the time he handed said complaints to the plaintiff to read, and that at that time the defendant intended to file said complaints and prosecute the same."

The court found:

"That the defendant stated he would not accept the securities offered by plaintiff in payment for the stock and bonds held by the defendant in the Oregon Gas & Electric Company, and acquired by the defendant as a result of the representations made to him by the plaintiff. That thereafter the plaintiff asked the defendant if the defendant had any objection to his (the plaintiff's) consulting with George H. Eckert, and that the defendant at once stated that he had no objection to such consultation, and that the defendant himself called up said George H. Eckert by telephone, and that the plaintiff thereupon asked said Eckert to come immediately to the defendant's office in San Francisco.

"That upon the arrival of said George H. Eckert, and after his refusal to answer questions relating to the construction cost of said Rogue River Valley plant, said George H. Eckert and the plaintiff retired to a room in the offices of Crittenden & Simmons, and remained in conference there, with no one else present, for a period of more than an hour; that said Eckert was the secretary of the W. F. Boardman Company, and was and has been associated with said plaintiff in various business enterprises for a number of years.

"That at the conclusion of said conference between the plaintiff and said George H. Eckert the plaintiff announced that he was willing to purchase the defendant's stock and bonds in the Oregon Gas & Electric Company by canceling the defendant's promissory note in favor of plaintiff, amounting to $20,000, by delivering to the defendant the promissory note of the Midland Land & Irrigation Company in favor of the plaintiff in the sum of $30,000, and by executing his promissory note for the balance, payable in two years, and bearing interest at 5 per cent.; that after some discussion between the plaintiff and the defendant as to whether the time for the payment of said last-mentioned note should be one or two years, or whether the interest should be 5 or 6 per cent., it was agreed between them that the time for payment thereof should be two years, and the interest thereon at the rate of 6 per cent. per annum; that thereupon the plaintiff himself suggested that such agreement should be immediately put in writing and executed, and that thereafter, and at the plaintiff's request, the said agreement was put in writing and executed by the plaintiff and defendant, and also an agreement was likewise put in writing at the plaintiff's request, whereby the defendant and William A. Nunlist, on behalf of themselves and their associates, agreed not to participate in litigation against the plaintiff with respect to the Oregon Gas & Electric Company; and that after the execution of said agreements the plaintiff himself suggested that a further meeting should be had at 9 a. m. on January 17, 1916, for the purpose of finally consummating the transaction, and making delivery of the securities mentioned therein, and stated that in the meantime he (the plaintiff) would have the bookkeeper of the W. F. Boardman Company ascertain the exact amount of the defendant's investment, plus 6 per cent."

The court further found:

"That plaintiff voluntarily entered into the agreements with the defendant of January 16 and 17, 1916; that there was no fraud or duress exercised upon the plaintiff by the defendant upon either January 16 or January 17, 1916, or with respect to the agreements and transactions had between them upon those dates, or either thereof, and that the defendant did not advise, or attempt to advise, the plaintiff upon said dates, or either of them, either as an attorney at law or otherwise; that neither the written contract executed between the plaintiff and the defendant on January 16, 1916, nor any of the agreements or transactions entered into or carried out by the plaintiff and defendant upon January 16 or January 17, 1916, were consented to, or in any way entered into, or carried out by the plaintiff wholly, or in any way, due to any fraudulent misrepresentations on the part of the defendant, or other than as the voluntary act of the plaintiff; that no fraudulent misrepresentations were made to the plaintiff by the defendant, either on January 16 or January 17, 1916; * * * that there was no menace exercised over the plaintiff by the defendant on January 16, 1916, and January 17, 1916, or either thereof, and there was no undue influence exercised over the plaintiff by the defendant upon said dates, or either of them, and that the agreements and documents executed by the plaintiff on January 16 and January 17, 1916, were executed by the plaintiff without being overcome by, and without having been subjected to, any menace, duress, or undue influence; that on January 17, 1916, in order to carry out the agreement executed by the plaintiff and the defendant on January 16, 1916, and in order to adjust certain other matters

necessitated thereby, particularly the amount of the defendant's investment plus 6 per cent. plaintiff voluntarily, and without being subjected to duress, fraud, or undue influence, delivered to the defendant the documents, papers, and personal property described in plaintiff's complaint; * * * that plaintiff was familiar with the construction cost of the Rogue River Valley gas plant at the time of the sale of the capital stock of the Rogue River Valley Gas Company to the Oregon Gas & Electric Company, and the defendant was ignorant of the construction cost of said Rogue River Valley gas plant at that time, and that the plaintiff was aware on January 16 and January 17, 1916, of the facts in regard to said sale of the capital stock of the Rogue River Valley Gas Company, and was then familiar with, and had knowledge of, the construction cost of said Rogue River Valley gas plant; that no statements were fraudulently made by the defendant upon January 16, 1916, and January 17, 1916, or either thereof; that the defendant believed each and every statement and representation made by him during the course of the conversation between himself and the plaintiff upon January 16 and January 17, 1916, and that the written agreement executed by the plaintiff on January 16, 1916, was not signed by the plaintiff as a result of any misrepresentations made to the plaintiff by the defendant, nor because of any belief in the plaintiff that the defendant knew more of the facts in regard to the sale of the capital stock of the Rogue River Valley Gas Company and the construction cost of its plant than did the plaintiff himself.

"That the statement and representation made by the plaintiff to the defendant in March, 1911, and at the time the plaintiff induced the defendant to invest in the Oregon Gas & Electric Company, that the construction cost of the Rogue River Valley gas and electric plant, exclusive of interest, commissions, and engineering fees, was the sum of $125,000, was false; that the construction cost of said plant at that time was not to exceed $100,000; that at the time the plaintiff induced the defendant to invest in said Oregon Gas & Electric Company, no statement was made by the plaintiff to the defendant as to any moneys paid by the W. F. Boardman Company to J. R. Anderson, and no statement was made by the plaintiff to the defendant with respect to any refund or credit in favor of the W. F. Boardman Company by or from the Stacoy Manufacturing Company; that said plant of said Rogue River Valley Gas Company was not a well-equipped plant at the time when said representations were made to the defendant by the plaintiff in March, 1911, and that at the time of the making of said representations and statements by the plaintiff to the defendant in March, 1911, the plaintiff misstated the construction cost of said plant and its equipment and condition, with the intent and purpose of thereby inducing the defendant to invest in said Oregon Gas & Electric Company; * * * that the transactions and agreements of January 16 and January 17, 1916, between the plaintiff and the defendant were fair, just, and equitable."

[1] This lengthy statement of the facts found by the trial court seemed necessary because of their complexity; but the legal question involved is conceded by the appellant to be but single. As stated by appellant's counsel, if, under the facts here, the attorney could repudiate his relationship to his former client, and could thereupon deal "at arm's length" with him, without insisting, or at least suggesting to said client, that he secure another attorney to represent or advise him in the transaction, then the judgment should be affirmed. Our discussion of that question is expressly limited to the peculiar facts of the present case. It conclusively appears that Mr. Boardman was a most capable business man, accustomed to handling his affairs and making decisions. He did not request or suggest legal advice, according to the testimony of the witnesses for the defendant; also, according to such testimony, he was accustomed to drawing contracts and attending to many details of his business which are commonly entrusted only to attorneys. He did not rely upon Mr. Crittenden, for he himself states that Mr. Crittenden told him at the beginning of the interview that he was "through with him." He also testified that he mistrusted Crittenden, and expected most anything from him during the interview. Upon such a showing, we cannot hold that there was an indispensable necessity that he receive advice from another attorney. It was said in the case of Kidd v. Williams, 132 Ala. 140, at page 144, 31 South. 458, at page 459, 56 L. R. A. 879, at page 881 thereof:

"If the client is competent and capable, and with full knowledge of the transaction he proposes to settle with his attorney, acts deliberately, and voluntarily settles his account for services with his attorney, there would seem to be no indispensable necessity for independent advice on the subject. This would certainly be true, when shown that there had been no fraud, deceit, or unconscionable advantage practiced by the attorney on the client, which would rebut the presumption of a violation of confidence reposed, as much so as independent advice would do. All that is necessary is for the client to be placed in such a position as would enable him 'to form an entirely free and unfettered judgment, independent altogether of any sort of control.' If this does not appear, it would be necessary to show that the client had independent advice, in order to remove the presumption of unfairness. But when this presumption is otherwise removed, a rule that would, in addition, require independent advice would seem to be arbitrary and unnecessary. 'It is only when confidence is abused that courts of conscience interfere,' and this essential fact in such cases may be shown by any competent evidence. Independent advice is simply a means of proof to establish the fairness of the settlement, and that it was voluntarily entered into free from undue influence. This is made clear under the decisions of this court."

The abundant evidence in the record as to Mr. Boardman's business ability and keen

mentality, as well as of his large experience in complicated and varied business enterprises, makes peculiarly applicable the further language of the opinion in the last-cited case:

"Of course, the satisfaction necessary for a court of equity to have, in order to sustain or set aside a settlement of the kind, would vary according to the circumstances of, and the evidence presented in, each cause. The age and experience or inexperience of the client, his mental and physical strength, or the lack of it, and general capacity to know, appreciate, and understand the matter of a settlement with his attorney, should always be considered."

The briefs contain lengthy discussions of the finding with reference to the business relation between Boardman and Crittenden; the specific contention of appellant being that, in so far as Mr. Crittenden was attorney for companies in which Mr. Boardman was a stockholder, he was, in reality, Mr. Boardman's attorney, and was under the same obligation toward Mr. Boardman that would arise out of the fiduciary relationship toward the corporations. We do not find it necessary to decide this question here, because, if we concede appellant's position—that the relationship of attorney and client existed between Boardman and Crittenden with reference to the Oregon Gas & Electric Company—to be correct, nevertheless, under the facts here, we should be compelled to affirm the judgment.

[2] While it is true that in a transaction between attorney and client the onus is upon the attorney to prove the transaction was fair, and that he made a reasonable use of the confidence reposed in him and that he gave honest advice to his client concerning himself, these principles are applicable only to cases in which the client was dealing with the attorney under the influence of the confidence which he had reposed in him, and does not apply to a case where the attorney assumes openly the hostile attitude of an urgent and pressing creditor, and where the parties are held at arm's length. Johnson v. Fesemeyer, 3 De G. & J. 13, 22, 44 Reprint, 1174. The last-cited case has been followed in this state in the case of Cooley v. Miller & Lux, 156 Cal. 510, 523, et seq., 105 Pac. 981. In that case it was said:

"The rule is well established that the relation of attorney and client is confidential in character and that any contract entered into between them while the relation continues, whereby the attorney obtains an advantage from the client, is presumed to have been made by the client under the undue influence of the attorney. Kisling v. Shaw, 33 Cal. 440, 91 Am. Dec. 644; Civ. Code, § 2235; 1 Story's Equity Jurisprudence, §§ 310, 311; 2 Pomeroy's Equity Jurisprudence, § 390. In the section cited, Mr. Pomeroy says: 'The presumption always arises against the validity of a purchase or sale between the client and attorney made during the existence of the relation. The attorney must remove that presumption by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention, and freedom of action by the client, and also that he gave his client full information and disinterested advice. * * * If all these circumstances are proved, the contract will stand; if not, it will be defeated or set aside.' The presumption does not apply to a transaction in which the attorney openly assumes a hostile attitude to his client. Johnson v. Fesemeyer, 3 De G. & J. 22. Nor is it applicable to a contract by which the relation is originally created and the compensation of the attorney fixed. The confidential relation does not exist until such contract is made and in agreeing upon its terms the parties deal at arm's length. Elmore v. Johnson, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413."

In the case of Black v. Riley, 20 Cal. App. 199, 128 Pac. 764, this rule of law was again recognized, the court saying:

"The court refused to give an instruction requested by defendant, as follows: 'You are instructed that an attorney, dealing with a person about to become a client as to his contract for payment for services, occupies no different position than any other two persons contracting for payment of services. No presumption of undue influence applies to a transaction where an attorney is in a hostile attitude to his client, nor in case of the contract by which the relation of attorney and client is originally created and the compensation of the attorney fixed.' The court was justified in so doing. While the first and last propositions stated are correct statements of the law, it is not true that 'no presumption of undue influence applies to a transaction where an attorney is in a hostile attitude to his client,' and the authority cited by appellant in support of such proposition does not sustain him. It is said in Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981, that 'the presumption does not apply to a transaction in which the attorney *openly assumes* a hostile attitude to his client.' This is a very different proposition from the one that 'no presumption of undue influence applies to a transaction where an attorney is in a hostile attitude to his client.' Whenever an attorney, for his own benefit, deals with his client, in regard to property that is the subject of his employment, he is in a hostile attitude to his client, but is still bound to the exercise of the utmost good faith toward his client in such transaction, and the burden is upon him to rebut the presumption of undue influence. It is only when he openly assumes a hostile attitude that his transactions with his client will be free from the presumption of undue influence on the part of the attorney."

It is admitted by the appellant that in the transaction here the attorney assumed an attitude which was openly and vigorously hostile to the client, and that it was so expressly stated and not left to inference. It also appears that Mr. Boardman did not trust the defendant and did not rely upon

him, and that Mr. Boardman was in every way a person fully competent to manage his own affairs and to decide upon his course of conduct. He had independent advice from his associate, Eckert, and spent considerable time in a private conference with Eckert before reaching his decision and concluding the agreement to purchase Crittenden's holdings. He suggested the settlement, insisted upon its immediate consummation and negotiated at some length about the details thereof. He also went to his home Sunday evening and was away from Mr. Crittenden during that night and until about noon the next day, when he voluntarily executed and consummated the agreement. It was found by the court that the actuating motive of Mr. Boardman was his knowledge of his own misrepresentations, and that the contract between the parties was fair, just, and equitable.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

52 Cal. App. 469

COTTON-MACAULEY CO. v. DESHIELDS, County Auditor (LUTEN, Intervener). (Civ. 2298.)

(District Court of Appeal, Third District, California. May 3, 1921.)

1. Mandamus ⟸176—Intervener not entitled to affirmative judgment against defendant.

In an action for writ of mandate to compel a county auditor to issue warrants, where the intervener, who had served stop notice on the auditor, did not ask any affirmative relief against the auditor, he cannot, in such proceedings, be granted any rights against the auditor, who was contesting the proceeding.

2. Mandamus ⟸187(8)—Defendant against whom intervener requested no relief entitled to dismiss his appeal.

Where a writ of mandate was rendered against county auditor, and both the auditor and the intervener who had served stop notice, appealed, *held* that, as no relief was requested by the intervener against the auditor, and as he could issue warrants at his own risk, the auditor was entitled to dismiss his appeal from the judgment.

3. Bridges ⟸20(4)—Payment after stop notice is at officer's risk.

Where defendant, pursuant to Code Civ. Proc. §§ 1183, 1184, served stop notice to prevent the county auditor from issuing warrants to plaintiff for payment for the construction of a bridge, the auditor, in issuing warrants regardless of the notice, acts on his own responsibility, and, if the notice be held good and plaintiff found not entitled to payment, the auditor is liable.

4. Mandamus ⟸187(8)—Whether clerk of trial court should be restrained from issuing writ unnecessary for decision on dismissal of appeal.

Where the application of the county auditor to dismiss his appeal from a judgment directing the issuance of a writ of mandate to compel the delivery of warrants to plaintiff was, on motion of the auditor, dismissed, the intervener, who had served stop notices in the action, is not, in proceedings for dismissal, entitled to have a determination of the question whether the clerk of the lower court should be forbidden to issue a writ of mandate until determination of the intervener's appeal, for the matter was not raised by any petition or application, and ample time would be given, before remittitur sent down, for such application to be made.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Petition by the Cotton-Macauley Company, a copartnership, for a writ of mandate against George M. Deshields, Auditor of the County of Tehama, State of California, in which Daniel B. Luten intervened. From a judgment for plaintiff, defendant and intervener appeal. Appeal of the Auditor dismissed.

M. J. Cheatham, of Red Bluff, for appellant Deshields.

V. L. Hatfield and W. H. Hatfield, both of Sacramento, and James T. Matlock, of Red Bluff, for appellant Luten.

A. E. Bolton and Arthur W. Bolton, both of San Francisco, for respondent.

PLUMMER, Presiding Justice pro tem. On the 3d day of December, 1920, a judgment was entered in the superior court of Tehama county for the issuance of a peremptory writ of mandate, to be directed to the defendant Deshields, auditor of the county of Tehama, commanding him to forthwith draw and deliver to plaintiff a warrant for the payment of a claim against said county, in favor of the plaintiff, theretofore allowed by the board of supervisors, for building a certain bridge in said county. On the same day, the defendant Deshields and the intervener, Daniel B. Luten, who had been allowed to intervene in said action, claiming said moneys as due him from plaintiff, and who had served a stop notice on the defendant Deshields under the provisions of sections 1183 and 1184 of the Code of Civil Procedure, served and filed their notice of appeal from the judgment and order of said court entered as above stated. Pursuant to the Constitution of this state, the hearing and determination of said appeal has been transferred to this court. The matter is now before this court upon motion of the defendant Deshields to dismiss the appeal so far as it relates to himself. This mo-

tion is contested by the intervener, who is also an appellant.

[1] An examination of the record discloses the fact that the intervener in his complaint in intervention asks for no relief against the appellant Deshields; his contention therein being that the Cotton-Macauley Company should take nothing by reason of its action. Not having made the appellant Deshields a party defendant in his complaint in intervention, it is apparent that no judgment can be entered in this court in favor of the intervener, as against the defendant Deshields as auditor of the county of Tehama, adjudging and determining the right of the intervener to any part of the funds in the treasury of the county of Tehama, irrespective of any judgment that may be entered as between the plaintiff respondent and the intervener appellant.

[2, 3] The right of an appellant to have his appeal dismissed has been passed upon and confirmed in the following cases: Estate of Wells, 148 Cal. 659, 84 Pac. 37; Guardianship of Degnan, 132 Cal. 260, 64 Pac. 485.

The case of the People v. Perris Irrigation District, 132 Cal. 289, 64 Pac. 399, 773, is not in conflict with the authorities just cited. In that case the motion was made by a nonappealing defendant to dismiss the appeal of intervening bondholders.

If the appellant Deshields were moving to dismiss the appeal of the intervener appellant, then and in that case the same right or principle would be involved, and if the intervener's appeal be well taken, the motion, of course, would be denied.

In the case at bar the defendant and appellant Deshields, against whom the intervener asks no relief, is moving, not to dismiss the intervener's appeal, as was the case in People v. Perris Irrigation District, supra, but to dismiss his own appeal and to discontinue the further prosecution thereof.

That the defendant Deshields will increase or decrease his liability to the other parties to this action by reason of his motion to dismiss is not material to this case. It does not appear from the pleadings that he came into court and asked, by way of interpleader or otherwise, that the right of the contending parties to the funds over which he had control be determined. Hence the extent or measure of liability to either of the parties are matters not to be considered.

The attention of the court is also called to the case of Slayden v. O'Dea, reported in 189 Pac. 1066, upon which the right of the plaintiff in this action was decided in the court below, and it is urged that the ruling in that case is not applicable here by reason of the fact that the words "public road or highway" do not appear in section 1183 of the Code of Civil Procedure, whereas the word "bridge" does, and therefore that the stop notice provided for by section 1184 of the Code of Civil Procedure is applicable to the case at bar, and was not in the Slayden-O'Dea Case.

We do not see what bearing this contention can have upon the right of the appellant Deshields to have his appeal dismissed. If this court should ultimately decide that the intervener's contention in this respect is true, and reverse the decision of the trial court in its holding that the plaintiff was entitled to a writ of mandate, it could enter no judgment in favor of the intervener as against the defendant and appellant Deshields, for the reasons heretofore stated.

As we examine the pleadings and judgment in the record before us, there appears nothing to prevent the appellant Deshields issuing a warrant in favor of the plaintiff at any time, notwithstanding the appeals now pending in this court. It is simply a matter of whether the auditor does or does not wish to assume such responsibility. There being nothing to prevent the auditor at the present time from issuing such warrant, we cannot very well see how any action of this court on the motion of appellant Deshields to have his appeal dismissed will in any way imperil the rights of the intervener. It the stop notices referred to as given by the intervener are ultimately held good, the intervener has his remedy, as payment made by any officer having proper notice thereof would be at his peril.

[4] Request is made in the intervener's brief that this court issue its order forbidding the clerk of the trial court to issue a writ of mandate herein until the appeal of the intervener is determined. As this matter is not before us upon any petition or application as to which the plaintiff would necessarily have a right to be heard and make reply, and as ample time will be given before this decision can become final and a remittitur sent down, for such application to be made and hearing had, if right to such an order exists, we do not deem it necessary to consider that question upon the present motion, and therefore express no opinion as to the existence or nonexistence of such right, or make any order in relation thereto.

Being of the opinion that the appellant Deshields is entitled to have his appeal herein dismissed, it is so ordered.

We concur: BURNETT, J.; HART, J.

52 Cal. App. 390

NATHAN v. O'DONNELL et al. (Civ. 3757.)

(District Court of Appeal, First District, Division 1, California. April 29, 1921. Hearing Denied by Supreme Court June 27, 1921.)

1. Assignments ⇐119—Plaintiff suing bank under assignments for refusal to honor checks not intermeddler in making the amount good.

Where the department commander of certain war veterans appointed the chairman of a committee to arrange transportation for state delegates to the national meeting of the organization, and the chairman collected from the delegates an amount of money to cover the cost of their transportation, and deposited the amount in his personal checking account, which was garnisheed, so that the bank refused to honor his checks to the railroad for the transportation, threatening to cancel the tickets, and the department commander gave his personal check to the bank to cover the chairman's checks to the railroad, in so doing the department commander was not an intermeddler without right to recover from the bank under assignments from the chairman and the delegates who had paid moneys to the chairman.

2. Banks and banking ⇐131—Bank depositor without title to moneys collected by him and deposited in his account to subject them to garnishment.

The chairman of a committee to arrange transportation for state delegates of certain war veterans to their national meeting had no title to funds collected by him from the delegates to cover their transportation and deposited by him in his personal checking account sufficient to subject such funds to garnishment or attachment against him.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Milton A. Nathan against H. M. O'Donnell and another. From judgment for plaintiff, defendants appeal. Affirmed.

Aitken, Glensor, Clewe & Van Dine and John T. Williams, all of San Francisco, for appellants.

Milton Nathan and John D. Rutledge, both of San Francisco, for respondent.

KERRIGAN, J. This action was brought by plaintiff to recover a certain sum of money held under attachment. Plaintiff recovered judgment, and defendants appeal.

The facts are as follows: In August, 1918, plaintiff, as the California department commander of the United Spanish War Veterans, appointed one John H. Simmons chairman of a committee for the purpose of arranging transportation for the California delegates to the national meeting of that organization to be held in Baltimore, Md. As such chairman Simmons collected from seven delegates the sum of $538.67 to cover the cost of railroad and Pullman tickets to be purchased by him entitling these delegates to transportation from San Francisco to Baltimore. The money so collected was deposited by Simmons in his personal account with the Bank of California National Association in San Francisco. Immediately thereafter Simmons purchased the tickets from the Southern Pacific Company, giving in payment thereof seven checks drawn upon said bank, the aggregate amount of which was the precise sum he had collected, viz. $538.67. Two days thereafter, and before these checks were presented to the bank for payment, defendant O'Donnell commenced an action against Simmons, in which an attachment was issued, pursuant to which defendant Finn, as sheriff, garnisheed all sums in the Bank of California standing in the name of Simmons. Thereafter the checks were presented by the railroad company for payment, but by reason of the garnishment the bank refused to honor the same. The railroad company thereupon notified Simmons that the tickets would be canceled. These facts were immediately reported by Simmons to plaintiff, who, to remedy this urgent situation, voluntarily drew a check on his personal account with the First National Bank in favor of the Bank of California for $538.67, and sent it to the latter, with the statement that the remittance was made for the express purpose of having the bank meet and honor the above-mentioned checks drawn by Simmons in favor of the railroad company, and this arrangement was carried out. Plaintiff thereafter took assignments from Simmons and from each of the persons who had paid Simmons for transportation of their interest in such sums, and thereupon instituted this action against the bank to recover the amount. The bank paid the sum in dispute under order of the court to the Savings Union Bank to be held by it as a savings account subject to the order of the court; the Bank of California was discharged from further liability, and Thomas F. Finn, as sheriff, was substituted in its place and stead as defendant.

[1] In support of their appeal from the judgment in plaintiff's favor defendants have furnished us with an elaborate argument to the effect that plaintiff never acquired an equitable assignment to the fund in question, or ever acquired any rights thereto under the principles of subrogation, their claim being that he is a mere stranger and intermeddler, who has no interest in the fund whatever. We do not so consider him. Plaintiff having appointed Simmons to collect the funds, he undoubtedly concluded that he was under a moral obligation to relieve the situation. Under such circumstances he cannot be said to be an intermeddler. 37 Cyc. 371.

[2] Irrespective of this question, however, from a mere reading of the facts it is manifestly apparent that Simmons had no title whatever to the fund that was sought to be subjected to the attachment. Whatever re-

lation he bore to the parties who had intrusted him with the funds for the indicated purpose, whether as trustee, bailee, or agent, is a matter of no consequence, for certain it is that he had no such title in the fund as would subject it to attachment proceedings instituted by strangers to the arrangement. The transaction shows that his position was little different, if any, from that of a mere messenger intrusted with funds to make a particular purchase.

The fact that the money so collected was by him deposited in his bank as a matter of convenience in no manner alters the situation, for the money did not belong to him when attached.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(52 Cal. App. 454)

Ex parte KASTER. (Cr. 556.)

(District Court of Appeal, Third District, California. May 2, 1921.)

1. Habeas corpus ⟸30(2)—Lies only when complaint against accused wholly fails to state cause of action.

When the complaint wholly fails to state a cause of action, the writ of habeas corpus will lie, but the proceeding may not be made to subserve the office of a demurrer; and, if the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie.

2. Habeas corpus ⟸30(2)—Complaint held to give justice jurisdiction.

In habeas corpus by one convicted in justice's court of violating the Vehicle Act, *held* that the complaint against accused charged an offense known to the law under section 22, subd. "A" of the act so as to give the justice's court jurisdiction under Pen. Code, § 1425, although there was not inserted in the complaint the name of the township wherein it is claimed the offense was committed, as the statute does not limit the trial of violations of the statute to the township where the offense was committed.

3. Criminal law ⟸90(4)—Jurisdiction in criminal cases runs throughout the entire county.

In the absence of express statutory limitation, the general jurisdiction of a justice's court runs to the entire county in criminal cases, and is not confined to the township wherein the court is situated.

4. Habeas corpus ⟸3—Objection to form of complaint not available in habeas corpus.

Even if good pleading under the Vehicle Act required the insertion in the complaint of the name of the township where the offense under the act was committed, yet this objection could not avail accused, when made for the first time in the Court of Appeals in habeas corpus proceeding, as the objection should have been made in some appropriate form before the trial.

5. Habeas corpus ⟸30(1)—Defect in process not ground for discharge after trial and conviction.

After trial and conviction, any defect in the process of bringing accused before the court for trial, such as written notice and accused's promise to appear or a warrant for accused's arrest, is not ground for his discharge on habeas corpus for, after final judgment, the jurisdiction of the court cannot be questioned by inquiry as to the manner in which he was brought before it.

6. Habeas corpus ⟸4—Admissibility or weight of evidence not reviewable.

The question of the sufficiency or admissibility of the evidence on accused's trial cannot be reviewed on his application for habeas corpus, being determinable on appeal.

In the matter of the application of Edward M. Kaster for writ of habeas corpus. Writ dismissed.

See, also, 198 Pac. 1031.

Thomas B. Leeper, of Sacramento, for petitioner.

Hugh B. Bradford, Dist. Atty., and Clifford Russell, Deputy Dist. Atty., both of Sacramento, for respondent.

ANDERSON, Presiding Judge pro tem. Petitioner was convicted in the justice's court of American township of Sacramento county by a jury of a misdemeanor arising under the "Vehicle Act" (Laws 1915, p. 397), in that the defendant did "unlawfully drive and operate an automobile upon the public highway at an excessive rate of speed, to wit, in excess of 35 miles per hour," etc. The defendant was thereupon sentenced to be confined in the Sacramento county jail for a period of 60 days with no alternative.

Petitioner contends that the justice's court did not have jurisdiction of the person of defendant. In order to understand the contentions made by petitioner it will be necessary to set forth a brief statement of the evidence.

From the evidence it appears that in the month of September, 1920, the defendant was driving an automobile, known as a Deusenberg racing car, along a paved highway, which highway traversed the territory embraced within two adjoining townships, known as "American" and "Center," in the county of Sacramento. In the course of his travel petitioner passed through American township, and at a certain point therein, while passing several buildings, the constable of American township made an effort to stop petitioner, but was unsuccessful, defendant continuing on into Center township, wherein he was arrested by a traffic officer,

who gave the defendant the notice provided in subdivision "C" of section 22 of the Vehicle Act, which notice directed petitioner to appear before the magistrate of American township, and which the defendant promised in writing to do. (No proof was offered to show that petitioner demanded to be taken before the "most accessible magistrate," as provided in subdivision "C" of said act.)

Thereafter the complaint herein was sworn to by said traffic officer in said American township, charging petitioner, as aforesaid, with violating the Vehicle Act in the county of Sacramento, without designating the township in which the violation was committed. The transcript does not show that a warrant of arrest was issued thereupon. Upon the hearing of the petition herein it was admitted that the verdict of the jury had been affirmed upon appeal by the superior court in and for the county of Sacramento, and petitioner also admitted at the hearing herein, and an examination of the transcript of the evidence shows, that the verdict was sustained by the evidence upon the charge that the Vehicle Act was violated by petitioner within the said American township, as charged in the complaint.

Before the trial of said cause the defendant, petitioner herein, moved the said justice's court to "quash the complaint," as follows:

"Comes now the defendant in the above-named proceeding, and moves the court to quash or dismiss the complaint in said proceeding upon the ground that the above-entitled justice's court and the magistrate thereof has no jurisdiction of the alleged offense charged in said complaint, in this, that said alleged offense was not committed in the above-entitled township, but said alleged offense was committed in Center township, Sacramento county, state of California, and that the traffic officer should have notified this defendant to appear before the justice or magistrate of said Center township, whereas in fact said traffic officer apprehended this defendant in said Center township, and served a notice upon this defendant to appear before the justice or magistrate of the above-entitled township, which justice or magistrate and township is outside of the township where said alleged offense was given, and outside the township where defendant was apprehended, and outside the township in which said notice was served upon defendant."

The motion was thereafter heard upon affidavits and counter affidavits, and duly denied by the court, and thereupon and thereafter the defendant was duly arraigned and entered a plea of "not guilty," whereupon a trial by jury was regularly had, resulting in a verdict of "guilty," as aforesaid.

The main contentions advanced by petitioner are: First, that the complaint fails to state a cause of action by reason of the omission therefrom to state the township in which the offense was committed; and, secondly, that by reason of the traffic officer having served notice upon petitioner to appear before a magistrate outside of the township in which the notice was served, and the appearance of petitioner in said township in response to said notice so served, petitioner could not be prosecuted for an offense committed in said township, and which was outside the township in which the notice was served. Both contentions are so intermingled that they may properly be considered together.

[1] Upon the first point urged it may be said that the law is clear that when the complaint wholly fails to state a cause of action the writ of habeas corpus will lie (Ex parte Williams, 121 Cal. 328, 53 Pac. 706; Ex parte Kearny, 55 Cal. 228; Ex parte Sullivan, 17 Cal. App. 278, 119 Pac. 526); but "* * * the proceeding may not be made to subserve the office of a demurrer; and if the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartifically they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie. (Ex parte Whitaker, 43 Ala. 323; Matter of Prime, 1 Barb. 340)." Ex parte Williams, 121 Cal. 330, 331, 53 Pac. 706. To same effect, Ex parte Ruef, 150 Cal. 665, 89 Pac. 605; In re Avdalas, 10 Cal. App. 507, 102 Pac. 674. In the case last cited Mr. Justice Hart exhaustively reviews the question and distinguishes the authorities.

Viewing thecomplaint in the light of the foregoing authorities, we must hold that the complaint, "charges an offense known to the law." Subdivision "A," § 22, Vehicle Act.

The offense having been committed in Sacramento county, and being punishable by fine not exceeding $500 or by imprisonment in the county jail not exceeding six months, or both, the justice's court had jurisdiction of the subject-matter of the offense. Section 1425, Pen. Code.

If anything further need be added to complete the jurisdiction, it is supplied by the fact that the defendant was charged with the commission of the offense in American township, the complaint was laid in said township, the trial was had in said township, and the defendant was present with his counsel and participated in the trial of said offense in said township; and it is admitted that the evidence was sufficient to sustain the charge made in the complaint against the petitioner.

[2, 3] In answer to the first point made, it should be said that we are unable to find anything in the statute making it mandatory to insert in the complaint the name of the township wherein it is claimed the offense was committed, nor do we find language in the statute limiting the trial of violations of the statute to the respective township wherein the offense is committed. In the absence of

such express statutory limitation, the general jurisdiction of a justice's court runs to the entire county in criminal cases.

[4] Even if good pleading under the statute required the insertion of the name of the township wherein it is claimed the offense was committed, yet objection could not avail petitioner when made for the first time in this court in this character of proceeding; objection should have been made in some appropriate form before the trial.

Upon the contention made by petitioner that he was not convicted by due process of law for the reason that every form of law was not complied with, it is sufficient to say that, so far as the record reveals, after the petitioner appeared before the magistrate of American township in response to the notice given, the notice had served its purpose, and the defendant had fully complied with his written promise to appear. In order to compel his attendance further it was necessary to serve a warrant of arrest upon defendant, founded upon a proper complaint. It seems that this was not done. This not having been done, and it not appearing that a waiver by the defendant was made, it would appear that he was no longer held under the process of the court. In this situation he was not under duress, under restraint, nor in custody. Thus being free of the restraint of the law at this time, he entered a plea of "not guilty," announced that he was ready for trial and demanded a jury trial.

[5] But aside from the action of the defendant and his counsel, as herein recited, in proceeding to trial, we think the defendant cannot be released from the judgment by reason of any defect in the process of bringing him before the court for trial. We think no greater effect, if as much, can be given to the written notice and promise to appear than could be given to a warrant of arrest, and it has been held that even a void warrant cannot operate to discharge a prisoner after trial and conviction.

"The court had jurisdiction of the subject-matter, and however irregular the proceedings taken to obtain jurisdiction of the person, its judgment is final and conclusive. * * * The fact that the process has not been served by the proper person, or at the proper place or time, or that the warrant or order upon which a prisoner has been arrested is void, and the arrest unlawful, will not render the judgment void and subject to a collateral attack. Ex parte McGill, 6 Tex. App. 498; Dorente v. Sullivan, 7 Cal. 279; Peck v. Strauss, 33 Cal. 685; Owens v. Gotzian, 4 Dill. 438; Ex parte Kellogg, 6 Vt. 511; Freeman on Judgments, § 126. After final judgment of conviction, the jurisdiction of the court cannot be questioned by an inquiry into the manner in which the accused was brought before it; and this is true, even though the prisoner has been kidnapped and forcibly brought before the court from a foreign jurisdiction. People v. Rowe, 4 Park. Cr. 253; United States v. Lawrence, 13 Blatchf. 306; Ex parte Scott, 4 Barn. & C. 446; State v. Smith, 1 Bail. 283; State v. Brewster, 7 Vt. 118; State v. Ross, 41 Iowa, 467. In the last-named case it was said: 'The liability of the parties arresting them [the defendants] without legal warrant for false imprisonment or otherwise, and their violation of the Penal Statutes of Missouri, may be ever so clear, and yet the prisoners not be entitled to their discharge.' See, also, Mahon v. Justice, 127 U. S. 700, where the cases bearing upon this question are thoroughly reviewed by Mr. Justice Field." Ex parte Ah Men, 77 Cal. 201, 202, 19 Pac. 380, 381, 11 Am. St. Rep. 263. To the same effect are People v. Pratt, 78 Cal. 345, 20 Pac. 731; Ex parte Clark, 85 Cal. 204, 24 Pac. 726; People v. Staples, 91 Cal. 23, 27 Pac. 523; Crocker on Sheriffs [3d Ed.] p. 35.

[6] Petitioner also complains that evidence of the offense committed in Center township was also introduced at the trial, but with this contention we have nothing to do, as the reviewing court, on appeal, must determine this, for the question of the sufficiency or admissiblity of the evidence cannot be reviewed on habeas corpus. Roberts v. Police Court (Sup.) 195 Pac. 1053; In re Kennedy, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840; In re Jacobs, 175 Cal. 661, 166 Pac. 801; In re Leonardino, 9 Cal. App. 690, 100 Pac. 708; Ex parte Clark, 110 Cal. 405, 42 Pac. 905.

The writ is dismissed, and the petitioner remanded.

We concur: BURNETT, J.: HART, J.

185 Cal. 647

Ex parte KASTER.

(Supreme Court of California. May 11, 1921.)

In Bank.

In the matter of the application of Edward M. Kaster for a writ of habeas corpus. Writ denied.

PER CURIAM. The petitioner heretofore sought his discharge on habeas corpus on account of the matters alleged in his petition filed herein, at the hands of the District Court of Appeal of the Third Appellate District. After a hearing that court, on May 2, 1921, discharged the writ, and remanded the petitioner. The court in so doing filed a written opinion. In re Kaster on Habeas Corpus, No. 556, filed May 2, 1921, 198 Pac. 1029. All points available to petitioner on habeas corpus are considered in that opinion, which, to our minds, correctly states the law in regard thereto.

The application for a writ is denied.

All concur.

186 Cal. 196

CHAMBERS, State Controller, v. GIBB. (S. F. 9488.)

(Supreme Court of California. June 16, 1921.)

1. Taxation ⟹862—Transfer in contemplation of death held taxable under statute at time of transfer.

A transfer of community property by a husband to his wife, made in contemplation of death, is taxable under the Inheritance Tax Act 1913, which gave an exemption of $24,000, though the transfer did not take effect in possession, and the tax was not payable until the death of the transferor, at which time the inheritance tax act of May 23, 1917, allowing an exemption of half the property transferred, had been enacted, since the repealing clause of the act of 1917 (section 25), provided that the repeal should not affect any right which the state might have at the time the act took effect to claim a tax on any property under the provisions of the repealed acts.

2. Taxation ⟹861—Exemption in subsequent statute held not applicable to transfer before its enactment taking effect thereafter.

Inheritance Tax Act 1917, § 1, subd. 2, providing that in the case of transfer of community property from a husband to a wife, within the meaning of section 2, subds. 3 or 5 of that act, one-half of the property so transferred shall be exempt, refers only to transfers taxable under that act, and not to a transfer made before the act took effect, but which was taxable on the death of the transferor thereafter.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Proceedings by John S. Chambers, as Controller of the State of California, against Sarah Oliver Gibb, to have fixed the inheritance tax to be paid by the defendant. From judgment fixing the tax, defendant appeals. Affirmed.

Frank E. Powers, of San Francisco, for appellant.

H. C. Lucas and A. W. Brouillet, both of San Francisco, for respondent.

WILBUR, J. This is an appeal from an order and judgment fixing the inheritance tax to be paid by the defendant. On September, 15, 1913, James Gibb transferred to his wife, Sarah Oliver Gibb, the defendant, certain real estate in the city and county of San Francisco, state of California. The real estate was community property, and the transfer was made in contemplation of death. No consideration was paid for the transfer, and the husband reserved a life estate to himself, giving him the right to the full enjoyment and possession of the same, and the rents, issues, and profits thereof for and during the term of his natural life. The conveyance was intended to take effect in possession and enjoyment upon his death. At the time of the transfer the inheritance tax act of 1913 (Stats. 1913, p. 1066) was in effect. By that statute community property, transferred in contemplation of death or devised or bequeathed to the wife, was taxable with an exemption to her of $24,000. This inheritance tax act was repealed by the inheritance tax act approved May 23, 1917 (Stats. 1917, p. 880). Thereafter on July 2, 1919, James Gibb died. It is conceded that the estate transferred was taxable to its full value, less an exemption of $24,000 under the statute of 1913.

[1] Appellant, however, contends: First, that the statute of 1913 was repealed, and that for that reason no tax at all was payable upon said property so transferred; and, second, that if this point is not well taken, at least the exemption of one-half of the community property granted in the statute of 1917 is applicable. It has been repeatedly held by this court that the inheritance tax law in effect at the time of the transfer is the one which controls (Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961; Estate of Felton, 176 Cal. 663, 669, 169 Pac. 392; Estate of Gurnsey, 177 Cal. 211, 170 Pac. 402; Estate of Murphy, 190 Pac. 46). The tax is imposed upon the transfer, and relates back to the time of transfer, but is not payable until the time of death. The repealing clause of the act of 1917 contained the following saving clause:

"Sec. 25. * * * provided, however, that such repeal shall in no wise affect any suit, prosecution or proceeding pending at the time this act shall take effect, or any right which the state of California may have at the time of the taking effect of this act, to claim a tax upon any property under the provisions of the act or acts hereby repealed. * * *"

It is difficult to understand how the saving clause contained in the act of 1917 could have been more definite as to the taxation of the transfer in question. Under the law of 1913 the transfer was taxable. The tax was payable at death. This right to collect a tax at the death of the donor was specifically reserved in the proviso to the repealing section of the act of 1917.

[2] Section 1, subdivision 2, of the act of 1917 provides that in the case of a transfer of community property from husband to wife within the meaning of subdivisions 3 or 5 of section 2 of this act, one-half of the community property so transferred shall not be subject to the provisions of this act. This provision in regard to the exemption of one-half of the community property from the tax is specifically made with reference to the transfer taxable under that act. In other words, it was prospective in character, and by its terms had no relation to a transfer made before the enactment of the statute, which was

taxable under the terms of the prior statute. The statute should not be given a retrospective effect unless the language demands such a construction. Matter of Van Kleeck, 121 N. Y. 701, 25 N. E. 50; Matter of Seaman, 147 N. Y. 69, 41 N. E. 401; Matter of Miller, 110 N. Y. 216, 18 N. E. 139. The right to the tax having been definitely fixed by the law of 1913, the Legislature would have no power by subsequent act to remit the tax. Estate of Martin, 153 Cal. 225, 94 Pac. 1053.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; SLOANE, J.; OLNEY, J.; LAWLOR, J.

186 Cal. 68

TRAIL et al. v. FIRTH et al. (L. A. 6434.)

(Supreme Court of California. June 6, 1921.)

1. Limitation of actions ⊜13, 175—Promises of defendant held not waiver of limitations not estoppel to set up limitations.

Where purchaser of land discovered falsity of representations that water was sufficient to irrigate the land, the fact that sellers, after the discovery, promised and agreed to furnish sufficient water the next year, and each year thereafter made the same promise, did not under Code Civ. Proc. § 338, subd. 4, extend the period of limitations on a cause of action for damages for deceit by reason of the original representations; such subsequent representations not constituting a waiver of the statute, nor estopping the sellers from setting up the statute.

2. Equity ⊜67—"Laches" and "limitations" distinguished.

There is a decided difference between the defense of laches and that of the statute of limitations, laches being a defense which may be interposed to a suit in equity whereby the plaintiff will be refused equitable relief because of his delay in bringing his suit, although the suit is commenced within the statutory period of limitation, and an action not brought within the statutory period is barred unless the case falls within some exception which the statute itself makes, or because of waiver or estoppel it is not open to the defendant to make the defense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Laches; Limitation.]

Department 1.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by John W. Trail and another against Emil Firth and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants.

Sheldon Borden and George H. Moore, both of Los Angeles, for respondents.

OLNEY, J. This is an appeal from a judgment for the defendants in an action to recover damages for alleged fraudulent representations made by the defendants to the plaintiffs. With other defenses which need not be stated, the defendants interposed that of the statute of limitations. If the complaint shows on its face a barred cause of action, the judgment for the defendants must necessarily be sustained. That it does show a barred cause of action is beyond reasonable question.

[1] The alleged misrepresentations were made, according to the complaint, in 1913 as the inducement for the plaintiffs to purchase certain land from the defendants, and consisted in representations that sufficient water was obtainable to irrigate the land. It is also alleged that the purchase was made, and that the plaintiffs went into possession, prepared the land for irrigation, and then in 1914 found that the water was not obtainable. Of necessity, the falsity of the representations was then discovered. That such discovery was then made is in fact conceded. The present action was not brought until 1919, five years later, while the period of limitation prescribed by the statute for actions for fraud is three years from the discovery of the fraud. Section 338, subd. 4, Code Civ. Proc.

To escape from the situation so presented, the plaintiffs rely upon certain further allegations of the complaint to the effect that upon failing to obtain sufficient water in 1914, the plaintiffs complained to the defendants, and the latter promised and agreed to furnish the water the next year, and that each year thereafter the same insufficiency of water developed, the same complaint was made, and the same promise given. But these facts, if they existed, were wholly insufficient to extend the period of limitation on a cause of action for damages for deceit by reason of the original representations. They are neither a waiver of the statute, nor would they estop the defendants from setting up the defense of the statute, and, unless there was either a waiver or an estoppel, it was open to the defendants to make the defense.

[2] The plaintiffs rely in support of their position upon authorities holding that facts such as those under discussion negative the defense of laches. But there is a most decided difference between the defense of laches and that of the statute of limitations. Laches is a defense which may be interposed to a suit in equity, whereby the plaintiff will be refused equitable relief because of his delay in bringing his suit, although the suit is commenced within the statutory period of limitation. But it would, indeed, be somewhat remarkable that the absence of this defense—for laches is a matter of defense—should have the affirmative effect of extending the period which a statute prescribes for

the bringing of the action. Laches or no laches, an action not brought within the statutory period is barred, unless the case falls within some exception which the statute itself makes, or because of waiver or estoppel it is not open to the defendant to make the defense. The present action was not brought within the statutory period, it does not come within any exception provided by the statute, it was open to the defendants to make the defense, and they made it. The judgment in their favor was therefore correct.

We would add that while we have discussed the case upon the sufficiency of the allegations of the complaint, the case is not one of insufficiencies in a complaint which are not found in the evidence. The evidence, or rather the evidence plus the facts which plaintiffs' counsel offered to prove, went no further than the allegations of the complaint.

Judgment affirmed.

We concur: SHAW, J.; LAWLOR, J.

186 Cal. 70

PACIFIC COAST S. S. CO. v. RICHARDSON, State Treasurer. (S. F. 9375.)

(Supreme Court of California. June 6, 1921.)

1. Taxation ⊜40(8)—Unequal assessment is excessive assessment.

An assessment of a corporation's franchise for taxation which is grossly disproportionate as compared with other assessments is an excessive assessment, as the final object of the assessment is to distribute the tax ratably, and an unequal assessment results in an excessive portion of the tax falling on one parcel.

2. Taxation ⊜376(1)—That assessment is excessive if without fraud does not make it invalid.

That an assessment of a corporate franchise is excessive or even grossly so does not itself make the assessment invalid, in the absence of fraud in the sense of a conscious failure to exercise that fair and impartial judgment which the law requires.

3. Taxation ⊜543(6)—Allegation held not to support finding that assessment was based on computation not authorized by law.

In a suit to recover back a so-called franchise tax paid under protest, an allegation that the board of equalization in making the assessment did not pursue a method authorized by law, in that it disregarded certain facts shown by the franchise tax return, which should have been considered, does not support a finding that the assessment was based upon a computation not authorized by law, as there is no method prescribed for ascertaining the total net value of the assets for the purpose of determining the value of the so-called franchise.

4. Taxation ⊜490—Conclusion as to value of corporation's assets can be attacked only for fraud or mistake.

The conclusion of the board of equalization as to the total net value of a corporation's assets for the purpose of determining the value of its so-called franchise can be attacked only for fraud or mistake.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Pacific Coast Steamship Company against Friend W. Richardson, as treasurer of the State of California. From a judgment for plaintiff, defendant appeals. Reversed.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for appellant.

Geo. W. Towle, of San Francisco, for respondent.

OLNEY, J. This is an action to recover the amount paid under protest by the plaintiff, a California corporation, to the state as the so-called "franchise" tax assessed against the plaintiff for the year 1917. The ground on which a recovery is sought is the alleged invalidity of the assessment on which the tax was based. The plaintiff recovered judgment in the lower court, and the state appeals.

A question which immediately presents itself upon the record is, Are the findings of the trial court sufficient to sustain the judgment in favor of the plaintiff? The sole finding of grounds by reason of which the alleged invalidity of the assessment appears is this:

"The court hereby finds that the assessment of plaintiff's corporate franchise by the State Board of Equalization as of the first Monday in March, 1917, was grossly excessive; was grossly unequal as compared with the assessment by the said board of all other like franchises as of the first Monday in March, 1917, and that the assessment by the said board of plaintiff's said franchise as of the first Monday in March, 1917, was based upon a computation that was not authorized by law."

It will be noted that the grounds so found are three, to wit: (1) That the assessment was grossly excessive; (2) that it was grossly unequal as compared with the assessments of other like franchises; and (3) that it was based upon a computation not authorized by law.

[1, 2] The first and second grounds are in reality the same. An assessment grossly disproportionate as compared with other assessments is an excessive assessment, since the final object of the assessment is to distribute the tax ratably on the various parcels of property subject to it, and an unequal assess-

ment on one parcel as compared with others means that an excessive portion of the tax falls on that parcel. But the fact that an assessment is excessive, even though grossly so, does not itself make the assessment invalid. This is the rule generally followed in other jurisdictions, and has been declared by at least three decisions of this court, namely Los Angeles v. Western, etc., Co., 161 Cal. 204, 118 Pac. 720; Los Angeles, etc., Co. v. County of Los Angeles, 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277; Miller & Lux v. Richardson, 187 Pac. 411. In the first of these cases, the finding of the trial court was, as here, that the assessment "was grossly excessive," and it was held, nevertheless, that it was insufficient as a ground for invalidating the assessment. In the last of the cases mentioned, the point is disposed of thus (187 Pac. 416):

"The plaintiff complains bitterly of the assessments as excessive and arbitrary. But this is a matter that cannot be gone into by the courts, provided the method pursued in making the assessment is that prescribed by law, except where there is fraud or mistake. If the method pursued is not that prescribed by law, or, what is much the same thing, if the thing ostensibly valued and required by law to be valued is not really the thing valued, as in this case if the thing valued as franchise be not franchise as meant by the Constitution, the matter can be gone into by the courts and the taxpayer relieved of the assessment. Coulter v. Weir, 127 Fed. 897, 62 C. C. A. 429; Louisville, etc., Co. v. Bosworth (D. C.) 230 Fed. 191; Hager v. American Surety Co., supra. But in the present case, as we have held, the method pursued of assessing the plaintiff's franchise on the basis of valuing its corporate excess was the correct one, and the thing assessed as franchise was the thing which was required to be so assessed by law as expressed in the Constitution. This being the case, the discretion of the assessing officials as to the valuation to be fixed is final, in the absence of fraud or mistake. In the present case neither fraud nor mistake is alleged. It is alleged that the assessments are excessive and arbitrary. The character of the assessment in this respect may be cogent evidence of fraud, but of itself does not constitute fraud. In order that there be fraud, there must exist, on the part of the assessing official, a conscious failure to exercise that fair and impartial judgment which the law requires of him. This is both the general rule and the settled law of this state."

It must be held, then, that the judgment is without support as to the first two grounds.

[3, 4] As to the third ground found, that the assessment "was based upon a computation not authorized by law," it is exceedingly doubtful if the finding is anything more than a conclusion of law. It is not found what method of computation was or was not pursued, and so far as the finding shows, the method pursued may have been one which in the opinion of the trial court was not authorized in law, when in truth it was. But passing this, and assuming that the finding states a sufficient ground for invalidating the assessment, it is wholly without support, either in the pleadings or in the evidence. There is no allegation in the pleadings nor is there a particle of evidence as to the method pursued by the board of equalization. All that is alleged is that the board did not pursue a method authorized by law in that it disregarded certain facts shown to it by the plaintiff's franchise tax return. It is unnecessary to state these facts. Suffice it to say that some of them were undoubtedly entitled to consideration as factors entering into the total net value of the plaintiff's assets, and, if not considered in that connection, should have been in all fairness. But their bearing in that respect would be only on the good faith of the board, and as to that, as we have said, there is no finding other than the insufficient one that the valuation fixed was grossly excessive. The point in connection with the allegation that the board followed an unauthorized method in determining the assessment is that the disregarding of these facts, if they were disregarded, something as to which there is no evidence, would not involve a departure from the method prescribed by law for the making of the assessment. There is no method prescribed for ascertaining the total net value of the assets of a corporation such as the plaintiff for the purpose of determining the value of its so-called "franchise," and the conclusion of the board as to such total net value can be attacked only for fraud or mistake. This in effect was likewise held in Miller & Lux v. Richardson. The allegation therefore that the board disregarded the facts mentioned, although some of those facts were material in determining value, is not the equivalent of an allegation that the method prescribed by law was not pursued.

As to the evidence, it was confined to a showing that the facts mentioned did in truth exist. There was not even an attempt to show that the method prescribed by law was not followed. This would not have been shown even if it had been made to appear that the facts mentioned had been disregarded by the board, but in justice to the board we think we should say that no attempt was made to show that they were disregarded, and that the allegation of the complaint in that respect was flatly denied by the answer.

The case, then, may be summed up by saying that of the three grounds found to exist for invalidating the assessment, the first two, which are both to the effect that the assessment was grossly excessive, are not sufficient as legal grounds, and that the third, to the effect that the method prescribed by

law was not followed, is not supported either by the pleadings or by the evidence.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWOR, J.

186 Cal. 102

In re WATTS' ESTATE. (Sac. 3138.)

(Supreme Court of California. June 7, 1921.)

1. Wills ⊂=489(4)—Declarations of testators as to intent held properly excluded.

In a suit for partial distribution of the estate of a testatrix where the will gave the remainder of the estate "to my heirs," evidence of declarations by testatrix at the time the will was drawn to show that the quoted words were intended to refer only to her own kin *held* properly excluded in view of Civ. Code, §§ 1318, 1340.

2. Wills ⊂=489(2)—Oral declarations to interpret will cannot be given except in cases of latent ambiguity.

In view of Civ. Code, § 1318, providing that testator's intention must be ascertained from the words of the will in view of the circumstances under which it was made, and of section 1340, relating to the correction of mistakes, evidence of oral declarations to aid in the interpretation of a will cannot be given at all except in cases of latent ambiguity.

3. Wills ⊂=489(2)—Oral declarations of testator not admissible to show intent even when uncertainty or imperfect description exists.

In view of Civ. Code, § 1318, providing that testator's intention must be ascertained from the words of the will in view of circumstances under which made, and of section 1340, relating to the correction of mistakes, when uncertainty or imperfect description appears in the will oral declarations of testator are not admissible to show intent with respect thereto.

4. Evidence ⊂=69—Allowances for support of widow under statute presumed to be so used by her.

An allowance for a widow's support under Code Civ. Proc. §§ 1464 and 1466, will be presumed, in the absence of evidence to the contrary, to have been all used by her for the purpose for which she received it and that none of it remains as part of her estate at her death.

5. Husband and wife ⊂=274(4)—Evidence sustaining finding that widow's estate was community property.

In a suit for partial distribution of a widow's estate, evidence *held* to require a finding that notes purchased by her from other heirs were paid out of the proceeds of the community estate inherited by her from her deceased husband and not out of her separate property, so that it was not error to refuse to set aside a stipulation that all the property of which she died seized was property distributed to her from her husband's estate.

6. Wills ⊂=525—Claim as to proportions in partial distribution in widow's estate at variance with statute held not tenable.

In a suit to partially distribute the estate of a deceased widow to whom had been distributed three-fourths of the community property owned by her and her deceased husband, under a will in effect providing for distribution to her heirs as if she had died intestate, a claim for distribution in proportions different from those prescribed by Civ. Code, § 1386, subd. 8, *held* not tenable.

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Proceeding for partial distribution of the estate of Lydia M. Watts, deceased. From a decree of partial distribution, Ella Gray, A. V. Watts, and others appeal. Affirmed.

W. H. Carlin, of Marysville, and D. Hadsell, of San Francisco, for appellants.

Bond & Deirup and Samuel J. Nunn, all of Chico, for respondents.

SHAW, J. This is an appeal from a decree of partial distribution.

The decedent was the widow of one Nelson Watts, who died intestate in June, 1900, leaving a large estate consisting entirely of community property. There were no children of the marriage, and neither husband nor wife left issue surviving. Upon the final settlement of the estate of Nelson Watts, three-fourths of the property remaining for distribution was assigned to Lydia M. Watts as his widow, and one-fourth thereof to A. V. Watts and others as brothers and sisters of Nelson Watts, or their descendants. Lydia M. Watts died on August 5, 1916. By her will she gave the residue of her property by the following clause:

"I hereby give, devise and bequeath all the rest, residue and remainder of my estate wheresoever situate to my heirs and to be distributed to them according to law."

Her estate was appraised at $356,344.65. Ella Gray and the other persons who were the next of kin of Lydia M. Watts petitioned the court for partial distribution of $81,000 of the estate. The superior court decided that the words "my heirs" in the will meant the next of kin of Lydia M. Watts alone and did not include the next of kin of Nelson Watts. On appeal to the Supreme Court the order was reversed, and it was held that the effect of the above-quoted provision was to give the property to the persons who would have inherited it under the statute of descent, had she died intestate, and therefore that it should go in equal parts, one-half to the relatives of Nelson Watts and one-half to the relatives of Lydia M. Watts, as provided in subdivision 8 of section 1386 of the Civil Code. The decision was made on September

24, 1918. Est. of Watts, 179 Cal. 20, 175 Pac. 415.

After that decision each of the contending sets of claimants filed a petition for distribution of a part of the estate. The Nelson Watts claimants asked distribution to them of one-half of $30,000 in money and one-half of 3,960 acres of land. The petition of the Lydia M. Watts claimants asked distribution to themselves of $45,000 in money out of the estate, claiming to be entitled to it all. After the filing of these petitions a large part of the real property was sold and amended petitions were filed asking distribution of the proceeds, with the other money on hand, and of the remaining land. After a trial of these conflicting claims the court below made findings declaring that money on hand amounting to $267,506.56 belonging to the estate and something over 1,600 acres of land remaining unsold was ready for distribution, and thereupon it entered a decree sustaining the contention of the Nelson Watts claimants and distributing said property accordingly, one-half to each set of claimants, setting out particularly the share of each person interested. From this decree the Lydia M. Watts claimants appeal.

[1] 1. Upon the trial the appellants offered to prove certain declarations made by the testatrix, Lydia M. Watts, at the time the will was drawn to the person who drew it, concerning her intention. This evidence was offered to show that by the words "to my heirs" in the above residuary clause she intended to refer only to her own kin; that her desire was for them to have the entire residue. This evidence was excluded and the ruling is assigned as error.

We think the ruling was correct. Section 1318 of the Civil Code provides as follows:

"In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations."

And section 1340 provides that—

"When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received."

[2, 3] It will be seen from these provisions, first, that evidence of oral declarations to aid in the interpretation of a will cannot be given at all except in cases of latent ambiguity, which does not appear here, and, second, that even when uncertainty or imperfect description so appears, oral declarations of the testatrix are not admissible to show her intent with respect thereto. This is the uniform rule of this court. Estate of Walkerly, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97; Estate of Young, 123 Cal. 344, 55 Pac. 1011; Estate of Tompkins, 132 Cal. 176, 64 Pac. 268; Estate of Blake, 157 Cal. 469, 108 Pac. 287; Estate of Willson, 171 Cal. 456, 153 Pac. 927. The same rule is stated by all the text-writers. 1 Redf. on Wills, p. 496; 1 Jarman on Wills (6th Ed.) top p. 412, *p. 379; Wharton on Ev. § 992; 4 Wigmore on Ev. § 2471; 3 Jones on Ev. § 480. Furthermore, the decision on the former appeal is to the same effect with regard to the meaning of these particular words, the court saying (179 Cal. 23, 175 Pac. 417):

"We must determine her intent from the language of her will, and where that language is clear and unambiguous, it 'must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby.'"

The decision also establishes the proposition that in view of the express provisions of the Civil Code, in section 1327, relating to technical words in a will, and in section 1334, defining the meaning of the word "heirs" when used in a will, there is no uncertainty on that subject arising on the face of this will. The rule excluding oral declarations is therefore strictly applicable to this case and the court properly excluded the evidence thereof.

It is suggested that the decision of the Supreme Court on the former appeal is not applicable to the question of the admissibility of evidence of oral declarations, because at the trial there under review no such evidence was offered; also, that the proof of the existence of the two opposing sets of claimants showed a latent ambiguity, upon which evidence of extrinsic facts was admissible. The Code sections quoted and the decisions we have cited dispose of the first suggested point without aid from our previous decision. Upon the former trial the extrinsic facts which it is now claimed produce a latent ambiguity were fully shown, as appears in the previous opinion. These facts were that the property to be distributed was community property of the marriage between Lydia M. Watts and Nelson Watts; that neither of them left children or lineal descendants surviving; and that both left collateral relatives entitled to inherit from them as such, respectively. To that extent the former decision is strictly applicable here and is decisive to the effect that no latent ambiguity arose from the existence of said facts.

2. Upon the hearing in the trial court of the petition for partial distribution under review on the former appeal, the parties filed a stipulation to the effect that all the property of which Nelson Watts died seized was community property of said Nelson Watts and Lydia M. Watts, his wife; that upon the

final settlement of his estate on July 5, 1901, three-fourths thereof was distributed to her and one-fourth to his relatives; that all the property of which she died seized is property so distributed to her as aforesaid and the rents, issues, and profits thereof; and that said stipulation might be used upon any subsequent petition for distribution of said estate or any part thereof.

Upon the hearing of the petitions now under review the appellants offered to prove that Lydia M. Watts, as administratrix of her husband's estate, had, on the final settlement thereof, received from the estate $4,100 as commissions for her services; that during the administration she received from the estate a family allowance amounting to about $4,550; that within two months after the final settlement of said estate she purchased from the next of kin of Nelson Watts their one-fourth interest in certain mortgages and notes belonging to said estate which had been distributed to them by the decree of distribution; and that during the administration of said estate there was set apart to her as a homestead two lots in Chico, which she still owned at her death. Objections to said offer on the ground that the appellants were bound by said stipulation were sustained by the court. Thereupon appellants, upon notice and affidavits, moved the court to be relieved from the effect of such stipulation, on the ground that the same was made through inadvertence and in ignorance of the facts which they then offered to prove. Counter affidavits were filed, and the court denied the motion.

The showing of inadvertence and excusable neglect in signing the stipulation was not strong. But conceding that it was sufficient in that respect, we think the motion was properly denied for other reasons.

[4, 5] The two petitions then on hearing were each for partial distribution and asked only for distribution of a specific sum of money and specific parcels of land. The appellants did not even attempt to allege or to show that the money received for commissions and family allowance, or the proceeds thereof, constituted any part of the money of which distribution was asked. The family allowance was received by her in 1900 and 1901, 15 years before her death. As the statute allows it for her support during the progress of the settlement of her husband's estate on the ground that it is necessary for that purpose (Code Civ. Proc. §§ 1464, 1466), it is to be presumed, in the absence of evidence to the contrary, that it was all used by her for the purpose for which she received it and that none of it remained as part of her estate at her death in 1916. The lots set off to her as a homestead are not included in the real property of which distribution was asked or made and they remain on hand as part of her undistributed estate. The question whether or not those lots are now to be classed as her separate estate is not now involved and may not appropriately be decided. The evidence offered in regard to the purchase of the one-fourth interest of the relatives of Nelson Watts in the mortgage notes shows that on August 2, 1901, she did buy said interest and paid therefor the sum of $12,891. Appellants claim that this alone raised a presumption that the payments were made to them by her out of her separate estate, and that this presumption is so conclusive that the court was without discretion to refuse to set aside the stipulation if it was inadvertently made in ignorance of that fact. There was, however, before the court at that time many other facts which almost conclusively rebut any presumption of that kind. The stipulation was to the effect that there was no separate property of either husband or wife in existence at the time of the death of Nelson Watts. There was no attempt to show that his widow had engaged in any independent business of her own after his death, or had received any property as her separate estate, except the family allowance and commissions. The inference is almost conclusive that she had no funds with which to buy said mortgage notes except what she received from the estate of her husband, aside from the commissions. It appeared that the annual rents of said estate at the time of his death were from $15,000 to $20,000. Of this she would be entitled to three-fourths. It also appears that he left notes amounting to over $60,000 in value, of which the interest she so purchased was a part. Furthermore, there is some evidence indicating that the subsequent purchase of these notes was in reality a partition thereof. The assignments thereof were all dated August 2, 1901, and were all recorded on September 24, 1901. On the same day there were recorded assignments by said widow to the next of kin of Nelson Watts of her three-fourths interest in certain other mortgage notes belonging to said estate, which assignments were dated July 24, 1901, in consideration of which she received from them $1,898.43. It may further be observed that if they transferred their interest in notes not secured by mortgage, as was not improbable, in the same transaction, the assignment of the notes could not be matters of record. There was no attempt to prove that the commissions were used to pay for the notes purchased by her from the other heirs. All the circumstances taken together furnish almost conclusive proof that instead of there being a purchase there was a mere partition of their interests in the notes. In any event, there was ample proof to show that whatever money she paid to them was more probably paid out of the proceeds of the community estate than out of her separate property, inasmuch as it is not claimed that she had separate property before the death of her husband. For these reasons we think that on

the merits of the proposition the court was justified in refusing to enter upon the inquiry which must inevitably have resulted in proving that the stipulation so far as it affected the case then before the court was true.

[6] 3. The remaining point of the appellants is stated in their opening brief as follows:

Since it appears that "Lydia M. Watts received only three-fourths of the common property at the time of the distribution of the estate of her predeceased spouse Nelson Watts, the other one-fourth going to the blood relatives, then in any event appellants are entitled to one-half of the common property which would be two-thirds of the three-fourths distributed to her. Therefore, appellants are clearly entitled to two-thirds of the estate distributed instead of the one-half which the lower court awarded."

We are unable to follow the somewhat abstruse reasoning by which this conclusion is reached. The Code plainly declares that upon the death of a widow leaving no issue and leaving estate which was common property of herself and her deceased spouse while such spouse was living, if there were no children of the former spouse nor any father or mother of either living at the time of the widow's death, such estate shall go in equal shares, one half "to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes * * * to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation." Civ. Code, § 1386, subd. 8. By the will of Lydia M. Watts, as has been seen, her property was to go to her heirs. In the former decision in this estate it was expressly held that this meant that it should go to her heirs as they were defined in subdivision 8 aforesaid in the same manner as if she had died intestate. We have no disposition now to revise that opinion and hold that it goes in some other proportions, especially in view of the precise language of the Code just quoted. We perceive no ground upon which to found the conclusion that the fact that she received only three-fourths of the common property at the distribution of her husband's estate made that three-fourths anything else than common property of the previous community, or pointed to a course of descent different from that specified in subdivision 8 aforesaid. The point appears to be without merit in itself and no authority is cited which approaches to a support of it.

The decree of distribution is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

(186 Cal. 64)

In re DOL'S ESTATE. (L. A. 6068.)

(Supreme Court of California. June 6, 1921.)

Wills ⊂=14—Pioneer society held a "charitable corporation."

An incorporated society of pioneers, whose objects included not only the cultivation of social intercourse among its members, but also the collection and preservation of data and articles of historical interest, and whose membership might embrace a large and indefinite portion of the public, is a charitable corporation, which is one organized for the purpose, among other things, of promoting the welfare of mankind at large, or of a community, or of some class from a part of it indefinite as to number of individuals, and therefore a bequest to such corporation, in a will executed less than 30 days before the death of testator, is void under Civ. Code, § 1313.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Charitable Corporation.]

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Victor Dol, deceased. From a decree ordering the payment of a bequest to the Los Angeles County Pioneer Society, Frank P. Flint and another, as executors and the residuary legatees, appeal. Reversed.

See, also, 187 Pac. 428.

Frank P. Flint and Donald Barker, in pro. per.

Flint & Mackay and Donald Barker, all of Los Angeles (Wm. H. Neblett, of Los Angeles, of counsel), for appellants Oberly and Ingram.

Will D. Gould, of Los Angeles, for respondent.

SHAW, J. The executors of the will and the residuary legatees appeal from a decree distributing and ordering paid a bequest of $2,000 made by the will of the decedent to the respondent, an incorporated society, known as "Los Angeles County Pioneer Society."

The will was executed less than 30 days prior to the death of the testator. If the respondent is a "charitable or benevolent" corporation, the bequest is void under the provisions of section 1313 of the Civil Code, declaring that—

"No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator."

If this point is good, the other points made by appellant need not be considered.

The articles of incorporation of the respondent state the purposes for which it was formed, as follows:

"That the purpose for which this corporation is formed is to cultivate social intercourse and friendship among its members, to collect and preserve data touching the early history of Los Angeles county and state of California, to collect and preserve articles, specimens and material things illustrative or demonstrative of the customs, modes and habits of the aforesaid times in said state; to perpetuate the memory of those who, by their labors and heroism, contributed to make the history of said county and state; and in furtherance of said purpose to receive, purchase, sell, hold, convey, lease, rent and maintain all kinds of property, both real and personal, to build clubhouses, and to do any and all acts necessary and convenient for the promotion of said purpose; and to exist as a social corporation under the provisions of the laws of the state of California, covering such corporations, and not for pecuniary profit."

The corporation has no capital stock, and it is stated in the bill of exceptions that the paragraph above quoted is the only part of its articles material to be considered upon the issues presented in the case.

We are of the opinion that the respondent is a charitable and benevolent corporation. If its only object were to cultivate social intercourse and friendship among its members, it would be for the benefit of the members alone, and it would not come within that class. But it is apparent from a reading of the part of the articles above quoted that this was but a minor part of its purposes. A charitable corporation is one organized for the purpose, among other things, of promoting the welfare of mankind at large, or of a community, or of some class forming a part of it indefinite as to numbers and individuals. It is impossible to enumerate specifically all purposes which characterize such corporations as charitable. "The difficulty is inherent in the subject-matter itself. With the progress of civilization new needs are developed, new vices spring up, new forms of human activity manifest themselves, any or all of which, for their advancement or suppression, may become the proper objects of an eleemosynary trust." People v. Cogswell, 113 Cal. 138, 45 Pac. 271, 35 L. R. A. 269. In Estate of Winchester, 133 Cal. 271, 65 Pac. 475, 54 L. R. A. 281, the status of a society known as the Santa Barbara Natural History Society was under consideration. It was an unincorporated society "having for its object to advance the study and promote knowledge of the various branches of natural history, by holding meetings, providing for lectures, and establishing a museum of natural history specimens." It was held to be a charitable society. Its purposes are not materially different from those of the respondent. The case seems to be decisive of the case at bar. The collection and preservation of data touching the early history of the state and the collection and preservation of articles, specimens, and material things illustrative of the customs, modes, and habits of the early times in California and the perpetuation of the memory of those who contributed to make the history of the state are obviously purposes tending to the benefit of the public at large, by furnishing means of information and knowledge of the history of the state. A case almost exactly parallel to the present one is Molly Varnum Chapter, D. A. R., v. Lowell, 204 Mass. 487, 90 N. E. 893, 26 L. R. A. (N. S.) 707. The plaintiff corporation in that case was organized—

"for the purpose of perpetuating the memory of the men and women who achieved American independence, of acquiring and protecting historical spots, encouraging historical research and the publication of its results, preserving documents and relics and individual records of revolutionary soldiers and patriots, and promoting the celebration of patriotic anniversaries, or cherishing, maintaining and extending the institutions of American freedom, and fostering true patriotism and love of country."

It was held to be a charitable corporation. The court said:

"If the sole object * * * had been the gratuitous collection and publication of facts connected with our revolutionary history, this certainly would have been educational and of great value to the community. * * * The foundation upon which such an institution rests would be in aid of letters and charitable by intendment of law."

It was also said that the encouragement and promotion of historical research and the publication of results in the form of books, pamphlets or periodicals without profit "is within the statutory category," and that property held for that purpose was exempt from taxation as a charitable and benevolent institution under the exemption statute of that state. There is no material distinction between these cases and that here presented.

It may be urged that the articles contain no provision whereby any person not a member thereof may receive any benefit from the carrying out of its corporate purposes. This may be true as to the cultivation of social intercourse and friendship among its members, although as there is no limit as to the number of members, or as to conditions of admission, the membership may embrace a large and indefinite portion of the public. But a reading of the article on the subject shows that the carrying out of the purposes defined will in the main benefit the general public as much as the members.

In view of the foregoing authorities and upon general principles it seems clear that the respondent corporation was a charitable and benevolent corporation within the mean-

ing of section 1313 of the Civil Code, and, the bequest having been made within 30 days prior to the death of the testator, it is void under the provisions of that section.

The order is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; SLOANE, J.; LAWLOR, J.

186 Cal. 53

H. HACKFELD & CO., Limited, v. CASTLE et al. (S. F. 8884.)

(Supreme Court of California. June 6, 1921. Rehearing Denied July 5, 1921.)

1. Sales ⊂⊃83—Question as to whether buyer or seller should furnish transportation held one of intention; "f. o. b" defined.

The question of whether the buyer or the seller of Hawaiian honey should secure the necessary transportation *held* one of intention of the parties as to what they contemplated, and the expression "f. o. b." throws no light upon the question; such expression merely making it the seller's duty to load at his own expense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, F. O. B.]

2. Sales ⊂⊃172—Shipping route provided for by contract held material.

A contract provision calling for shipment of Hawaiian honey by a certain route *held* one material to the contract, so that it could not be performed according to its terms except by shipment by such route, and the continued existence of such route was, in absence of warranty that it would continue in existence, a condition of the contract, so that the parties would be excused in case before breach performance became impossible by reason of the prescribed route ceasing to exist.

3. Sales ⊂⊃83—Option as to shipping route construed.

A contract of sale prescribing a certain shipping route, or at buyer's option another route in case the first route was discontinued, meant that the contract was conditional upon the first route remaining open, but that in case it were discontinued the buyers might waive the condition if the goods could go forward by the other route; and was not merely an option between routes.

4. Sales ⊂⊃177—Discontinuation of shipping route on account of war excuses buyer from acceptance.

Assuming that it was the duty of the buyers of Hawaiian honey to secure transportation, that duty was conditional upon the necessary instrumentality continuing in existence, and where, owing to war, the route specified in the contract was discontinued, the buyer was justified in refusal to accept the honey.

5. Sales ⊂⊃180(1)—Acceptance of part of goods purchased held not to waive contract requirements as to transportation.

The fact that a buyer of Hawaiian honey accepted a part of the purchase shipped by another route than that provided for by contract *held* no waiver by the purchaser of contract requirements as to subsequent shipments.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by H. Hackfeld & Co., Limited, against Walter M. Castle, Albert E. Castle, and Arthur H. Castle, doing business under the firm name and style of Castle Bros. Judgment for defendants, and plaintiff appeals. Affirmed.

Andros & Hengstler, Louis T. Hengstler, and Golden W. Bell, all of San Francisco, for appellant.

Walter Perry Johnson and Nathan H. Frank, both of San Francisco, for respondents.

OLNEY, J. The plaintiff, an exporting firm of the Hawaiian Islands, sold to the defendants, a jobbing firm of San Francisco, the output of honey of a certain Hawaiian brand, for the season of 1914. The output amounted to 1,946 cases, of which 800 were delivered and paid for. The defendants refused to accept the remaining 1,146 cases, and the plaintiff sold them at public auction for the account of the defendants for a figure less than the contract price and brought the present action for the difference. Judgment went against the plaintiff, and it appeals.

At the time the contract of sale was made, March, 1914, a regular line of steamers was running between Honolulu and the Isthmus of Tehuantepec, there connecting with the railroad across the isthmus and by means of the railroad with vessels on the Atlantic side sailing between the isthmus and Atlantic ports. By means of this line, shipments could be made in regular course from Honolulu direct to European ports, including that of Hamburg. Such being the means of shipment from Honolulu to Hamburg, the contract between the parties provided that the price was net f. o. b. Honolulu, payable on sight draft with shipping documents attached, and provided also:

"Goods to be shipped direct shipment from Honolulu via Tehuantepec to Hamburg (or at our [buyers'] option, via Panama Canal, in case the Tehuantepec route is discontinued)."

Upon the provision just quoted the cause turns. Before the time arrived for the shipment of the honey, the Tehuantepec route was discontinued because of unsettled political conditions in Mexico, and was not reopened. The Panama Canal was not yet open, and was not opened until the middle of August, 1914. In the meantime, the recent World War had broken out, the port of Hamburg had been blockaded, and shipment to

that port by any route had become a practical impossibility. In this situation, and because of it, the defendants refused to accept the honey, and the final question in the case is, were they justified in so doing?

The question is largely discussed before us as if it were to be determined according as it was the duty of the seller or the duty of the buyers under the contract to secure the necessary transportation. The contention on behalf of the plaintiff is that under f. o. b. contracts it is the rule, in case of shipments by sea as distinguished from shipments by rail, that it is the duty of the buyer to secure the transportation, and that since the defendants in this case failed to do so they are responsible. On behalf of the defendants, on the other hand, it is asserted that the prevailing American, as distinguished from the English, rule is that under an f. o. b. contract it is the business of the seller to secure transportation, and in support of their contention counsel cite a number of decisions by courts of this country so holding as to shipments by rail. We doubt if either of these contentions is strictly correct; that is, if it can be truly said either that there is one rule for shipments by sea and another for shipments by rail, or that there is one rule followed in America for the most part and another followed in Great Britain.

[1] The question is one as to the intention of the parties, as to what they contemplated. The expression "f. o. b." in and of itself throws no light upon it. The expression merely makes it the duty of the seller to load at his own expense. But whether the means of conveyance on which the goods are to be loaded are to be furnished by him or by the buyer is not indicated by the requirement. It would seem that in the absence of any express provision on the point (and usually there is none), what the parties contemplated must be determined by what was reasonable under the particular circumstances of each case. When the buyer is not at the point of shipment, and when between that point and the point of destination there is a regular and customary method of transportation with fixed rates and uniform conditions, so that it is practically immaterial to the buyer whether he or the seller arrange for the transportation, and there is no difficulty and no substantial burden in arranging for it, the fact that the seller is on the ground and it is convenient for him to arrange for it, when it is not convenient for the buyer, would seem to make it reasonable that the seller should attend to the matter. This is generally the situation in the case of shipments by rail. It is, however, not the situation, as a rule, in the case of shipments by sea. For one thing, there is usually no uniformity of freight rates, so that the buyer, who, of course, must pay the freight under an f. o. b. contract, is immediately concerned with what arrangement may be made for transportation. On the other hand, the arrangement is a matter of indifference to the seller. Under these circumstances it would seem to be reasonable to conclude that the parties contemplated that, since the buyer is the party interested, he should attend to arranging for the transportation, either directly or by instructions to the seller. Of the decisions cited to us by counsel, most of those in this country were concerned with shipments by rail, and most of those in England with shipments by sea, and the above is, we believe the probable explanation of whatever differences may exist between them. But if this view be correct, it follows that where the conditions of transportation by sea are substantially the same as those of transportation by rail, as where the contract of sale contemplates transportation by a regular line of steamers with fixed rates and uniform conditions, and the seller is at the point of shipment and the buyer is not, it might well be concluded that the parties contemplated that the matter of arranging for transportation would be attended to by the seller. The present case closely approximates at least that situation. But we need not determine finally whether it was the duty of the seller or of the buyers in the case before us to secure the transportation. We are of the opinion that, even accepting the view that it was the duty of the buyers, it yet does not follow that they were not justified in refusing to accept the goods when shipment by the prescribed route became impossible.

[2] That the contract called for shipment via Tehuantepec hardly admits of question. There is a suggestion by plaintiff's counsel that the provision we have quoted was in the nature merely of shipping instructions by the buyers to the seller, and was not intended as truly a part of the contract between them. But the mere presence of the provision in the writing which constitutes the contract would alone indicate prima facie that the provision was a part of the contract itself, and when, in addition to this, we consider the circumstances under which the contract was made there can be no doubt upon the point. Neither can there be any doubt upon the further point that the provision was one inserted for the benefit and protection of the buyers. It seems that prior to the making of the contract the plaintiff had given the defendants a firm option on the honey, and that, while holding this option and before accepting it and closing the contract, the defendants contracted with a Hamburg firm for a resale of the honey to it; the contract specifying that the honey should go forward via Tehuantepec. These facts were known to the plaintiff when the defendants closed the contract with it, and there is but one possible inference from them, and that is that the provision under consideration was inserted in the contract in order to insure to the defendants that the honey would be

shipped to Hamburg via Tehuantepec as their contract with the Hamburg firm required.

The provision calling for shipment via Tehuantepec was, then one material to the contract, so that the contract could not be performed according to its terms except by shipment by that route. This means that that route was a necessary instrumentality for the performance of the contract. Its continued existence was therefore, in the absence of any warranty by either party that it would continue in existence, a condition of the contract, within the rule thus stated by Prof. Williston (3 Williston on Contracts, § 1948):

"Not only where a specific thing is itself to be sold or transferred, but wherever a contract requires for its performance the existence of a specific thing, the fortuitous destruction of that thing, or such impairment of it as makes it unavailable, excuses the promisor unless he has clearly assumed the risk of its continued existence. A contract to manufacture goods in a particular factory is discharged by the destruction of the factory (Stewart v. Stone, 127 N. Y. 500); a contract to do work on a specific building is discharged by the destruction of that building (Keeling v. Schastey, 18 Cal. App. 764); a contract to carry goods by a particular ship is discharged by the loss of the ship (Furness, etc., Co. v. Randall, 124 Md. 101), or by such an injury to it as prevents its use within the time permitted by the contract (Nicholl v. Ashton [1901] 2 K. B. 126); and a contract to serve or to employ another on a particular ship is subject to the same defense (The Dawn, 2 Ware, 121). A contract to move a building is excused by its destruction (Jones-Gray Const. Co. v. Stephens, 167 Ky. 765); a contract to furnish water from a spring by the failure of the spring (Ward v. Vance, 93 Pa. 499); a contract to drive logs down a stream by a fall in the water in the stream, owing to which performance becomes impossible (Clarksville Land Co. v. Harriman, 68 N. H. 374)."

A case substantially parallel to the present is that of The Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747. There the owners of certain cotton and the owners of a certain ship had contracted for the carriage of the cotton by the ship from New Orleans to Liverpool. Before the ship commenced her voyage she was injured by fire so that she was rendered unseaworthy and incapable of earning freight unless repaired at a cost which would exceed her value when repaired. It was held that both parties to the contract for carriage were excused, the court saying (108 U. S. 351, 2 Sup. Ct. 752, 27 L. Ed. 747):

"In Taylor v. Caldwell, 3 Best & Smith, 826, it is laid down as a rule that 'in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.' The reason given for the rule is that without 'any express stipulation that the destruction of the person or thing shall excuse the performance,' 'that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.' The rule was there applied to excuse the owner of a music hall which had been burned from fulfilling a contract to let the use of it. The principle was extended further in Appleby v. Myers, L. R. 2 C. P. 651. There the plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract, and that the plaintiffs were not entitled to sue in respect of those portions of work which had been completed, whether the materials used had become the property of the defendant or not."

See, also, for other cases involving the same principle and closely parallel to the present on the facts, Furness, etc., Co. v. Randall, 124 Md. 101, 91 Atl. 797; Scottish, etc., Co. v. Souter, [1917] 1 K. B. 222; Horlock v. Beal, [1916] 1 A. C. 486; Nickoll v. Ashton, [1901] 2 K. B. 126; Lovering v. Buck, etc., Co., 54 Pa. 291.

In the leading English case of Taylor v. Caldwell, mentioned in the quotation just made from The Tornado, Lord Blackburn states the underlying principle as follows:

"There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible. The law is so laid down in 1 Roll. Abr. 450, Condition (G), and in the note (2) to Walton v. Waterhouse, 2 Wms. Saund. 421a (6th Ed.), and is recognized as the general rule by all the judges in the much-discussed case of Hall v. Wright, E. B. & E. 746. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

This language is directly applicable to the present case. The parties here must from the beginning have known that the contract could not be fulfilled unless the Tehuantepec route continued to exist, so that when entering into the contract they must have contemplated its continuing existence as the foundation of what was to be done. There was no express or implied warranty by either party that it would continue to exist, and the contract is therefore to be construed as subject to an implied condition that the parties be excused in case, before breach, performance became impossible by reason of the prescribed route ceasing to exist.

The only substantial difference between these cases and the present is that in them it did not appear that the parties contemplated, when the contract was made, the contingency which subsequently arose, namely, the loss of the instrumentality by which alone the contract could be performed, while in the present case it does appear that the parties did contemplate it. This appears from the provision that at the buyers' option the honey might go by Panama in case the Tehuantepec route were discontinued. But the effect of this difference is only to strengthen the implication that the contract was conditional upon the Tehuantepec route remaining open. It was only at the buyers' option that the honey could go forward otherwise than by Tehuantepec, even if that route were closed and performance thereby made impossible. The reasonable implication is that if the buyers did not choose to exercise this option (and they did not), the condition inserted for their benefit that the honey should go by Tehuantepec would operate and they would be excused because of noncompliance with it. Otherwise the option would be valueless.

[3] In this connection we would note a contention made by plaintiffs' counsel as to the construction of the option provision. It is that the option given the buyers in case the Tehuantepec route was closed was one of choosing the Panama route in preference to any other; in other words, was merely an option between routes. The answer to this, however, is that the granting of such an option would amount to nothing. The plaintiff's fundamental contention is that the defendants were obligated to accept the honey, whether the Tehuantepec route was open or not. If this be true, the buyers necessarily would have the right, in case the Tehuantepec route were closed, to select any route they pleased, so that, without any express grant of an option to that effect, they could select the Panama route. It must be taken that the express grant of an option meant something and was intended to do more than give the buyers a right they would plainly have without it. The reasonable construction of the whole provision would seem to be that the contract was conditional upon the Tehuantepec route remaining open, but that in case it were discontinued the buyers might, at their option, waive the condition if the goods could go forward via Panama.

[4] It is no answer to the proposition that the contract required the honey to go via Tehuantepec, and that therefore the continued existence of that route was a condition of the contract, to say that it was the duty of the buyers to secure the transportation necessary according to the contract, and that they cannot rely upon their own failure to secure transportation as any reason why they should not carry out the contract. We may assume that it was the duty of the buyers to secure the transportation, but that duty, like their other obligations under the contract, was conditional upon the necessary instrumentality continuing in existence. If this be not so, the provision of the contract, plainly inserted for their benefit, that the honey go forward via Tehuantepec, means nothing. The provision that it should go forward is at once negatived as to the buyers by the fact that they are under an unconditional obligation to provide for its so going forward, so that, whether the honey move by the prescribed route or not, they are responsible. In other words, such a construction of the contract would wholly frustrate the object for which unmistakably the provision under discussion was inserted—the protection of the buyers. Furthermore, the fact that the provision was inserted for that purpose strongly supports the view that the parties contemplated that the seller would attend to the matter of transportation. It is rather difficult to see why the buyers should insist upon a provision that the honey be shipped via Tehuantepec if it were contemplated that they themselves should attend to the matter of transportation, so that whether the transportation arranged for was via Tehuantepec or some other route would be entirely in their own hands. But even if it does not appear that it was the seller who was to arrange for transportation, the facts that the contract required the goods to go via Tehuantepec unless at the buyers' option they went via Panama in case the Tehuantepec route were closed, and that this requirement was for the benefit of buyers plainly indicate that the whole contract was conditional, so far, at least, as the buyers were concerned, upon its being possible to ship the honey by that route. As it turned out, this was not possible, and the buyers were therefore justified in their refusal to accept the honey.

[5] There are some further points of minor character advanced on behalf of the plaintiff, but of these there is but one which either is not disposed of by what has already been said or is of such importance as to justify discussion. It is contended on behalf of the plaintiff that the parties themselves, by their dealings with respect to the 800 cases which were delivered and paid for, have construed

the contract as one obligating the defendants unconditionally to accept the honey. These cases were shipped after the Tehuantepec route was closed, and were shipped to the defendants at San Francisco because they could not be shipped via Tehuantepec, and were accepted by the defendants at San Francisco. But the trial court found, and its finding is not attacked, that the shipment was made only after the defendants had been notified that a portion of the honey was ready, and had taken up with their Hamburg buyer the question of routing the honey via San Francisco and the Panama Railroad, and had secured his consent to such routing, and that upon securing such consent the defendants notified the plaintiff to that effect and authorized the shipment via San Francisco on a through bill of lading to Hamburg. The shipment was not, in fact, made on a through bill of lading, but was consigned to the plaintiff itself on a local bill of lading. But the trial court also found in this connection that the defendants did not accept the shipment and pay for it until they had been assured by the steamship company, which had a line from San Francisco to Panama as well as one from Honolulu to San Francisco, that it would take up the local bill of lading and issue in place of it a through bill from Honolulu to Hamburg via Panama. All of this occurred before the outbreak of the war and when shipment to Hamburg was possible. When the transaction is considered as an entirety, it is evident that there is nothing in it inconsistent with a position on the part of the defendants that they had the right to insist on shipment via Tehuantepec unless they chose, in accordance with their option, to have the shipment by Panama. There being nothing inconsistent with that position, the transaction cannot be taken as one whereby a contrary construction was put upon the contract. Much less can it be said to be a waiver by the defendants of any requirement of the contract as to subsequent shipments.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

186 Cal. 169

PRYOR et al. v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 9637.)

(Supreme Court of California. June 15, 1921.)

1. Master and servant ⊂=367—Members of contracting firm, pumping sand from well, held "independent contractors," and not "employés," within Compensation Act.

Members of a contracting firm conducting a sand-pumping business as an incident to their well-boring business, who furnished their own appliances and paid their own expenses, and who were not subject to control while doing their work, for which they received a specified price per foot for boring and a per diem compensation for pumping sand, *held* "independent contractors," and not "employés" within the Workmen's Compensation Act while pumping sand from a well completed under a prior contract, though they were subject to discharge at any time and were willing to follow directions of the owner's representative.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Independent Contractor.]

2. Evidence ⊂=471(30), 568(1)—Statement of compensation claimaint that he was employé mere conclusion, and of no weight.

Statements of a claimant under the Workmen's Compensation Act and an associate engaged with him in pumping out sand from a well that they considered themselves employés of the well owner were mere legal conclusions, and of no weight, in view of evidence showing that they were working under an independent contractor.

In Bank.

Proceeding under the Workmen's Compensation Act by Thurman Crane, employee, opposed by John F. Pryor, employer, and the Globe Indemnity Company, insurer. Award of compensation by Industrial Accident Commission and Employer and Indemnity Company bring certiorari. Award annulled.

Howard L. Phillips and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

LENNON, J. Certiorari to review a decree of the Industrial Accident Commission awarding compensation to Thurman Crane, the applicant below, for an injury sustained while pumping sand from a well on a ranch belonging to John F. Pryor. The award is resisted upon the ground that the injured man was working under an independent contract, and not as an employee of petitioner John F. Pryor.

The said Thurman Crane and his two brothers-in-law, Warren and Albert Martin, were engaged in the business of well-boring, and possessed two complete outfits for use in that work. They also engaged in the business of pumping sand from wells. The usual price charged for the boring of wells was $2.50 per foot; expenses were deducted, and the three shared equally the profits of the business. They had completed a contract for the boring and sinking of a well for petitioner John F. Pryor, and were at work elsewhere when Pryor's well filled with sand. Thereupon Pryor arranged with Warren Martin, the business man of the firm, that the two Martin brothers and Crane should return and pump out the sand; Pryor agreeing to pay

$25 per day on condition that the three start work on the following day, which was Sunday. They took their pumping apparatus to the well and were at work there when Crane was struck by the handle of a windlass.

[1] Applying the accepted tests to the relationship of the parties at the time the injury was sustained, we are convinced that the work was pursuant to independent contract. It is conceded that when boring the well the firm was engaged in the performance of an independent contract. There is undisputed evidence that sand-pumping was in the same general line of work as well-boring; that in about one-third of the cases where contracts for the boring and sinking of wells had been completely performed the firm was recalled for the purpose of pumping out the sand which had subsequently filled in; and that considerable equipment, such as sand pipes, windlasses, and other apparatus, was required in this work. Both the contract for the boring of Pryor's well and the agreement for the removing of the sand were oral, Warren Martin arranging the terms on behalf of the firm, and in both instances the contracting firm furnished its own equipment. In short, the business of sand-pumping was conducted as an incident of the well-boring business, and it was carried on in practically the same manner.

The method of payment was the only item wherein the arrangements for the boring of the well differed from those for the sand-pumping. In neither branch of their business did the men contract for payment by the job. Boring was paid for by the foot, but clearly this could not be adopted as the basis for the charge for sand-pumping. There was uncontradicted testimony that the difficulty of estimating the length of time it would take to sand-pump a well was the reason for charging by the day; the amount depending somewhat on the number of men at work. Owing to the conditions, it was impracticable to set a price for the work as a whole, or a time for its completion; but the fact that no definite price was agreed upon for the completed work and that the work was performed by the day would not, in and of itself, render the contract one of employment. Flickenger v. Ind. Acc. Com., 181 Cal. 425, 184 Pac. 851, 8 A. L. R. 468. Nor was it material that the firm performing the pumping work might have been discharged at any time. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721; Donlon Bros. v. Ind. Acc. Com., 173 Cal. 250, 159 Pac. 715.

It is important that, as in the case of Flickenger v. Ind. Acc. Com., supra, the men were engaged to accomplish a particular result, in the performance of which they were not subject to the immediate authoritative control of those for whom the work was being done and that they were expected to furnish their own appliances and pay their own expenses. In applying the test of control we must differentiate between an order and a suggestion. Western Indemnity Co. v. Pillsbury, supra; Fidelity & Deposit Co. v. Brush, 176 Cal. 448, 168 Pac. 890. It appears that the men were not subject to the actual control or direction of any one while performing their work. According to the testimony, Mr. Pryor's representative "butted in," and the men were "willing to try" his suggestions. Had the men been subject to actual control, it would have been obligatory for them to follow directions. The men were not laborers, nor did they work as such. They carried on an extensive business, employing their own workmen. Warren Martin, who arranged for most of the work, in this case made all of the financial arrangements, and the claimant for compensation was not even cognizant of the terms of the contract until after the accident. The *firm* was engaged in this case, and the injured man was never personally employed by, nor did he ever personally make any contract with, Pryor or Pryor's representative.

[2] The statements of Crane and Warren Martin that they considered themselves employees are mere legal conclusions, and of no weight, in view of the uncontradicted evidence of facts which demonstrate that they were working under independent contract. Winslow v. Glendale Light & Power Co., 164 Cal. 688, 130 Pac. 427.

The determination that the injured man was working under an independent contract eliminates any discussion of the additional point of petitioners, namely, that if the contract were one of employment it was casual employment and therefore not within the terms of the Compensation Act. Stats. 1917, pp. 831, 835.

The award is annulled.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.; SLOANE, J.

186 Cal. 42

KAYE v. METZ et al. (L. A. 6439.)

(Supreme Court of California. June 6, 1921. Rehearing Denied July 5, 1921.)

1. Limitation of actions ⊂=66(4) — Action by trustee in bankruptcy against stockholders held not barred.

An action by the trustee of a bankrupt corporation to recover unpaid purchase price of stock *held* not barred by the two-year statute (Code Civ. Code. § 339), on the theory that the cause of action accrued as soon as the corporation was adjudged bankrupt, where the call for the enforcement of which the action was begun was made by the trustee under direction of the court less than two years prior to filing of complaint.

2. Bankruptcy ⊂=250(1)—Call for unpaid stock subscription held not invalid.

Where a bankruptcy court in pursuance of petition ordered the trustee to call in the entire unpaid subscription if necessary for the payment of corporate debts, the objection that the call was invalid, because the trustee did not make the assessment in the manner provided by Civ. Code, §§ 331–349, providing for assessments upon corporate stock and for collection by sale of the stock or action at law was untenable; the provisions for sale being useless in a case of a bankrupt corporation.

3. Bankruptcy ⊂=250(1)—In trustee's action for unpaid stock subscription, stockholders held liable for whole amount unpaid.

In a bankruptcy trustee's action to recover unpaid stock subscriptions, a judgment rendered against each stockholder for the whole amount unpaid upon his stock was proper as against objection that the judgment against each stockholder should have been for no more than his ratable proportion of the total indebtedness.

4. Bankruptcy ⊂=305—Judgment in trustee's action held not to charge interest on unpaid stock subscriptions.

In a bankruptcy trustee's action to recover unpaid stock subscriptions, a judgment determining the amount of interest which had accrued on the debts and giving judgment against certain stockholders for no more than the amount of their unpaid subscriptions, and in no case more than the debts and accrued interest thereon, *held* not objectionable as charging interest on the amount of the stockholders' unpaid subscriptions.

5. Bankruptcy ⊂=154 — Stockholders' claims cannot be set off against amounts unpaid on stock subscriptions.

In a bankruptcy trustee's action to recover unpaid stock subscriptions, the court did not err in refusing to offset claims of respective stockholders as creditors of the corporation against the amounts unpaid on their respective holdings, the unpaid amounts being assets of the corporation, and as such constituting a trust fund to be applied to payment of its debts in general, since by allowing such a set-off a creditor stockholder would obtain a preference.

6. Set-off and counterclaim ⊂=46(1) — Debts must be mutual.

In order to warrant a set-off the debts must be mutual, and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity.

7. Corporations ⊂=232(3)—Rule as to valuation of property taken in payment for stock as affecting fraud as to creditors stated.

Where fully paid up stock has been issued in consideration of a transfer of certain property to the corporation, the rule is that, where the corporation and stockholders have agreed on a given valuation for the property transferred, such value is conclusive unless fraudulent in purpose or effect, but, if the parties set a valuation in excess of what they knew or believed to be its true value, this is a constructive fraud upon the creditors, and the stock will be deemed paid only to the extent of the actual value of the property.

8. Bankruptcy ⊂=303(3)—Finding as to value of property transferred in payment of stock held supported by evidence.

A finding in a bankruptcy trustee's action to recover unpaid stock subscriptions that certain property transferred in consideration for the issuance of such stock was worth no more than one-quarter of the par value, and that such fact was known by the parties, and hence constituted payment for such stock only to that extent, *held* supported by evidence.

9. Evidence ⊂=352(5), 383(6)—Books kept by assistant secretary showing issuance of stock held admissible and prima facie evidence.

The fact that books of a corporation showing the issuance of stock were kept by the assistant secretary, and the entries made by him rather than the secretary was immaterial and such books were competent and prima facie evidence of the facts shown by the entries therein.

Department 1.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by W. W. Kaye, as trustee of the J. M. S. Oil Company, bankrupt, against T. J. Metz, J. W. Jameson, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Black & Black, D. S. Hammack, and Alfred L. Black, all of Los Angeles, E. W. Owen, C. L. Claflin and Anderson & Borton, all of Bakersfield, and Black, Hammack & Black, of Los Angeles, for appellants.

Stutsman & Stutsman, Flint & Mackay, and Flint & Jutten, all of Los Angeles, and W. W. Kaye, of Bakersfield, for respondent.

SHAW, J. This is an action by W. W. Kaye, as trustee in bankruptcy of the J. M. S. Oil Company, a bankrupt corporation, against alleged stockholders of said corporation to recover of each the balance alleged to be unpaid to the corporation for the

stock thereof belonging to him. The court found in favor of the plaintiff and gave judgment accordingly. The appeal is from the judgment. We take up the points presented in the order in which they appear in the appellants' brief.

[1] 1. The appellants contend that the action is barred by section 339 of the Code of Civil Procedure, the two-year statute of limitations. Appellants' theory is that the cause of action accrued and the period of limitation began to run as soon as the corporation was adjudged a bankrupt, if not before. The adjudication occurred more than two years before the action was begun.

This proposition is settled against the appellants by the decision in Union Savings Bank v. Leiter, 145 Cal. 696, 79 Pac. 441. In that case the bank had been adjudged insolvent under the bankrupt act of 1878, as amended in 1887 and 1895 (Stats. 1895, p. 172), and, as provided in that act, the directors proceeded to settle its affairs. The proceeding under the act was, in effect, a proceeding in insolvency, and the result was that ordinary actions could not thereafter be maintained against the bank, except as provided in the act. It was in legal effect the same as an adjudication in bankruptcy. People v. Superior Court, 100 Cal. 105, 34 Pac. 492; Long v. Superior Court, 102 Cal. 457, 36 Pac. 807; Crane v. Pacific Bank, 106 Cal. 69, 39 Pac. 215, 27 L. R. A. 562; Argues v. Union Savings Bank, 133 Cal. 139, 65 Pac. 307. The directors, in pursuance of their duties under the act, made a call for payment upon the stock subscriptions for the purpose of obtaining funds to pay the corporate debts. Upon the failure of Leiter to pay the amount called the action was begun. It was held (145 Cal. 705, 79 Pac. 441) that the statute of limitations did not begin to run against such action at the time of the adjudication that the bank was insolvent, nor until such time as the directors, acting as trustees in liquidation under the act, had duly made a call for payment by stockholders upon their subscription liability, and that the action was not barred until two years from the time of making such call. This case cannot be distinguished from the case at bar. In the present case the call for the enforcement of which this action was begun was made by the trustee in bankruptcy under the direction of the court less than two years prior to the filing of the complaint. Consequently it is not barred.

[2] 2. The next objection is that the call was invalid because the trustee did not make the assessment in the manner provided by sections 331 to 349 of the Civil Code, providing for assessments upon corporate stock and for the collection thereof by sale of the stock, or, at the option of the directors, by an ordinary action at law. It has been held that these provisions of the Code are so far a part of the contract of subscription that the corporate directors in the ordinary course of its business cannot enforce the payment of the price, except by proceedings in the mode prescribed by those sections, unless the subscription contract itself dispenses therewith. Los Angeles Athletic Club v. Spires, 166 Cal. 173, 135 Pac. 298. This rule, however, has no application to a suit in the nature of a creditors' bill to reach the unpaid subscription as assets of the corporation for the payment of its debts. The Code provisions contemplate that the directors may create a lien upon the stock for the amount of the assessment and enforce payment by a sale of the stock, or by a suit. The provisions for a sale would, of course, be wholly useless in the case of bankrupt corporation, or one having no property subject to execution. The enforcement of a call by suit would be no greater burden upon the stockholders when begun by a trustee in bankruptcy than if begun by the corporation itself. Consequently it is held that—

"When the corporation is insolvent, and the directors neglect or refuse to make a call, courts of equity will disregard the formality of a call and will order the unpaid subscriptions to be paid to a receiver for the benefit of the corporate creditors." Welch v. Sargent, 127 Cal. 83, 59 Pac. 319; 1 Cook on Corp. §§ 108, 207; In re Minnehaha, etc., Ass'n, 53 Minn. 423, 55 N. W. 598; Baines v. Babcock, 95 Cal. 591, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Daggett v. Southwest Packing Co., 155 Cal. 765, 103 Pac. 204; Edwards v. Schillinger, 245 Ill. 244, 91 N. E. 1048, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308.

In the present case the bankruptcy court, in pursuance of a petition filed therein, ordered the trustee to call in the entire unpaid assessment if necessary for the payment of the debts. This order was made upon a contest in the bankruptcy court. We think the objection is without merit.

[3] 3. Appellants also claim that judgment should have been rendered against each stockholder for no more than his ratable proportion of the total indebtedness instead of the whole amount unpaid upon his stock. Hunt v. Sharkey, 20 Cal. App. 690, 130 Pac. 21, is relied upon in support of this proposition. In that case the trustee in bankruptcy, under the order of the court, had sold the corporate assets at public auction, including the agreements of the several stockholders to buy and pay for their stock. The total subscriptions unpaid amounted to $30,050, and the plaintiff purchased all of them for $650. The debts of the corporation were less than half of the aforesaid balances. The plaintiff sued Sharkey for the entire balance due on his subscription. A judgment of nonsuit in the court below was affirmed on the ground that it was neither alleged nor proven that any assessment or call had ever been made upon the stockholders, either by the proper court or under its direction. The re-

mark in the opinion that an assessment in such a case should be for an amount against each stockholder that would "ratably distribute the liability of the bankrupt estate among the subscribers to the stock" was, of course, wholly unnecessary to the decision, since no assessment had been made. The real point decided was that the bankruptcy court could not by such sale subject the stockholder to a liability for his full subscription by selling the same outright to a purchaser at public auction and allow the purchaser to sue for the whole sum regardless of the amount realized by the sale to the benefit of creditors. The case is not authority on the point here presented, and the remark above quoted is contrary to the authorities.

"Corporate creditors compelling stockholders to pay their subscriptions are under no obligation to see that the payments made by the stockholders are proportionately equal. A court of chancery will compel subscribers to pay in full the amount of their unpaid subscriptions if the corporate indebtedness make it necessary, leaving them to seek contribution from the other stockholders." 1 Cook on Corp. § 211.

"The mere fact, however, that the whole amount of the balance due upon the complainant's stock may not ultimately be wanted, to pay the debts of the corporation, if all the other solvent stockholders should pay their ratable proportions of what still remains due upon their stock, does not necessarily render it inequitable that the receiver should compel the several stockholders to pay the balances due from them respectively, in the first instance. For, if any balance should remain in the hands of the receiver, after satisfying the debts of the corporation and the necessary expenses of executing the trust, it will be distributed among the several stockholders who shall have paid in full for their stock, so as to produce perfect equality among them. And it might do great injustice to the creditors of an insolvent corporation, to compel them to wait for the whole amount of their respective debts, until it could be ascertained, by a protracted litigation with all of the stockholders, how much each of such stockholders was liable and able to pay." Pentz v. Hawley, 1 Barb. Ch. (N. Y.) 123.

It is also held that a creditor suing in equity may pursue one stockholder alone. Edwards v. Schillinger, 245 Ill. 244, 91 N. E. 1048, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308. In giving its judgment the court below provided, so far as possible, for a just distribution of the liability by requiring that the plaintiff should collect from the defendants in the aggregate a sum not to exceed the total amount of indebtedness and interest of the bankrupt corporation. The objection is not well taken.

[4] 4. The objection of appellants that the court erred in allowing interest on the amount adjudged against J. W. Jameson and I. M. Jameson is based on a misunderstanding of the terms of the judgment. The court found that the corporate debts amounted to $31,307.82 on January 28, 1913, the date of the adjudication in bankruptcy. The judgment was rendered on July 9, 1918. It declares that interest amounting to $14,129.38 had then accrued on said debts, making a total of $45,437.20. J. W. Jameson owned 96,800 shares of the stock, on which three-fourths of the par value was unpaid, amounting to $72,600. I. M. Jameson owned 52,150 shares, on which $39,112.50 was unpaid. The judgment did not charge any interest on either of these amounts. J. W. Jameson, it will be noted, owed more on his stock than the total amount of the debts and interest. The judgment against him was only for that amount, to wit, $45,437.20. A similar judgment was given against Smith, another stockholder, who owed more than the total debts and interest. I. M. Jameson owed only $39,112.50 on her stock, which was less than the debts and interest. The judgment against her was for $31,307.82 (being the amount of the debts without interest), together with interest thereon from January 28, 1913, but in no event to exceed $39,112.50, the amount unpaid on her stock. The other defendants owed less than the principal of the debts, and the judgment against them was for the unpaid amount without mention of interest on the debts. The appellants are in no way injured by this method of stating the amounts adjudged against them, and it is not true that they were charged interest on the amount of their unpaid subscriptions.

[5] 5. The court did not err in refusing to offset the claims of the respective stockholders as creditors of the corporation against the amounts unpaid on their respective holdings. The unpaid amounts were assets of the corporation, and as such they constituted a trust fund to be applied to the payment of its debts in general. Sawyer v. Hoag, 84 U. S. (17 Wall.) 622, 21 L. Ed. 731; Scovill v. Thayer, 105 U. S. 152, 26 L. Ed. 968; Scammon v. Kimball, 92 U. S. 366, 23 L. Ed. 483; Sanger v. Upton, 91 U. S. 60, 23 L. Ed. 220. It is always possible in the liquidation of an insolvent estate, in contemplation of law, that the assets may not be sufficient to pay the debts. If a creditor stockholder were allowed to set off his debt against his unpaid stock liability, he would receive payment in full of his debt, while other creditors would receive a pro rata share only, if the assets would not pay the debts in full, and even their pro rata shares would be less because of the set-off.

[6] A creditor stockholder would thus obtain a preference. In order to warrant a set-off, "the debts must be mutual, and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity." 19 Cyc. 894. The trustee in bankruptcy held these stock liabilities, as above stated, as trust funds for the benefit of creditors. They are

not held by him in the same capacity as would be the case if the corporation was not insolvent and had itself sued the stockholder for his subscription, hence a set-off is not permitted. This is expressly decided in the four cases last above cited.

[7] 6. The J. M. S. Oil Company was organized on April 30, 1910, with a capital stock of $500,000, divided into 500,000 shares of the par value of $1 each. Five shares were subscribed for by each of the incorporators, namely, J. W. Jameson, J. M. Smith, William Jenkins, F. E. Borton, and T. Metz, all of whom were made directors. Thereafter, in July, 1910, the company purchased of the two directors Smith and Metz a 40-year lease held by them on 40 acres of land in the oil region, in consideration of the issuance to Smith and Metz of 400,000 shares of stock of the company to be issued as fully paid-up stock. The lease was transferred and the stock issued in accordance with this agreement. The appellants claim that this constituted full payment for the said shares, and that nothing is unpaid upon the stock so issued.

The rule applicable to such transactions is thus stated in Harrison v. Armour, 169 Cal. 790, 147 Pac. 1167:

"In such cases the rule is that, where the corporation and stockholder have agreed upon a given valuation for the property transferred, such valuation is binding and conclusive unless it is fraudulent in purpose or effect. But, if the parties have put upon the property a valuation in excess of what they knew or believed to be its true value, this is a constructive fraud upon the creditors, and the stock will be deemed paid only to the extent of the actual value of the property received in exchange for it."

The same doctrine was stated in Herron Co. v. Shaw, 165 Cal. 674, 133 Pac. 491, Ann. Cas. 1915A, 1265, and the court added:

"It is the value of the property in the condition it is in at the time of the exchange, the value as known to the parties and as they honestly believe it to be, that determines the liability, at least where there is no subsequent increase in value nor any intentional fraud. The parties may believe that the property will eventually rise to a value far above that at which it is exchanged, and they may willingly accept the hazard in view of the expected gain, but they have no right to demand that the creditor shall share the risk with them, in effect become their partner with no share in the profits, and lose his recourse on them if their speculation proves a bad one."

In the last case the court had found that the directors believed that the property could and would be developed so that eventually its value would exceed the amount at which it was taken in exchange for stock, although they did not believe that it was worth at the time of the exchange more than one-tenth of that amount. See, also, Hasson v. Koeberle, 180 Cal. 363, 181 Pac. 387.

[8] On this point the court found the making of the exchange as above stated, and that "at all of said times the said corporation and the officers and directors thereof knew and believed that said leasehold interest and said appurtenances above described * * * was actually worth no more than the sum of $100,000; * * * that at none of said times did said corporation, its officers or directors, have any reasonable ground for believing that said leasehold interest above referred to and appurtenances were worth or had a value, actual or otherwise, of $400,000, or any sum in excess of $100,000." The appellants claim that these findings are without support in the evidence. It must be conceded that the evidence on the subject is not as full and complete as might have been desired; but, on the other hand it is to be said that full and complete evidence on a subject of this character can seldom be obtained. The only one of the directors who was examined as a witness was J. W. Jameson. He testified that at the time of the transaction he believed the leasehold property was worth the sum of $400,000 and even more, but he based his belief on his opinion that by development it would produce a profit from the pumping of oil therefrom in excess of $400,000. Testimony of other witnesses familiar with the locality and with the business of oil production was given to the effect that the property was worth no more than $100,000, and probably less than that amount under the circumstances then existing in that vicinity and in the oil business. It was also shown that all of the directors, including Smith and Metz, the holders of said lease, were present at the meeting of the directors at which the transaction was closed, and that immediately after the passage of the resolution authorizing the purchase of said lease by the corporation for said amount of stock the same directors passed another resolution that the remaining 100,000 shares of stock of the company should be placed on the market at 25 cents a share. This was done accordingly, and a large part of the 100,000 shares was sold at that price. The greater part of the stock in question here was the stock originally transferred to Smith and Metz in exchange for said lease. It had been acquired afterwards by the appellants with knowledge of all the circumstances. The conduct of these parties in immediately putting the remaining stock on the market at 25 cents a share was a clear indication that they then believed that the stock already disposed of to Smith and Metz had no real value above that amount. It is true that Jameson testified that it was necessary to sell at that price in order to raise the money with which to develop the property, and that this proceeding was not an unusual one in the oil business. It still remains true,

however, that the court may well have inferred from this circumstance that the directors, all of whom consented to this sale at the reduced price, did not believe that the stock had a greater value. We are, therefore, of the opinion that the finding is sustained by the evidence, and that under the doctrine above stated it must be deemed paid up only to the extent of $100,000, or one-fourth of the par value.

[9] 7. It is contended that the findings that I. M. Jameson held 52,150 shares of the stock of the corporation is not sustained by the evidence. The books kept by the company were introduced in evidence. It appears that she had an office in which she carried on business, that this office was also used as the office of the corporation in which its books were kept, and that she was somewhat familiar with its affairs. These books show the issuance to her of more than that number of shares of the so-called "treasury stock" at the price of 25 cents a share, and a payment by her of a part of the price. The principal objection as to the effect of this evidence seems to be that the books were kept by one Rose, who was not the secretary of the corporation and that therefore the entries in the books were not competent evidence. The evidence shows, however, that he was the assistant secretary and acted in that capacity in keeping the books and making the entries therein. It is obvious that they have the same sanction as if the secretary had personally made the entries. They were competent evidence and sufficient prima facie evidence of the facts shown by the entries therein. 1 Cook on Corp. § 55.

No other points are presented. No brief has been filed on behalf of the appellant Hubbard. We find no sufficient ground for a reversal.

The judgment is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

186 Cal. 119

STRATTON et al. v. RAILROAD COMMISSION OF CALIFORNIA. (S. F. 9579.)

(Supreme Court of California. June 8, 1921. Rehearing Denied July 7, 1921.)

1. Waters and water courses ⊂=217—Water taken by mutual company for distribution to stockholders not taken for public use.

As respects the power of the Railroad Commission to fix rates, water taken by a mutual water company and distributed to its stockholders is not taken for a public use; the corporation being but a joint instrumentality of its stockholders, by means of which each diverts and has brought to him the water to which he in his own private right is entitled.

2. Waters and water courses ⊂=217—Water diverted by company authorized by riparian owner and distributed to land formerly owned by such owner not taken for public use.

Where a land company owning riparian lands, before subdividing and selling them, organized a water company and authorized it to divert the water to which the land company was entitled and supply it to the land for a specified price per acre, reserving the riparian rights, however, as appurtenant to the land, the water was not taken by the water company for a public use, as respected the power of the Railroad Commission to increase the annual rate fixed by the contract.

3. Waters and water courses ⊂=217—Water company diverting and supplying water to riparian lands under contract with former owner held not "public utility."

Where a land company owning riparian lands and also owning stock in a mutual water company, before subdividing and selling the lands with their pro rata share of the water, created a water company and authorized it, as agent of the owners of the land, to divert the water to which the land company was entitled and supply it to the land for $1 an acre, but reserved the riparian rights as appurtenant to the land, the water company was not a "public utility," and the Railroad Commission was without jurisdiction to increase the rate authorized by the contract.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

4. Waters and water courses ⊂=217—Views of parties or intention of company of weight in determining whether services public or private.

In determining whether a water company which is performing a service for a number of people of a certain class, and obligates itself to serve those who come within that class, is rendering a public service to a limited public or purely private services to each of a number of persons, the views of the parties themselves, or the intention with which the company undertook the service, may be of weight.

5. Public service commissions ⊂=19(1)—Findings of Railroad Commission not res judicata.

The Railroad Commission is essentially an administrative and legislative tribunal, and not a judicial tribunal in a strict sense, though many of its functions are quasi judicial, so that its orders are not judgments, and its findings of fact are not adjudications, and the facts found by it are not res judicata and as such finally and conclusively established between the parties for all purposes.

6. Waters and water courses ⊂=217—Finding of Railroad Commission that company was public utility not conclusive in another proceeding.

Under Public Utilities Act, § 65, providing that the orders and decisions of the Railroad Commission which have become final shall be conclusive in all collateral proceedings, a decision by the Commission that a water company was a public utility, in a proceeding by landowners claiming to be entitled to water under

a contract to compel distribution to them of their pro rata proportion, even if necessary to its order in such proceeding, was not conclusive in a subsequent proceeding to increase the company's water rates, since the statute only makes the orders and decisions of the Commission conclusive for the purposes for which they are made.

7. Waters and water courses ⟸217—Acquiescence of consumers in decision that water company was public utility held not to create relation.

Where a proceeding by landowners, claiming to be entitled to water from a water company, to compel distribution to them of their pro rata proportion, in which the Railroad Commission decided that the company was a public utility, resulted in a denial of the relief asked, so that the company and the consumers proceeded as before under the previously existing arrangement between them without change in their rights or in the relation between them, the consumers' acquiescence in the decision that the company was a public utility did not have the effect of bringing into existence the relation of public utility and consumers, when not previously existing.

In Bank.

Original application by W. N. Stratton and others for a writ of review directed to the Railroad Commission of the State of California to annul its order increasing water rates. Order annulled.

Harris, Johnson, Willey & Griffith, and Johnston & Jones, all of Fresno, James E. Kelby, of Los Angeles, and M. B. Harris and E. M. Harris, both of Fresno, for petitioners.

Scarborough & Bowen, of Los Angeles, for Empire Water Co.

Hugh Gordon, of Los Angeles, for respondent.

OLNEY, J. A corporation known as the Empire Water Company had been serving the landowners in a certain tract with water for irrigation at the price of $1 per acre per annum. The company applied to the Railroad Commission for an increased rate, the application was granted over the objection of some of the landowners, and the latter have applied to this court for a writ of review annulling the order of the Commission. The ground on which the writ is asked is that the relation between the water company and the landowners is not that of a public utility and consumers, so that the matter of rates between them is not within the jurisdiction of the Commission. The question in the case therefore is as to the character of that relation.

It seems that in 1905 a corporation known as the Empire Investment Company, and which we will hereafter refer to as the land company, was the owner of a large tract of land lying on both sides of the Kings river and riparian to it. As such owner the company possessed the right to the use of the water of the river on the land. The company also owned certain shares of stock in a mutual water company, entitling it to receive from that company certain water for its land. The land company desired to subdivide and sell the tract, and to facilitate the doing of this desired to put water upon the land. To accomplish this latter object it organized the water company, transferred to it what irrigation works had been constructed, agreed to finance it in the completion and extension of those works, and, without transferring its riparian right to water from the Kings river, authorized and empowered the water company as its agent to divert the water to which it was entitled and supply the same to its land for an annual charge of $1 per acre. The water company, on its part, issued all of its capital stock to the land company, and agreed to assume the burden of distributing to the land the water which it was authorized to divert as the agent of the land company. The land company also transferred to the water company its water stock in the mutual company, the water deliverable by reason of such stock to be distributed in like manner and under the same arrangement as the water diverted from the river under the riparian right.

The arrangement so outlined was made by a deed and written contract between the parties. The deed expressly states that it is not the intention to convey to the water company any riparian right, but that such right shall remain a part of and appurtenant to the land, and the contract recites that it is the desire of the parties to make a binding and permanent arrangement, whereby the system for supplying the land with water may be maintained and water be delivered perpetually to all of the lands of the land company for use thereon by it and by persons succeeding to its title.

The foregoing arrangement having been made, the land company proceeded to subdivide and sell its lands, and succeeded in selling substantially all, or at least substantially all that were irrigable. In making sales, it represented to purchasers that every acre had a perpetual water right attached to it, for which no charge in addition to the price of the land was made, and for whose enjoyment an annual charge of $1 an acre, for the purpose only of maintaining the irrigation system, was payable. In the sales contracts and deeds the contract between the land and water companies was referred to, and it was provided that with each acre went the riparian right to its pro rata of the water to which the entire tract was entitled. A number of years after the land had been sold, the water company applied to the Railroad Commission for an order increasing the annual rate of $1 fixed by its contract, and the

Commission made the order now under attack.

[1, 2] Such being the facts of the case, it will be noted at once that the water which the water company is engaged in distributing is not water devoted to a public use. The water taken is of two sorts; that taken under the right given by the ownership of the stock in the mutual water company, and that taken under the riparian right incident to the ownership of the land. It is settled in this state that water taken by a mutual water company and distributed to its stockholders is not taken for a public use, but that such a corporation is but the joint instrumentality of its stockholders, by means of which each diverts and has brought to him the water to which he in his own private right is entitled. See Thayer v. California Development Co., 164 Cal. 117, 135, 128 Pac. 21. As to the water taken by the company under the riparian right, the case is even clearer. The water company did not have even the legal title to such right. It was expressly reserved to the land company and its successors in interest in the ownership of the land, and the water company was avowedly only an agent for making the diversion for the landowners under the riparian right which was carefully preserved to each. This right, of course, is of a purely private nature. We might add that it is expressly admitted by counsel in the case before us that none of the water received or taken by the water company and by it distributed to the landowners is water dedicated to a public use.

[3] The fact, then, being that all of the water distributed by the water company is water received or taken by it, under private rights, the case comes directly within the authority of Allen v. Railroad Commission, 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249 (the Lake Hemet Case), and is controlled by it. There, as here, the owner of a large tract of land, which he desired to subdivide and sell, organized a water company, transferred to it certain water rights, and proceeded, through the corporation, to divert the water and bring it to the land. He then sold the land, and each purchaser desiring water thereon was required to purchase a "water certificate" from the water company, whereby he was entitled to receive a certain amount of water upon the payment of a certain annual rate. The sole question in the case was whether or not the water company, in serving the landowners under these circumstances, was serving them as a public utility company. It was held that it was not. We see no possible distinction between that case and this. The only differences pointed out are two. The first is that there the water company itself had the legal title to the water rights under which the water was diverted, while here it has not the title to the rights—the riparian rights—under which most of the water is taken. But this difference would seem only to emphasize the private nature of the arrangement. There would seem to be less reason for the view that the service performed by the company is a public service where it consists in taking water for the benefit of a landowner under a private right possessed by him and conveying the water to his land, than where it consists in taking the water under a right possessed by the company itself and distributing that water to the landowner.

The second point of difference pointed out is that in the Lake Hemet Case the water company issued to each purchaser of land a water certificate. But this certificate, as the opinion states, merely represented the contract between the water company and the purchasers, and the same function exactly is served in this case by the contract of the water company with the land company which was made for the express benefit of purchasers from the latter.

[4] The affirmative point advanced to sustain the position of the water company is that the service performed by it is merely that of carrying the water, and that, since it carries the water for all the landowners within a certain district, the service is of a public character. But this very point was likewise advanced in the Lake Hemet Case and there denied. 179 Cal. 73, 175 Pac. 466, 8 A. L. R. 249. It might be that under some circumstances, possibly under circumstances closely resembling those of the present case, the carriage of water would be a public service. Where a company is performing a service for a number of people of a certain class, and obligates itself to serve those who come within that class, as is the case here, it is not always easy to determine whether the service is rendered as service to a limited public and therefore a public service, although the class served is but a limited one, or is merely an aggregate of purely private services rendered to each of a number of persons. In such a case the view of the parties themselves, or the intention with which the company undertook the service, may well be of weight in determining the true nature of the service. In the present case it is fairly plain that the water company was not organized and did not enter upon its task of serving the landowners with any intent of doing so as a public utility, but just the contrary. The company, as we have said, was organized in 1905, and in the arrangement which it made with the land company the riparian rights of the landowners were expressly reserved to them, and it was provided that the water company should act only as their agent in diverting the water from the Kings river. Just two years before, this court had decided the case of Hildreth v. Montecito, etc., Co., 139 Cal. 22, 72 Pac. 395, and the language of the opinion so exactly covers the arrangement made by the water company here, and is so closely followed by the language of the ar-

rangement, that the inference is strong that the arrangement was made with the definite purpose of coming within that language. The court, in Hildreth v. Montecito, etc., Co. said (139 Cal. 29, 72 Pac. 398):

"Where a number of persons owning land are each entitled to take water from a common stream or source, for use upon their respective tracts of land, either by virtue of an appropriation under the Civil Code or by prescription, or as riparian owners, the water right of each is individual and several, and must be considered as private property and not the subject of public use, although the persons so owning interests in the stream are very numerous and their lands include a large neighborhood. The owners of such water rights may make a joint diversion, and may carry the water from the point of diversion in a common conduit, made with common funds, and in such a case, in the absence of a special contract to the contrary, they will be the owners in common of the diversion works and conduits; but the respective water rights will remain several and will remain private property. If the persons owning such rights see fit to form a corporation and delegate to such corporation the work of making the diversion and distribution, and of constructing and keeping in repair the dams and conduits, reserving to themselves their rights in the water, as was done in this case, they do not thereby dedicate or appropriate to public use the water thus reserved and used by them. The corporation becomes merely their agent for the purpose of serving their several interests, so far as they may be served by a common system of works; the water remaining the subject of individual ownership and private use as before. This principle was decided in substance in McFadden v. County of Los Angeles, 74 Cal. 571, and it was also recognized in McDermont v. Anaheim, etc., Co., 124 Cal. 114."

It is perhaps also worthy of note that in the case before us the water company did not agree or hold itself out as ready to transport any and all water for even the limited number of persons it was undertaking to serve. The only water which the company agreed to carry was the water deliverable upon the stock of the mutual water company and that which the landowners as riparian owners had the right to take from the Kings river. In other words, even for the limited class it agreed to serve, the water company did not agree to convey any water that might be offered to it.

[5, 6] Our conclusion, then, is that under the arrangement shown the relation between the water company and the landowners was private in character, and not that of a public utility and consumers. It is urged, however, that any question as to the character of the relation is concluded by a previous order of the Commission, which became final, holding that the water company was a public utility, and that the landowners are estopped from questioning the fact because of their acquiescence in that order, meaning by acquiescence, apparently, merely that the order was not contested and was allowed to become final, for nothing more than this appears. It seems that in 1913 some of the landowners owning lands on the west side of Kings river applied to the Railroad Commission for an order directing the water company to convey to that side of the river and there distribute a pro rata proportion of the water received upon the mutual water company's stock, which water had theretofore been distributed only to lands on the east side of the river. The application to the Commission was, of course, necessarily based on the assertion that the company was a public utility, and for that reason subject to the jurisdiction of the Commission. The company denied that it was a public utility, but took the position that the issue was really between east side and west side landowners, and that it was not concerned. Certain, at least, of the east side landowners resisted the application. The Commission decided that the company was a public utility, but denied the relief asked for. The claim now is that this decision as to the character of the company is res judicata. There is more than one answer to this, but one alone need be given. It is that the Commission is not a judicial tribunal in the strict sense, although many of its functions are quasi judicial, so that its orders are not judgments, and in particular its findings of fact are not adjudications, and facts found by it are not res judicata and as such finally and conclusively established between the parties for all purposes.

The Commission is essentially an administrative and legislative tribunal, and not a court. It frequently has to hear evidence and determine for its own guidance questions of fact, just, for example, as a board of supervisors frequently has to do, but that it must do these and similar things as a court does them does not make it a court, or change the character of its decrees from administrative or legislative orders into judicial judgments. Their character in this respect is not affected by the provision of section 65 of the Public Utilities Act (St. [Ex. Sess.] 1911, p. 54), that "in all * * * collateral proceedings the orders and decisions of the Commission which have become final shall be conclusive." There may possibly be some doubt as to just what the full effect of this statutory provision is, but, giving it the fullest effect to which it can reasonably be claimed it is entitled, it goes no further than providing that the orders and decisions of the Commission are conclusive for the purposes for which they are made. The point here is that they are not made for the purpose of adjudicating between litigants. For example, assuming that the statute should have full effect, it would follow that the previous order of the Commission could in no wise be attacked or its operation prevented in the present proceedings. The point is that it is not sought to do this, and our ruling that the water company is not a public utility does not do it.

That order stands, and it would stand even if it had been an order directing the company as a public utility to do something. But the operation of the order and its full recognition as a final, existing, and effective order does not involve or mean more as to questions of fact determined by the Commission in making the order than that such questions are conclusively determined for the purposes of the validity of the order. If the previous decision of the Commission that the water company involved here were a public utility had been necessary for the order which it made, which it was not, that fact, assuming that the fullest effect should be given to the statute, would be deemed conclusively established so far as questioning the validity of the order or its effective operation is concerned, but no farther. The peculiar effect of a determination of fact operating to conclude the question for other purposes than those of the very proceeding in which the determination is made is confined to strictly judicial determinations alone, and an order of the Commission is not of that character.

[7] As to the contention that the landowners acquiesced in the determination of the Commission as to the character of the water company, the answer is that it is wholly immaterial whether they did or not, unless by reason of the Commission's order and the acquiescence of the parties in it the relation between the company and the landowners was changed. If the Commission had held that the water company was a public utility, and then it and the landowners had not only acquiesced in the order, that is, failed to question it, but had proceeded upon the basis that the company was a public utility, then and there the relation of public utility and consumers would have come into existence between them, regardless of whether it had previously existed between them or not. This, and this alone, is the point of Franscioni v. Soledad, etc., Co., 170 Cal. 221, 149 Pac. 161, and Van Hoosear v. Railroad Commission, 194 Pac. 1003. Nothing of this sort appears in the present case. The Railroad Commission denied the relief which the west side landowners asked, so that the company and the landowners proceeded as before under the previously existing arrangement between them, and as a consequence without change in their respective rights or in the relation between them. That relation must, as we have said, be held, on the authority of Allen v. Railroad Commission, not to be one of public utility and consumers, and consequently not within the jurisdiction of the Commission.

The order of the Railroad Commission is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

186 Cal. 157

SOUTHERN PAC. LAND CO. v. MESERVE et al. (L. A. 6348.)

(Supreme Court of California. June 14, 1921. Rehearing Denied July 14, 1921.)

1. Public lands ⊜114(6)—Patent made pursuant to grant presumed to cover land covered by grant.

In an action to quiet title, in which plaintiff claimed title under a patent made pursuant to the grant from the United States to the Southern Pacific Railroad by Acts Cong. July 27, 1866, § 18, and March 3, 1871, § 23, which grant covered only odd-numbered sections, it will be presumed that the land is in an odd-numbered section; the patent itself being prima facie evidence thereof, shifting the burden upon defendants of proving the contrary.

2. Evidence ⊜83(1)—Official duty presumed to have been duly performed.

Official duty will be presumed to have been duly performed.

3. Evidence ⊜335(2)—Map of resurvey held competent to show section in which tract of land was situated.

In an action to quiet title, in which plaintiff claimed under a patent issued pursuant to a grant from the United States to the Southern Pacific Railroad under Acts Cong. July 27, 1866, § 18, and March 3, 1871, § 23, a map of a resurvey under Act Cong. March 3, 1909 (U. S. Comp. St. § 4824), *held* competent to prove the section in which the land was situated, where the map was made for the purpose of ascertaining the tracts listed for patent under such grant, and where defendants' only claim was under a desert entry shown to have been canceled.

4. Evidence ⊜46—Judicial notice taken of a letter of instructions from commissioner of land office to United States surveyor general.

The court will take judicial notice of a letter of instructions from the commissioner of the land office to the United States surveyor general regarding the resurvey it made under Act Cong. March 3, 1909 (U. S. Comp. St. § 4824).

5. Use and occupation ⊜10—Finding as to value of use of land wrongfully occupied held excessive.

In action for damages for wrongful occupation of land, where the use of the land was of no value without water, and where the only water available was that owned by the defendants, finding fixing the value of the use of the land during the occupation as $200 per year under Civ. Code, § 3334, *held* excessive in that the computation made allowed plaintiff damages for the use of the water which was defendants' own property; the use of the land without water being without value.

Department 1.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Southern Pacific Land Company, against Alvin R., E. A., and H. W. Meserve. Judgment for plaintiff against the

two last named defendants, and they appeal. Reversed.

Conkling & Brown, of El Centro, and Meserve & Meserve, of Los Angeles, for appellants.

Frank Thunen, of San Francisco, for respondent.

SHAW, J. This is an action to recover possession of a tract of land, to quiet title thereto, and for damages for the withholding of posssession thereof by the defendants. The action was dismissed as to Alvin R. Meserve, and judgment was given for plaintiff against the other defendants, from which judgment said defendants appeal. The pleadings, findings, and judgment were in the usual form. The claim of the appellants is that the findings and judgment relating to the title to the land and damages are contrary to the evidence. The finding concerning title is that the plaintiff was the owner of the land and was entitled to the exclusive possession thereof, and that the defendants had no right, title, or interest therein. The land in controversy is described as the southeast quarter of the southwest quarter of tract 188, township 13 south, range 14 east, San Bernardino meridian, as shown by the plats of existing official surveys of the United States.

[1] The evidence shows a straight chain of title to the plaintiff based on a patent from the United States to the Southern Pacific Railroad Company, executed on November 9, 1915. This patent was made in pursuance of the grant from the United States to the Southern Pacific Railroad Company made by the acts of Congress of July 27, 1866, and March 3, 1871 (14 U. S. Stats. 292, § 18; 16 U. S. Stats. 573, § 23). This grant covered only odd-numbered sections of land. The patent from the United States to the Southern Pacific Railroad Company included the particular tract in controversy as a part of tract 188 of township 13 south, range 14 east, San Bernardino meridan. The patent does not on its face show that tract 188 was in an odd-numbered section. Upon the theory that the acts of Congress aforesaid do not authorize a patent to the railroad company of land not in an odd-numbered section, appellants claim that in order to make the patent valid plaintiff should have proved that the tract claimed was a part of some odd-numbered section, and they contend that there was no evidence of that fact. There are two answers to this objection.

[2] There is a presumption that official duty has been duly performed. Since the proper officers of the United States selected and listed this land as a part of the land covered by said grant and issued the patent accordingly, the patent itself is prima facie, and in this form of action perhaps conclusive, evidence that the land was included in an odd-numbered section according to the survey of 1856, the survey in force at the date of said acts, if that fact was necessary to the validity of the patent. If in a collateral attack, such as the one here made, the patent is conclusive upon this point, there is no more to be said. If it is only prima facie evidence of the fact, it is sufficient, for in that event it puts the burden on the defendants to prove the contrary, and they introduced no evidence on the subject.

[3, 4] The other answer is that a map from the government records was given in evidence, showing that the land in controversy is part of section 5 of said township and range. Appellants contend that this map was not competent evidence, because, as they claim, it was a resurvey made under the act of March 3, 1909, (35 U. S. Stats. 845 [U. S. Comp. St. § 4824]), which act provides that no resurvey made thereunder "shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands" affected thereby. The map itself shows that the survey which it delineates was made in February and March in the year 1912. A letter of instructions from the commissioner of the land office to the United States surveyor general in California regarding this alleged resurvey, of which letter we may take judicial notice (S. P. Co. v. Lipman, 148 Cal. 491, 83 Pac. 445; S. P. R. R. Co. v. Wood, 124 Cal. 485, 57 Pac. 388), under date of August 14, 1912, shows that the map was made for the purpose of ascertaining and designating the tracts of land in certain townships, including the one in controversy, which under the grant aforesaid had been selected and listed for patent to the Southern Pacific Railroad Company under said grant. Furthermore, the only interest which the defendants claim in defense was under a desert land entry made by Alvin R. Meserve in 1907, and the evidence shows that on appeal by Meserve to the secretary of the interior this entry was canceled on February 28, 1912, prior to the completion of said resurvey and prior to the issuance of the patent to the Southern Pacific Railroad Company. It would seem, therefore, that whatever may be the state of the title of the plaintiff, the defendants had no title whatever except such as comes from the bare possession at the time said resurvey was made, and hence the same could not impair their rights. Under any view of the case, therefore, the finding that the title was in the plaintiff was fully sustained by the evidence.

On the subject of damages, the findings are that the action was begun on November 16, 1916; that during the three years immediately preceding that date the two appellants were occupying the land without the consent of the plaintiff and were withholding posses-

sion thereof from the plaintiff; that the value of the use of the said land during said occupation was $200 per year. The judgment awards plaintiff damages "at the rate of $200 per annum from November 16, 1913, until surrender of possession by said defendants to plaintiff."

The only witness on the subject of value testified, on examination in chief, that the value of the use of the land in the condition it was in during the said period was $200 per year. On cross-examination he said that the land was desert land, and that the use thereof was of no value whatever unless water was applied thereto for irrigation, that said defendants had used water on the land during said period, and that the value given by the witness was the value of the use with water. It further appeared that said defendants were able to get water on the land solely because they owned stock in Imperial Water Company No. 4, that no water for use on said land could be obtained except from said company, nor by any one from said company unless he was the owner of stock of said company, and that the plaintiff never owned any such stock. There was further testimony to the effect that during said period the land could not have been rented at all unless the owner could buy stock from said company so as to obtain water therefor. It also appeared that the plaintiff might have been able to obtain water stock from said company by paying the price therefor.

[5] It is claimed by the appellants that this evidence showed that the damages allowed were excessive. Their theory is that the value shown by the evidence—$200 per year—is composed of two elements: First, the value of the use of the land; second, the value of the use of the water; that water for use on land is a species of real property; that the plaintiff owned no water at all, whereas the defendants were owners thereof; and that the computation made by the court allows plaintiff damages for the use of defendants' property. We see no escape from this conclusion. It appears from the evidence that the stock of Imperial Water Company No. 4 was valuable and could not be had without the payment of money—how much does not appear. It is obvious, however, from the circumstances that the use of the land was of no value without water, and, as water was not available from any other source, that the water stock would probably be worth as much as the land.

The measure of damages for the wrongful occupation of land is the value of its use during the time of such occupation. Civ. Code, § 3334. In the circumstances here appearing this would not be the value of the use of both the land and the water. The plaintiff should have been required to prove the rental value of the land alone, taking into consideration the possibility and the expense of getting water thereon. That was its condition when defendants took possession. The application of the defendants' water right to the land was not, under the conditions existing in that locality, strictly speaking, an improvement on the land; in effect, it was a combination or union of two properties—water and land—the first owned by defendants; the second by plaintiff. It does not appear that the water stock ever became attached to or appurtenant to the land. Apparently it remains the property of defendants. The plaintiff was entitled only to the value of the use of that which belonged to it. The possibility that the plaintiff or its tenant could have procured water by buying the water stock was a circumstance which would tend to increase the rental value of the land. That value, so increased, would be all that the plaintiff should have been allowed to recover in this case. The damages appear to be excessive.

We are not to be understood as approving the form of the judgment on the subject of damages, as above quoted.

We find no reason for disturbing the finding with respect to the title to the property. It will be necessary, however, that there be a new trial of the issue on the subject of damages, and there should be a reversal for that purpose alone.

It is ordered that the judgment be reversed, that the cause be remanded for a new trial on the issue of the subject of damages, and for further proceedings in accordance with this opinion.

We concur: OLNEY, J.; LAWLOR, J.

186 Cal. 162

STORY v. RICHARDSON, State Treasurer (two cases). (Sac. 3061, 3062.)

(Supreme Court of California. June 15, 1921.)

1. Constitutional law ⟸16—Constitutional provision must be interpreted in consonance with objects and purposes.

Where constitutional provisions are not free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption.

2. Constitutional law ⟸16—Court, in construing ambiguous provision, may consider conditions, constitutional convention's debates, etc.

In aid of the interpretation of terms of a constitutional provision not entirely free from doubt, the court may consider conditions existing prior to and at the time of adoption of the provision under consideration, the debates in the constitutional convention, and the printed arguments for and against the provision submitted to the people at the polls.

3. Taxation ⊜382—Provision of Constitution for taxation of gross receipts applicable only to public utilities.

The provision of Const. art. 13, § 14, adopted in 1910, for taxation of electric companies in proportion to gross receipts, is applicable only to public utilities.

4. Taxation ⊜382—Owner of office building not a "public utility engaged in transmission or sale of electricity" within Constitution.

Owner of a 12-story office building in a city, in the sub-basement of which were located three 125-horsepower boilers, pumping engines, lighting engines, etc., to supply tenants occupying the building with light, heat, hot water, elevator, and cleaning service, though during one year he supplied electrical energy and steam to individuals not tenants, but occupying property in the vicinity of the building, *held* not a public utility engaged in the transmission or sale of electricity within Const. art. 13, § 14, providing for taxation in proportion to gross receipts of public utilities, despite the definition of public utility in the Public Utility Act, § 2.

In Bank.

Appeals from Superior Court, Sacramento County; Peter J. Sheilds, Judge.

Action by Walter P. Story against Friend William Richardson, Treasurer of the State of California. From the judgment, both parties appeal. Reversed in part and affirmed in part.

U. S. Webb and Frank L. Guerena, both of San Francisco, for appellant.

Amend & Amend, of Los Angeles, for respondent.

LENNON, J. This action was brought for the purpose of having an assessment declared null and void, and to recover from the Treasurer of the State of California the amount of a tax paid by plaintiff pursuant to said assessment, and under protest.

The plaintiff, Walter P. Story, is the owner of a 12-story office building in the city of Los Angeles, in the sub-basement of which are located three 125-horsepower boilers, pumping engines, lighting engines, vacuum sweeper engines, a hot water heater, filtering machinery, house pumps, etc. This machinery and equipment were placed in the building at the time of its construction, for the purpose of supplying the tenants occupying the building with light, heat, hot water, elevator and cleaning service, and have ever since been so used. During the year 1916, in addition to furnishing such service to the tenants of the building, plaintiff supplied electrical energy and steam to certain individuals, some of whom were not tenants of the Walter P. Story building, but occupied property in the vicinity of that building.

The terms of these sales were arranged by private contract between plaintiff and purchasers; plaintiff possessed no franchise, and neither the operation of the plant nor the sales in question were regulated in any manner by any public utility commission or body. The state board of equalization levied a tax upon the said machinery and equipment in plaintiff's building equal to 5.6 per cent. of the gross sums received from the special sales of electrical energy and steam for the year 1916, which gross returns amounted to $6,040.13 and $7,618.77, respectively. Plaintiff claims that this taxation was unauthorized, and that he is entitled to recover the amount thereof. The trial court held that plaintiff was not entitled to recover the tax based upon the gross sales of electrical energy, but that the tax based upon the gross sales of steam was without authority, and void. Plaintiff and defendant have each appealed from those portions of the judgment which are adverse to them.

Section 14 of article 13 of the Constitution of California provides:

"Taxes levied, assessed and collected as hereinafter provided upon railroads, * * * car companies, * * * companies doing express business on any railroad, steamboat, vessel or stage line in this state; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section shall include persons. * * *"

Subdivision "a" of this section of the Constitution provides that the railroads, car companies, express companies, telegraph companies, gas and electric companies previously mentioned shall annually pay a tax upon the property used exclusively in the operation of their business in this state; the amount of which tax shall equal certain percentages of the gross receipts of said companies; and that—

"Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided."

Defendant claims that this section of the Constitution confers upon the state the power to levy upon plaintiff's property the tax assailed in the instant case. Controverting this contention, plaintiff asserts that the section permits the state to tax the property of only those companies or persons engaged in the transmission or sale of electricity operating as public utilities, and that plaintiff is not a public utility, and therefore not taxable under the section.

[1-3] Where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in

contemplation at the time of their adoption. Accordingly it has been held, in aid of the interpretation of such terms, that the court may consider conditions existing prior to and at the time of the adoption of the provision under consideration, the debates in a constitutional convention, and the printed arguments for and against the provision submitted to the people at the polls. Matter of Russell, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152; Older v. Superior Court, 157 Cal. 770, 109 Pac. 478; Pacific Gas & Electric Co. v. Ind. Acc. Comm., 180 Cal. 497, 501, 181 Pac. 788. The provision of the Constitution here under consideration was adopted by the people of the state at the election of November, 1910, as the result of a movement to separate state and local taxation. In 1905 a commission was authorized to investigate the system of revenue and taxation in force in this state, and recommend a revision thereof. Stats. 1905, p. 390. The commission appointed proposed an amendment to the Constitution. Report of the Commission on Revenue and Taxation of the State of California, 1906, vol. II, Appendix to Journals of Senate and Assembly of California, session 1907. In 1910, after some alterations, the amendment was submitted to the people, and adopted by them. The amendment as adopted was fundamentally the same as that proposed by the commission in its report in 1906, and that report may, therefore, be considered in determining the meaning of doubtful provisions. The commission recommended a separation of the sources of state and county revenue, and that the property of certain "public utilities" and certain "other corporations," namely, banks and insurance companies, be taxed solely for the benefit of the state.

The theory of the report was that an ad valorem system of taxation was unsatisfactory, in that it failed to distribute equally the burden of taxation, particularly in view of the fact that, in certain cases, such as public utilities, banks, and insurance companies, the greatest value lay in the extent and nature of operation rather than in the intrinsic worth of separate items of property. Accordingly, a uniform scheme was proposed for the taxation of certain enumerated public utilities, including electrical companies, and that system was that the tax should equal a certain percentage of gross receipts; special methods were prescribed for the taxation of banks and insurance companies. Throughout the report electrical companies were classified and discussed as one group of "public utilities" to be taxed upon gross receipts. In the printed arguments submitted to the voters in 1910, at the time the constitutional amendment was voted upon, the "gross receipts" method of taxation was advocated solely for public utilities. It is clear, both from the report of the commission proposing the amendment, and the arguments advanced to those voting upon the adoption of the amendment, as well as from the nature of the amendment, that the provision for taxation in proportion to gross receipts is applicable only to public utilities. In discussing the amendment, the cases have generally assumed that the tax upon gross receipts was limited to public utilities, although the precise question has never before been presented for decision. San Francisco v. Pacific Telephone & Telegraph Co., 166 Cal. 244, 247, 135 Pac. 971; Pacific Gas & Electrical Co. v. Roberts, 168 Cal. 420, 143 Pac. 700.

[4] Plaintiff is also correct in his contention that he is not a public utility "engaged in the transmission or sale of * * * electricity" within the meaning of said section 14 of article XIII of the state Constitution. He is not engaged in the sale and distribution of electricity to the public at large, or any portion thereof, as such. It appears that plaintiff furnished electrical energy under special contract to certain occupants of his own building and to the occupants of an adjoining building. This was the extent of his special sales of electrical energy.

"The test is * * * whether the public has a legal right to the use, which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner." Farmer's Market Co. v. R. R. Co., 142 Pa. 580, 21 Atl. 989, 990.

"The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character." Thayer v. California Development Board, 164 Cal. 117, 127, 128 Pac. 21, 25.

There was no such general offer on the part of plaintiff. Plaintiff's plant was designed primarily and pre-eminently for supplying service to the tenants of his own building, and the special sales of electrical energy and steam were wholly subsidiary and ancillary to this main purpose. The surplus electrical energy at plaintiff's disposal was therefore so limited as to restrict the sale thereof to exceptional cases and prevent the indefinite offer of service essential to a public use.

Defendant claims that, notwithstanding plaintiff's restricted operation, he comes within the term "public utility" as defined by the "Public Utilities Act" of this state. That act provides that any one who generates or distributes electricity to the public, or any portion thereof, for any compensation or payment whatsoever is a public utility, subject to the provisions of that act. The same act defines "public, or any portion thereof" as—

"The public generally, or any limited portion of the public, including a person." Stats. 1915, pp. 115, 118, 119.

"Even a constitutional declaration cannot transform a private enterprise or a part thereof into a public utility, and thus take property for public use without condemnation and pay-

ment." Del Mar Water, etc., Co. v. Eshleman, 167 Cal. 666, 680, 140 Pac. 591, 596.

Consequently, it has been held that the definitions of public utilities contained in the Public Utilities Act must be construed as applying only to such properties as have, in fact, been devoted to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto. Allen v. R. R. Comm., 179 Cal. 68, 88, 175 Pac. 466, 8 A. L. R. 249. Inasmuch as plaintiff's property was employed solely in a private enterprise, the consummation of the special sales did not bring him within the scope of the definition contained in the act.

Since section 14, article 13, of the Constitution, was designed to authorize state taxation in proportion to gross receipts only in the case of public utilities, and plaintiff is not operating as a "public utility," his property is not taxable thereunder. It follows that the tax based upon gross sales of electricity was without authority, and void. It therefore becomes unnecessary to pass upon the point raised by the state treasurer in his appeal, namely, that the sales of steam were taxable as a by-product of the business in electricity, and that the trial court erred in holding void the tax based upon gross receipts from sales of steam.

The trial court found that plaintiff was not furnishing the commodities of electricity and steam as a public service concern. Therefore, with the exception of the single conclusion of law to the effect that the tax based upon plaintiff's gross sales of electrical energy for the year 1916 was valid, the findings of the trial court are in accordance with the allegations of plaintiff's complaint, and will support the judgment wholly in his favor. That portion of the judgment which declares that plaintiff recover nothing from defendant on account of the tax based upon the sales of electrical energy is reversed, with directions to the trial court to enter a judgment declaring the said tax void, and that plaintiff recover the amount thereof. That portion of the judgment which grants plaintiff a recovery on account of the tax based upon the sales of steam is affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; LAWLOR, J.; OLNEY, J.; SHAW, J.; WILBUR, J.

(186 Cal. 183)

TURLOCK IRR. DIST. v. WHITE, Tax Collector, et al. (Sac. 2935.)

(Supreme Court of California. June 15, 1921. Rehearing Denied July 15, 1921.)

Taxation ⟸217—Irrigation district not a "municipal corporation" within exception from exemption from taxation.

An irrigation district organized under the laws of California is not a "municipal corporation," within the amendment of 1914 to Const. art. 13, § 1, excepting from the exemption from taxation of property belonging to municipal corporations, "such lands and the improvements thereon located outside the municipal corporation owning the same as were subject to taxation at the time of their acquisition by the county, city and county, or municipal corporation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Corporation.]

Sloane, J., dissenting.

In Bank.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the Turlock Irrigation District, a public corporation, against James G. White, Tax Collector of Tuolumne County, and the County of Tuolumne. From judgment enjoining collection of taxes, defendants appeal. Affirmed.

Rowan Hardin, of Sonora, for appellants.

P. H. Griffin and Griffin, Boone & Boone, all of Modesto, for respondent.

PER CURIAM. This appeal is by defendants, from a judgment enjoining them from attempting to collect certain taxes levied by the defendant county against lands of the plaintiff.

The plaintiff, an irrigation district, whose corporate boundaries are wholly within the counties of Merced and Stanislaus, is the owner of land situated in the county of Tuolumne. It is the taxation of this land by the county of Tuolumne that is sought to be enjoined.

Authority to levy and collect such tax is claimed by the defendant county under the amendment of 1914 to section 1 of article 13 of the state Constitution. As this section of the Constitution previously stood, it provided that no property belonging to the "United States, this state, or to any county or municipal corporation within this state" shall be subject to taxation. The amendment excepts from such exemption—

"such lands and the improvements thereon located outside of the county, city and county, or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation."

The entire controversy in this case is as to whether or not an irrigation district, organized under the laws of California, is a "municipal corporation" within the meaning of this section of the Constitution.

This amendment to the Constitution (article 13, § 1) was submitted by the Legislature to the people in November, 1914. A printed argument in favor of its adoption accompanied the publication of the proposed amendment, a copy of such argument being mailed to each voter in the state as required by law.

Sections 1195, 1195a, 1195b, Pol. Code. This argument in favor of the proposed amendment clearly explains its purpose, and the voters, in acting upon the amendment, must be deemed to have considered such reasons in interpreting the general term "municipal corporation" used in the proposed amendment. The argument, in part, was as follows:

"* * * This amendment does not seek to hinder in any way the development of enterprises by and for the benefit of counties or municipalities, in any part of the state, but to protect from loss those counties into which they may enter for such purposes. A concrete illustration is afforded by the counties of Tuolumne, Mono, and Inyo. In furtherance of obtaining a large water supply, for municipal and other uses, the purchase by San Francisco in Tuolumne county aggregated over $1,000,000 worth of property. Los Angeles, in Owens river valley, acquired by purchase over 75,000 acres of land, amounting to over one-sixth of the assessed value, and more than one-fourth of the located agricultural land of the county. The city of Los Angeles has acquired large holdings in Mono county. Before such acquisition the area was taxpaying property. Since the acquisition in Inyo county, the city of Los Angeles has continued to pay taxes, as a matter of justice, but its payments are accompanied by protests, in order to preserve to it the right of refusal to pay which many contend that it has under the constitutional provision as it stands at present, and that it might sustain in case of legal contest. While not abandoning any right from a technical standpoint, the city recognizes the justice of the contention upon which this amendment is based.

"The city of San Francisco refuses absolutely to pay one dollar in taxes in Tuolumne county on their $1,000,000 worth of property, contending they are exempt from such a tax by a constitutional provision. * * *

"It would be possible for an acquiring city or county to virtually destroy the government of a small county by acquiring, for one purpose or another, for municipal use, the substance of its revenue yielding property. That such a result would be improbable and extreme does not alter the fact of its possibility. In the Inyo county instance, refusal by the city of Los Angeles to pay taxes upon real estate which has heretofore borne its due share of the expense of the county government would be a serious matter, either curtailing the county's welfare or imposing a heavier burden on other property. With such a result possible to a fractional extent, it would be equally possible to the fullest extent that the investing city might see fit to go.

"It is to remedy such a condition that this amendment was proposed. Uncertainty on the matter should be removed by a legal assurance that, while natural resources within one county may be directly used for the upbuilding of another, lands or other property already upon the invaded county's tax roll shall continue to bear its shares of maintaining the local government.

"It is hoped, therefore, that the justice of this amendment will insure for it the approval of the people of the state."

It is apparent that the term "municipal corporation" was thus presented to the people as synonymous with such corporations as Los Angeles and San Francisco; that is to say, as municipal corporations in the strict technical sense.

In their brief appellants say:

"To start with, it will be admitted that by the late decisions of the Supreme Court said decisions have, by an exceedingly fine analysis, determined that, as a technical, legal proposition, an irrigation district is an arm of the state government, or a public corporation, and not a municipal corporation, as the term municipal corporation is technically known."

However, appellants' contention is that the term "municipal corporation," in its popular acceptation, includes irrigation district, and, consequently, this popular meaning is to be applied, rather than a technical one. The rule appellants rely on is thus stated in a recent case (City of Pasadena v. Railroad Commission of the State of California, 192 Pac. 25, 10 A. L. R. 1425):

"* * * The Constitution, 'unlike the acts of our Legislature, owes its whole force and authority to its ratification by the people; and they judged of it by the meaning apparent on its face, according to the general use of the words employed, where they do not appear to have been used in a legal or technical sense.' Miller v. Dunn, 72 Cal. 465, 14 Pac. 27, 28, 1 Am. St. Rep. 67. Where a word has a popular and also a technical meaning, 'the courts will accord to it its popular meaning, unless the very nature of the subject indicates or the context suggests that it is employed in its technical sense.' Weill v. Kenfield, 54 Cal. 113."

Other instances of its application may be found in Miller v. Dunn, 72 Cal. 462–465, 14 Pac. 27, 1 Am. St. Rep. 67; Towle v. Matheus, 130 Cal. 574–577, 62 Pac. 1064; San Pedro etc., v. Hamilton, 161 Cal. 610–617, 119 Pac. 1073, 37 L. R. A. (N. S.) 686; Perrin v. Miller, 35 Cal. App. 129–132, 169 Pac. 426.

In support of the proposition that the term "municipal corporation" as commonly understood includes an irrigation district, the following quotation from Merchants' Bank v. Escondido Irrigation District, 144 Cal. 329, 77 Pac. 937, is cited:

"* * * But the term municipal, as commonly used, is appropriately applied to all corporations exercising governmental functions, either general or special; and, indeed, this must be taken as the definition of a public or municipal corporation."

Appellants also cite the following from In re Madera Irrigation District, 92 Cal. 296, 319, 28 Pac. 272, 277 (14 L. R. A. 755, 27 Am. St. Rep. 106):

"The municipal corporations which may be thus created are not limited to cities and towns. The constitution makes provision in various places for municipal corporations, other than

cities and towns. Article XI, §§ 9, 10, 12, 16. In each of these sections provision is made with reference to the government or officers of 'county, city, town, or other public or municipal corporation,' thus clearly indicating that there may be municipal corporations other than those of a town or city."

The fact that the argument submitted to the voters indicated that the term "municipal corporation" was used with technical accuracy requires that the rule relied upon by appellants be applied against them, rather than in favor of their contention, because the very nature of the subject, the context of the amendment, and the manner and reason for its presentation all require that it be construed in its technical sense, and, hence, it is within the exception of the rule of construction above stated. There are, however, other cogent reasons for concluding that an irrigation district is not included within the term "municipal corporation" as used in the amendment. The nature of an irrigation district has been a matter of judicial investigation and interpretation, and it has been held that such a corporation is not a municipal corporation, but a "public corporation for municipal purposes." Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. As to swamp land, drainage, levee, and reclamation districts, similar to irrigation districts, it has been held that they were not municipal corporations. People v. Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 676; People v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207; Swampland Dist. No. 150 v. Silver, 98 Cal. 51, 32 Pac. 866, and Reclamation District No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277. See, also, People v. Selma Irrigation Dist., 98 Cal. 206, 208, 32 Pac. 1047, and cases there cited. The amendment in question must be considered to have been framed and submitted to the people with these decisions in mind, by which it was settled that such corporations were not "municipal corporations."

It is worthy of note that at the very election at which this constitutional amendment was adopted several amendments were submitted in which the term "irrigation district" was used. For illustration, section 13, § 11, was amended to prohibit the Legislature with interfering with any county, city, town, or municipal improvement, etc.—

"except that the Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state."

Article 11, § 13½, was amended to include "irrigation district" in the phrase "county, city and county, city, town, municipality, or other public corporation," so that the phrase now reads: "Any county, city and county, city, town, municipality, irrigation district, or other public corporation," etc., thus tending to impress upon the voter that the term "municipality" did not include an "irrigation district."

At the same election, article 11, § 6, was amended by the people. This section restricts the power of the Legislature in the formation of municipal corporations, to providing by general law for their formation, and prohibits the formation of such corporations by special statute. That section uses the term "municipal corporation," as synonymous with "cities and towns." The section reads, in part, as follows:

"Sec. 6. Corporations for municipal purposes shall not be created by special laws; but the Legislature shall, by general laws, provide for the incorporation, organization and classification, in proportion to population, of cities and towns. * * *"

If it were intended by the Legislature and by the people to use the term "municipal corporation" with its broadest possible meaning in article 13, § 1, supra, it is reasonable to suppose that language similar to that contained in article 11, § 13½ supra, would have been employed, expressly including, as does the latter section, the term "irrigation districts."

One of the important rules of constitutional construction is thus stated by Mr. Cooley:

"If a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic aids which may be resorted to, and which are more or less satisfactory in the light they afford. Among these aids is a contemplation of *the object to be accomplished or the mischief to be remedied or guarded against* by the clause in which the ambiguity is met with." Cooley, Const. Lim. p. 100. (Italics the author's.)

In view of the general policy of the law and the great necessity on which that policy rests, that property held by public corporations shall not be taxed by the state, much less by other public corporations, and the plain fact that this particular amendment of the constitution was manifestly inspired by the desires of three counties to prevent Los Angeles and San Francisco from escaping taxation on property owned by them situated outside their limits for the carrying on of public water systems, together with the further fact that the Constitution itself, in other parts thereof, describes "municipal corporations," and provides for their creation in such a way that it cannot be doubted that none other than the ordinary municipal corporations were referred to, it is clear that irrigation districts were not made taxable by the exception contained in the amendment in question.

It should be stated that it is conceded that irrigation districts were not taxable before the amendment of 1914, and are not now, un-

less such taxation is authorized by the amendment, but it is contended that they then were exempt because of the special exemption of the property of "municipal corporations" contained in such section, and that such irrigation districts are now taxable under the special exception in the amendment authorizing the taxation of "municipal corporations." To the contrary, such exemption existed because of the express exemption of the property of "the state," and contained in that section because of the implications in favor of the exemption of public property. See Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 Pac. 668, and cases therein cited for a discussion of the principle applicable. See, also, Webster v. Board of Regents, 163 Cal. 705, 126 Pac. 974, and cases cited. Reference may also be made to Central Irrigation District v. De Lappe, 79 Cal. 351, 21 Pac. 825, and Lindsay-Strathmore Irrigation District v. Superior Court, 187 Pac. 1056, for a discussion of the similarity of the organization of reclamation and irrigation districts.

The language quoted in the dissenting opinion from Southern Pacific Co. v. Levee Dist. No. 1, 172 Cal. 345, 156 Pac. 502, read in the light of the express statement in the opinion that such districts are not "municipal corporations," would indicate that the court considered that the property of the district was "state property," rather than property of a "municipal corporation." The same view is taken in People v. Reclamation District No. 551, 117 Cal. 114, 48 Pac. 1016, where it is said:

"Certainly, these districts were not municipal corporations as that term is used in the Constitution." "If these districts can be said to be corporations at all, I think they are properly called public corporations for municipal purposes. That phrase means no more than that they are state organizations for state purposes. They certainly are not municipal corporations in the strict sense."

Similarly, in Re Madera Irrigation District, 92 Cal. 296, 322, 28 Pac. 272, 278 (14 L. R. A. 755, 27 Am. St. Rep. 106), it was said:

"The property held by the corporation is in trust for the public, and subject to the control of the state."

However, the reasons presented for the conclusion reached in Southern Pacific Co. v. Levee Dist. No. 1, supra, were so numerous and cogent that the differentiation between the various forms of taxing agencies was of little, if any, weight in arriving at the conclusion that it was intended by the amendment to prohibit all such agencies from exercising the taxing power over railroad corporations, that the decision is of little or no assistance in reaching a conclusion on the question involved here.

Judgment affirmed.

ANGELLOTTI, C. J., and WILBUR, SHAW, OLNEY, LENNON, and LAWLOR, JJ., concur.

SLOANE, J. I dissent. The reasoning of the majority opinion that this constitutional provision should be strictly interpreted against the tax in question because all intendments of the law are against the taxation of public property cannot apply in this instance, because here the provision involved is avowedly dealing with the taxation of public property.

Section 1 of article 13 expressly defines what classes of public property shall be exempt from taxation. It discloses, first, that "all property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed." Standing alone, under the rule cited, this might not include public property, exempt under the general rule of public policy, but the section proceeds with a proviso which shows that it is dealing with the subject of taxation as applied to both public and private property.

The proviso is that various enumerated classes of property, including—

"such as may belong to the United States, this state, or to any county, city and county, or municipal corporation within this state, shall be exempt from taxation."

It is entirely clear that unless the property of an irrigation district is either the property of the state or of a municipal corporation it is not exempt from taxation at all. When the Legislature or Constitution has made express provision for the exemption of certain classes of public property, the inference is clear that it did not intend that other classes should be exempt. 26 R. C. L. p. 291; Chicago Sanitary Dist. v. Martin, 173 Ill. 243, 50 N. E. 201, 64 Am. St. Rep. 110; Bd. of Trustees v. Atlanta, 113 Ga. 883, 39 S. E. 394, 54 L. R. A. 806. But under our Constitution the matter is made conclusive by the direction that all property not so enumerated shall be taxed.

This court was confronted with such an alternative in the case of Reclamation Dist. v. Sacramento, 134 Cal. 477, 66 Pac. 668. As stated in the opinion in that case:

"The sole question presented is, whether property acquired by a reclamation district as necessary and indispensable to the execution of its objects is subject to taxation for state and county purposes."

Exemption was claimed for this property by the district under section 1 of article 13 of the Constitution as it read prior to the amendment of 1914, exempting all property which belongs to "this state, or to any county or municipal corporation within this state." Reviewing the authorities on the question as to whether or not a reclamation district was a municipal corporation, without directly

passing upon this point, the court disposes of the case upon another theory. It says:

"It is not necessary to hold this property, thus acquired, to be the property of a municipal corporation, in order to make it exempt from taxation. It would be sufficient to hold that it is public property of the state, within the meaning of the Constitution."

It requires great latitude of construction to hold the property of a reclamation district as property "belonging to the state," but, considering the nature of such district organization, with its limited corporate powers under the law as it existed at the time covered by this decision, it was perhaps a more logical conclusion than to class it as a municipal corporation.

The Supreme Court of Illinois, in determining the liability of a drainage district of the city of Chicago to taxation upon property it owned outside the corporate limits of the city under analogous constitutional provisions (Chicago Sanitary Dist. v. Martin, supra), held that, as the legal title to the property was vested in the district, it could not be held to be property "belonging to the state."

People v. Morrill, 26 Cal. 336, defines "lands belonging to the state" as those—

"(1) Which it holds by virtue of grants from the United States; (2) those which it owns by reason of its sovereignty."

In either event, the term implies ownership, and not mere authority and control over. In view of the fact that the law of California governing irrigation districts expressly provides that "the legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district," it would be an elastic use of terms to hold that the interest of the state in such lands amounts to such ownership as to justify holding such property to belong to the state.

As previously pointed out, the only remaining alternative which will permit of any exemption of irrigation district property at all is to include such district, for the purposes of this section, as a "municipal corporation."

It, of course, follows that, if the general exemption clause of section 1, art. 13, of the Constitution, includes irrigation districts under the classification of "municipal corporations" the exception from such exemption of "lands and the improvements thereon located outside the county, city and county or municipal corporation owning the same" must also apply to such irrigation districts, for the term "municipal corporations" is obviously used in the same sense in both connections. But the most persuasive reason for classifying an irrigation district as a municipal corporation under this constitutional provision is that any other construction, in my opinion, defeats the very apparent purpose of the amendment.

It is doubtless true, as set forth in the argument presented to the voters on the submission of this amendment, that the inducing cause of the amendment was the acquisition of large real estate interests in the counties of Tuolumne, Mono, and Inyo for reservoir purposes by the distant cities of Los Angeles and San Francisco. These corporations happened to be governmental municipalities, but that was not the circumstance which appealed to the voters of these counties and others likely to be invaded by public power and water purveyors.

The real purpose was to prevent abuses threatened and likely to recur from permitting private lands subject to taxation in one jurisdiction to be taken over for public uses by other communities, and, by depriving the territory in which the lands are situated of the revenue from this taxation, thus throw part of the burden of such public use upon territory not benefited by it. What possible reason or justification could there be for protecting these outside jurisdictions from the incursions of towns and cities in search of water storage and distribution, and leaving them exposed to precisely the same invasion by extensive irrigation districts outside their territory? The gist of the matter clearly appears in the part of the argument for this constitutional amendment which says:

"Uncertainty on this matter should be removed by a legal assurance that, while natural resources within one county may be directly used for the upbuilding of another, lands or other property already upon the invaded county's tax roll shall continue to bear its share of maintaining the county government."

The direct object of the amendment was to protect and conserve the revenues of the invaded territory, and with that object in view it can make no difference whether the public use acquired is by a city or county, or some other public corporation exercising municipal functions.

No violence is done to the rules of construction under the interpretation of the term "municipal corporations" here contended for. It is common knowledge that in popular usage the term "municipal corporation" is understood as applying to all departments of state organization exercising public functions, and the same general use of the term is common in judicial decisions and with law text-writers.

In 19 Ruling Case Law, p. 691, it is said that "municipal" in its primary sense means "pertaining to a town or city or to its local government," but it also declares that the word "municipal" has two meanings, one of which is pertaining to the internal government of a state or nation, and in that sense every corporation formed for governmental purposes is a municipal corporation"; and, further, at page 696, it is said:

"The legislature frequently organizes the people of a certain territory into a district having certain limited powers for the carrying out of some particular public purpose. Familiar ex-

amples are school districts, * * * irrigation districts, levy districts; * * * but it has been held that such a district is a 'corporation for municipal purposes.'"

Such district organizations are very commonly referred to in the California decisions as public corporations for municipal purposes, or quasi municipal corporations. Merchants' Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937; People v. Reclam. Dist., 117 Cal. 120, 48 Pac. 1016; Irrigation Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825; Irr. Dist. v. Williams, 76 Cal. 366, 18 Pac. 379; Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067; Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. 40; Jenison v. Redfield, 149 Cal. 500, 87 Pac. 62; Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316; Healey v. Anglo-Calif. Bank, 5 Cal. App. 278, 90 Pac. 54; Dean v. Davis, 51 Cal. 409.

The same classification is maintained in the federal courts in the consideration of such districts under the laws of California. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 174, 17 Sup. Ct. 56, 41 L. Ed. 369; Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773; Herring v. Modesto Irr. Dist. (C. C.) 95 Fed. 705.

In the construction of words used in a constitution a more general and inclusive definition is often recognized than in the more technical provisions of a statute or a contract. A constitution is the formulation of broad general rules of governmental policy submitted to the popular will and understanding for their adoption.

"Where a word, having a technical as well as a popular meaning, is used in a constitution, * * * the courts will accord to it its popular signification." Weill v. Kentfield, 54 Cal. 111; Miller v. Dunn, 72 Cal. 462, 465, 14 Pac. 27, 1 Am. St. Rep. 67; Towle v. Matheus, 130 Cal. 574, 577, 62 Pac. 1064; San Pedro, etc., v. Hamilton, 161 Cal. 610, 617, 119 Pac. 1077, 37 L. R. A. (N. S.) 686; Perrin v. Miller, 35 Cal. App. 129, 132, 169 Pac. 426.

This rule of liberal construction appears to have been applied by this court in So. Pac. Co. v. Levee Dist. No. 1, 172 Cal. 345, 156 Pac. 502, construing the use of the word "municipal" in an amendment to the state Constitution in a way which we think has a marked bearing on this case. In the amendment of the Constitution by adoption of the new section 14, art. 13, for the purpose of changing the system of taxation of corporations, it was declared that the system of taxation provided should "be in lieu of all other taxes and licenses, state, county, and municipal." Levee district No. 1 of Sutter county, being a levee district organized under the act of the Legislature for the creation of such districts, undertook to levy a tax upon property of the Southern Pacific Company within such district, and attempted to sustain the validity of such tax against the plea of this constitutional amendment, on the ground that it is a district, and not a municipality, and that the amendment does not exempt from district taxation. This court, in the case cited, while holding directly that such levee district was not a municipal corporation, decided, upon an exhaustive consideration of the purposes of the section, and the obvious intent of the constitutional amendment, that district taxes of this nature were included under the term "municipal," and says:

"It would appear to be beyond peradventure, therefore, that, when the Constitution declared that the state taxes 'shall be in lieu of all other taxes, state, county and municipal,' it used the words 'state, county and municipal,' as inclusive and descriptive, and not as designed to exempt districts from its operation. * * * "

An irrigation district probably comes nearer than any other of the subordinate public corporations of the state to meeting the technical requirements defining a municipal corporation. It has its own directors and officers, conducts its own elections, can sue and be sued in its corporate name, issues bonds, levies, collects, and disburses its own revenues, acquires and holds property, both real and personal, in its own name, and in the management of its internal affairs is entirely independent of the county and state, aside from the control of general laws.

While the courts have frequently drawn the line between public corporations of a quasi municipal character and those performing strictly municipal functions, it has usually been for the purpose of defining limitations upon the political powers of these lesser state agencies, but no reason seems to exist why the distinction should be pushed so far in this case as to exclude irrigation districts from the operation of the constitutional amendment under discussion.

198 Cal. 143

PEOPLE v. CLIFTON. (Cr. 2331.)

(Supreme Court of California. June 13, 1921.)

1. Homicide ⟸238 — Evidence held not to show defendant so intoxicated as to be without appreciation of his act or ability to form a deliberate intent to kill.

In a prosecution for murder, evidence *held* to show that the defendant was not intoxicated to such an extent as to render him unconscious of or without appreciation of the nature of his act in so cutting deceased with a knife as to cause death and not to show him incapable of forming a deliberate intent to kill.

2. Homicide ⟸22(2), 180 — Instruction on murder requiring deliberate intent to kill, and permitting jury to consider defendant's intoxication, approved.

The jury was correctly instructed that to constitute first degree murder the unlawful killing must be accompanied by a deliberate and

clear intent to kill, and that it should consider the evidence as to defendant's intoxication at the time, together with other evidence, to determine defendant's purpose or intent in committing the act.

3. Criminal law ⟸763, 764(1) — Instruction that prosecution must establish "each material fact so charged" in indictment not objectionable as meaning that indictment's allegations "are facts and true."

The claim that an instruction that every material allegation of the indictment was put in issue by the plea of not guilty, and that it devolved on the prosecution to establish to a moral certainty and beyond a reasonable doubt "each material fact so charged," was an instruction to the effect that allegations of the indictment "are facts and true," *held* without foundation.

4. Witnesses ⟸277(4), 380(2) — Defendant's statements shortly after homicide held admissible to discredit his testimony; defendant may be cross-examined as to all matters concerning direct examination.

In a prosecution for murder the state may fully cross-examine defendant as to all matters concerning his examination in chief under Pen. Code, § 1323, and in so doing may show by his own admissions that he has made a statement contrary to his direct examination to discredit him, so that his answers to questions soon after the homicide as to the cause of trouble between him and deceased, where not amounting to a confession of guilt, were admissible as to his credibility.

5. Criminal law ⟸786(1) — Refusing of instruction as to defendant's credibility held not error in view of the facts.

Where defendant's answers to questions as to cause of difficulty shortly after homicide were introduced to discredit his testimony in chief, an instruction that if defendant was at such time, because of intoxication, unable to understand questions or answers they should not be considered, while hardly objectionable, was not erroneously refused, where, in view of the character of answers given, it appears that witness sufficiently understood and intelligently answered questions.

6. Homicide ⟸253(1) — Evidence held sufficient to sustain conviction of first degree murder.

In a prosecution for first degree murder, evidence *held* sufficient to sustain conviction.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

David Clifton was convicted of murder in the first degree, with penalty of death, and from the judgment and order denying new trial he appeals. Judgment and order affirmed.

Ralph W. Smith, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

ANGELLOTTI, C. J. The defendant was convicted of murder of the first degree for the killing of one Henry Smith on April 9, 1920, and was adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial.

The killing was admitted, but it was claimed on the trial that it was done in lawful self-defense. In view of the record it cannot reasonably be contended that the jury was not justified in concluding otherwise and finding the defendant guilty. It is earnestly urged, however, that the evidence was not such as to justify a verdict of murder of the first degree, for want of testimony to support a conclusion of the presence of the deliberation and premeditation essential to such a verdict.

[1] While there was evidence which would strongly justify a claim before the jury that the homicide was the result of a drunken quarrel between defendant and deceased, without any element of deliberation and premeditation on the part of defendant, there was, in our opinion, sufficient evidence upon which to found a contrary conclusion. Deceased and defendant and two women, all negroes, were living in a small four-room shack, fronting on an alley between O, P, Fourth, and Fifth streets in the city of Sacramento. Apparently all were ignorant and superstitious. Deceased was living with one of these women, a Miss Fisher, and the other woman, a Miss Watson, had been an occupant of the house for only a few days. The relations between defendant and deceased had been very friendly, so far as the evidence shows, to within a couple of days of the quarrel, and defendant had originally taken up his abode in the house at the invitation of deceased. The only evidence of any trouble between them prior to the fatal quarrel was that of Miss Watson. She testified to a verbal altercation between them a day or two before with relation to the defendant carrying and using red pepper as a protection against evil spirits in and about the house, which ended in defendant drawing a knife, and being pushed out through a door by Miss Fisher. She also testified that the day before the homicide deceased accused Miss Fisher in the presence of defendant of giving defendant money and taking care of him out of his (deceased's) labor. She said that he also told Miss Fisher to make defendant leave the house, and that he would not stay there if defendant remained. She also testified that during the morning of the day of the homicide defendant sharpened his knife in her room, and, after sharpening it, said it would do the work. In none of these statements was she corroborated by other witnesses, and her evidence may well be claimed to be somewhat rambling and unconvincing. The question of her credibility was, however,

a question for the jury. Later in the day defendant and deceased, both of whom had apparently been drinking previously, together with a white man called "Pat," who has never been produced as a witness, were in the dining room of this house, engaged in drinking and talking. According to defendant, a quarrel commenced between him and deceased on the question as to which of the two should go out after more liquor, and deceased attacked him with a butcher knife, but there is nothing except this testimony of defendant to suggest that deceased had a knife or was armed. The evidence was such as to fully warrant the jury in concluding that he was unarmed. No witness professes to have seen the commencement of the physical encounter. The two who say they witnessed any part of the encounter, a negro named Miller and Miss Watson, found the two grappling on the floor of the room, Miss Watson saying that defendant was on top of deceased, and that deceased was pleading with him to stop cutting him, and Miller saying that each man was on his side. According to both of the witnesses deceased was then bleeding badly. The defendant then got up and left the house, and was arrested a short time thereafter in the immediate locality, near the corner of Fifth and P streets, where he was standing against a fence. The knife, with blood upon it, was found in his pocket. Deceased, who died the same day, had received several small knife wounds, one being between the thumb and index finger of his left hand, and a mortal wound about nine inches in length across the abdomen, portions of the small intestines being severed. The case was such, assuming the reliability of Miss Watson as a witness, as to warrant a conclusion that there was some feeling of hostility between the two men, and a disposition on the part of defendant to use his knife on deceased, and also that defendant attacked deceased with his knife, deceased being unarmed, and inflicted the abdominal wound with the deliberate purpose of killing. If this wound was consciously inflicted, it is hard to account for the act upon any other theory than that it was done with the deliberate purpose of killing, for the nature of the wound was such that it was most likely to result in death. That it was consciously inflicted seems very clear, unless defendant was intoxicated to such an extent that he did not know and appreciate what he was doing. The strongest evidence in defendant's behalf is that relating to his intoxication. Unquestionably he was under the influence of liquor to some extent. All those who had anything to do with him that afternoon, including the officers, agree on this. The question in this connection is whether he was intoxicated to such an extent as to render him unconscious of or without appreciation of the nature of his act and incapable of forming a deliberate intent to kill. We are forced to the conclusion that the evidence was such as to sufficiently support a negative answer to this question.

[2] The jury was correctly instructed that to constitute murder in the first degree, the unlawful killing must be accompanied by a deliberate and clear intent to kill, and also that it was proper to consider the evidence on the subject of intoxication at the time of the act, together with all the other evidence in the case, for the purpose of determining the purpose or intent with which he committed the act. It found the existence on the part of defendant of this deliberate and clear intent. While in this respect the case may be one that may merit earnest consideration on the part of the executive upon an application for executive clemency, it is not one in which this court is authorized to reverse for want of sufficient legal evidence.

[3] The claim that an instruction that every material allegation of the indictment was put in issue by the plea of not guilty, and that it devolved upon the prosecution to establish to a moral certainty and beyond all reasonable doubt "each material fact so charged," was in substance an instruction to the effect that the allegations of the indictment "are facts and true," is, it would seem hardly necessary to say, entirely without foundation.

[4] Defendant testified as a witness in his own behalf. Among other things he testified that there had never been any trouble between himself and deceased prior to the fatal quarrel, and especially that there had never been any trouble or feeling between them with regard to the woman Fisher. He also testified that the deceased attacked him with a knife, "with a keen butcher knife," "a little keen butcher knife that was wrapped around the handle with some string," which he, defendant, knocked out of his hand. On cross-examination the foundation was properly laid with a view to his impeachment as a witness in regard to these matters by asking him if at the city jail about 2:25 p. m. of April 9, 1920 (the day of the homicide), in the presence of certain specified persons, he did not give certain answers to certain questions. The questions and answers involved were as follows:

"Q. What did the fight start over? A. God! his woman, I guess. That was the only thing it started over.

"Q. What is the woman's name? A. Miss Cora Fisher.

"Q. Dave, did you get cut anywhere? A. No, sir; not to my knowledge, no.

"Q. Henry didn't have a knife out or anything? A. Not that I know of.

"Q. Did he have a gun or anything? A. No, sir.

"Q. Did he say he was going to get a gun or anything? A. No, sir.

"Q. He didn't? A. Yes, sir.

"Q. Did Henry have a knife or anything in his hand? A. No, sir; I don't remember."

Defendant answered that he did not remember making any statement. In rebuttal, Mr. Vinson, the official shorthand reporter who took down the questions and answers in shorthand, testified to the giving by the defendant of these answers to such questions on the occasion specified. Objection was made to this evidence on the part of Mr. Vinson on the ground, substantially, that it was not made to appear that the statement was voluntary, or that defendant was apprised of his rights, and that his condition was such that he was not able properly to understand the questions and know the statements he was making. There was considerable testimony as to his condition with regard to being intoxicated and the extent thereof, but the evidence before the court was clearly of such a nature as to warrant the conclusion that he sufficiently understood the questions and the answers he was giving. It is contended that the court erred in admitting the evidence thus given by Mr. Vinson.

There can be no question, of course, as to right of the prosecution to fully cross-examine the defendant as to all matters concerning which he was examined in chief (section 1323, Pen. Code), and in so doing to show by his own admissions, if they could, that he had made statements contrary to those made upon his direct examination, for the purpose of throwing discredit upon them. See People v. Gallagher, 100 Cal. 466, 475, 35 Pac. 80; People v. Creeks, 170 Cal. 368, 379, 149 Pac. 821. It seems plain on principle that in the event of his failure to admit the making of such contrary statements, when properly questioned as to the same, proof thereof might be made by other persons who heard him make them, just as in the case of any other witness. This is certainly true if such statements do not constitute a confession of guilt of the offense for which the defendant is on trial, in which event it may be assumed for the purposes of this decision that the same would not be admissible in the absence of proof of being voluntarily made. The trial court admitted proof of the statements here involved for the purpose of impeachment, without proof of their voluntary character. But it is perfectly clear that they did not constitute a confession of guilt, within the meaning of the rule requiring such proof. The distinction between a confession of guilt and a mere admission of a fact or facts not constituting guilt of the offense in question is very fully and learnedly discussed in People v. Fowler, 178 Cal. 657, 664, 174 Pac. 892, and need not here be further discussed. These statements, being mere admissions of material facts not amounting to a confession of guilt, were also admissible as such altogether regardless of any question of impeachment. See People v. Sexton, 132 Cal. 37, 39, 64 Pac. 107. As we have said, the evidence was clearly sufficient to warrant the conclusion of the trial court that he was not so incapacitated by intoxication that he did not sufficiently understand the questions asked and the answers he gave.

[5] It is argued that the trial court erred in refusing to give an instruction, requested by defendant—

"That before you can consider the statement made by the defendant at the city jail on April 9, 1920, in reply to questions of Mr. Hughes * * * in the presence of the police officers and Mr. Vinson, the reporter, or any part thereof, the evidence must show to your satisfaction that the accused, David Clifton, was at the time of the making of the statement in possession of his mental faculties, and was so possessed to understand the questions which he answered. Should you find that the defendant was not so possessed of his faculties by reason of his having been drinking liquor, or any other cause, then you are to disregard the evidence as to those portions of the statement concerning which defendant was examined on the witness stand, and which have been admitted in evidence."

As an abstract statement of law we see no very good objection to this instruction, and, in view of the evidence as to some intoxication on the part of the defendant, it might well have been given. However, one of the grounds upon which the learned judge declined to give it was that "there is not sufficient evidence, if any, on which to produce such an instruction," and it is true that there is no affirmative evidence in the record tending to show lack of understanding on the part of defendant of the purport of the questions and his answers. The answers of the defendant were responsive to the questions, and indicated comprehension of the subject of inquiry. In view of the character of the answers given it is difficult to imagine that defendant did not fully understand both questions and answers. Every witness who testified regarding the matter testified that, although the defendant was somewhat under the influence of liquor, he apparently sufficiently understood and intelligently answered the questions. Under the circumstances we think it cannot be held that the trial judge erred in refusing the instruction for the reason above stated, and on which, among others, he founded his refusal.

[6] No other point is made for reversal, and careful consideration of the record shows nothing in the way of substantial error in the proceedings in the trial court. Defendant had a fair trial, and there is sufficient evidence to support the verdict.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; SLOANE, J.

186 Cal. 75

SAN FRANCISCO BAR ASS'N v. OPPENHEIM. (Cr. 2350.)

(Supreme Court of California. June 6, 1921.)

1. Evidence ⊜317(2)—Hearsay testimony by clerk as to what was said by defendant judge sought to be disbarred inadmissible.

In proceedings to disbar an attorney holding office of police justice, for misconduct relative to admitting to bail one charged with homicide, testimony as to what the clerk of court said that defendant judge said was inadmissible to show the making of an order or statement by defendant judge.

2. Attorney and client ⊜53(2)—Evidence insufficient to warrant finding police judge guilty of misconduct relative to admitting to bail.

In proceedings to disbar a police judge for misconduct relative to admitting to bail one charged with homicide, evidence *held* insufficient to warrant the court in finding defendant judge guilty.

3. Attorney and client ⊜53(2)—Evidence insufficient to show police judge guilty of bribe taking.

In proceedings to disbar a police judge for misconduct in receiving a bribe on a corrupt understanding that he should be corruptly influenced in the decision of certain criminal cases, the allegation being that he discharged the defendants in each of such cases, evidence *held* insufficient to sustain such charges.

Lawlor, Olney, and Sloane, JJ., dissenting.

In Bank.

Application by the San Francisco Bar Association for disbarment of Morris Oppenheim. Order to show cause discharged, and proceeding dismissed.

John O'Gara, J. J. Webb, and Max Kuhl, all of San Francisco, for accusers.

Thos. B. Dozier and A. S. Newburgh, both of San Francisco, for accused.

ANGELLOTTI, C. J. This is a proceeding instituted in this court for the disbarment of Morris Oppenheim, an attorney and counselor, for conduct involving moral turpitude. Defendant was at all the times mentioned in the accusation one of the police judges of the city and county of San Francisco, and, as in the case of John J. Sullivan (Crim. No. 2347, decided May 5, 1921) 198 Pac. 7, all the charges against him are for acts and conduct on his part with relation to matters coming before him as such police judge. Three separate specific charges against the accused are made by the accusation. The accused denied the truth of each charge. By order of the court, the evidence in support of and against the charges was taken by the chief justice, and the transcript of the evidence taken has received full consideration at the hands of each member of the court.

The charges are of the same general nature as those made against John J. Sullivan in the proceeding referred to above. In the opinion in that matter we sufficiently discussed the rules of law applicable, and it is not necessary to repeat that discussion here. In this matter, as in the Sullivan Case, the only direct evidence of guilt of the accused of any of the specific offenses charged is that of C. Vincent Riccardi, whose credibility as a witness is fully discussed in the opinion in that case. It is unnecessary to repeat that discussion here, further than to say, as we substantially said there, that we can accept his testimony as true only in so far as it is substantially corroborated by other evidence. We had occasion in the Sullivan Case to discuss the business of Peter P. McDonough and the intimate relations existing between him and the accused therein. The same sort of intimacy existed between him and the accused here, and all that is said in the opinion in that case about these matters is equally applicable here.

The specific charge mainly relied on is the first in order in the accusation, being with relation to the conduct of the accused in a matter pending before him as a committing magistrate, in which one George Imperiale was charged with the crime of manslaughter. The charge is that while this matter was so pending before him, the accused entered into a conspiracy and agreement with one Peter P. McDonough wherein and whereby it was understood and agreed that accused, as police judge, should make such orders in regard to the bail of Imperiale that the latter would be induced to discharge his then attorney, one John V. Filippini, and employ in his place C. Vincent Riccardi, and also to pay for attorney fees and his release from custody and for the dismissal of the case $500, of which sum McDonough was to receive a part; that, in pursuance of such corrupt agreement, accused, on April 24, 1919, first made an order fixing the bail at $5,000 bond or $2,500 cash, and subsequently on the same day made an order holding Imperiale without bail, thus inducing Imperiale to discharge Filippini from his employment and to employ Riccardi in his place, and that then accused made a third order, fixing the bail at $1,000, which amount was furnished by McDonough, and Imperiale thereupon released; and that on or about May 23, 1919, the case was finally dismissed; and that the sum of $500 was paid by Imperiale for attorney fees and for his release, and for the dismissal of the case, of which sum McDonough received $200. There is no claim either in the accusation or the evidence that accused was to receive or did receive any money in this matter.

Imperiale, who was engaged in the business of running an auto stage or truck, had in operating his car, run into and killed a

child. The charge of manslaughter was based upon his alleged negligence in this matter. In so far as the dismissal of the charge by accused is concerned, it is not claimed that the accused was not fully justified in his action by the facts. No effort was made by the accuser to show what an investigation of the facts disclosed. Mr. George B. Keane, an attorney employed by the parents of the dead child, testified that he fully investigated the facts, and concluded that there was no case against Imperiale. It is undisputed that in open court he so stated to the accused judge and asked that the matter be dismissed. In so far as the record shows, there was no probable cause shown for believing Imperiale to be guilty of the crime with which he was charged, and the dismissal was proper.

It is solely in connection with the matter of the bail of Imperiale that anything improper appears. Imperiale, an ignorant foreigner, was in custody on the charge of manslaughter, having been arrested the night before. Riccardi had such information as to lead him to the conclusion that he had some property and sufficient resources to enable him to pay a large amount of money to gain his liberty. Here was a fertile field for development in the eyes of Riccardi. An intervening obstacle to such development was the presence in the case of Mr. John V. Filippini as the attorney of Imperiale. Mr. Filippini was an attorney at law of good repute, without much police court or criminal practice experience, who as a lawyer had previously done some business for Imperiale and had his confidence. In consequence of this he had been engaged to appear for him in this matter, and was, with Mrs. Imperiale, in and about the hall of justice and the courtroom of accused on the morning of April 24th, when Imperiale was first brought into court to answer to the charge, engaged in an effort to obtain the release of Imperiale on bail. It was considered by Riccardi to be necessary to exclude Filippini from the case and to obtain his own employment in his place. The plan adopted to accomplish this was to bring Imperiale and his wife and Filippini to a conclusion that Filippini could not obtain an order for such release on bail, or other favorable action in the case, and that Riccardi could obtain his release at once and eventually a dismissal of the case.

There can be no doubt that Imperiale and his wife and Filippini were prevailed upon to believe that Filippini could do nothing for Imperiale in that court, and that with the assent of Imperiale, Filippini withdrew from the case, and Riccardi took charge. Except for the continued representations and insinuations by Riccardi as to his ability to accomplish results and the lack of knowledge of Filippini as to how things must be done in order to obtain favorable results in that court, the potent consideration leading the parties to the conclusion that Filippini could do nothing was certain information given them as to an alleged change made by the accused in the matter of the bail. It is the alleged willful participation by the accused with Riccardi in this matter, as well as in the original fixing of bail, that is mainly relied on by the accuser.

Riccardi's story is, in brief, substantially as follows: All his dealings in the matter were with McDonough, and at no time did he speak to the accused about the case. Before court convened on the morning of April 24, 1919, he went to McDonough's place of business and acquainted him with the prospect of mutual gain in the Imperiale case in the event that he was employed as attorney in place of Filippini. McDonough agreed to help and Riccardi divulged his plan, which was to have the judge fix the bail at so high a figure as to make it impossible for Filippini to obtain it. McDonough said he would communicate with the judge at once. Riccardi went back to the courtroom, arriving there before court was convened. After the accused took his place on the bench for the disposition of the business of the day's calendar, application was made by Filippini for the fixing of bail in the Imperiale case. The judge fixed it at $5,000 bond or $2,500 cash. Filippini left the courtroom saying that he would endeavor to obtain it. Riccardi thereupon went to McDonough again and told him that Filippini would probably get the required bond and suggested that he have the accused raise the bail or refuse bail altogether. McDonough said he would do this. Riccardi went back to the courtroom a little later. Court had adjourned and the accused had left the courtroom. Imperiale and the other prisoners were still in the dock in the courtroom. He (Riccardi) says that he was informed by the clerk of the court that an order of "no bail" had been made. It was at this stage that Filippini withdrew from the case and Riccardi became attorney for Imperiale. He then went back to McDonough's place of business, in company with Mrs. Imperiale, and sought an order fixing the bail at $1,000 cash. McDonough went into a back room and came back with such an order signed by the accused. He heard the voice of accused speaking in such back room. He procured $1,000 from McDonough to deposit with the bond and warrant clerk, and went to the office of such clerk with the money and the order fixing bail, there deposited the money and the order, and received an order directed to the prison keeper at the city prison for the release of Imperiale. He went back to the courtroom with this order, and showed it to Filippini who was still there. The prisoner had in the meantime been taken to the city prison. The order for release was taken to the city prison and delivered to the officer in charge, and Imperiale was discharged from custody at 11:55 a. m.

This story is absolutely uncorroborated in so far as any competent evidence directly implicating the accused is concerned. Moreover, in certain essential details it is opposed, in our opinion, to a clear preponderance of the testimony, altogether regardless of the denials under oath of both accused and McDonough. The latter denies that he had anything whatever to do with the case, beyond furnishing on application, in the course of his business, the money to be deposited as bail, and says he never communicated with the accused in relation to the case. The accused testified that McDonough never communicated with him about the case, and denied that he ever made any "no bail order" or said anything about such an order to any one. He further testified that having first fixed the cash bail at $2,500 on the statement of the arresting officer, he reduced it to $1,000, before leaving the courtroom; his best recollection being that he so reduced it on the application of Mr. N. C. Coghlan, who came into the case by arrangement with Riccardi.

In so far as appears, except for Riccardi's testimony there is nothing to suggest even a suspicion of wrongdoing in the matter of the original fixing of bail. When the application was made by Mr. Filippini, the accused said he would have to wait for the arresting officer's statement. When the officer arrived, he told the accused that the case was a serious one of deliberately running down a little boy and killing him. He also said something about previous negligent driving by Imperiale. The accused then made the order, and when Filippini protested and said it should be reduced to $1,000, somewhat impatiently said the order had been made and would stand. This is, in substance, the testimony of Mr. Filippini. To us, in view of the seriousness of the charge and the statement of the arresting officer, the amount so fixed does not appear excessive, certainly not so excessive as to suggest improper motive. Much is made of the fact that on cross-examination the accused could not remember ever having fixed so high an amount of bail in a case of involuntary manslaughter, and that he admitted that in the ordinary case of this character, where generally the party charged was the employee of some person of known responsibility, the bail was fixed at a sum which appears to us absurdly low. But here it is not disputed that neither Mr. Filippini nor Imperiale was known to the accused, and, according to Mr. Filippini's testimony, the officer's statement was such as to make the matter seem very serious in so far as the defendant therein was concerned.

[1] As to the alleged subsequent order of "no bail" there is no competent evidence whatever. Of course, such an order would be absolutely without warrant in law in any but a capital case, and if there were any competent evidence showing the making of such an order by accused, or the willful doing of anything for the purpose of making Filippini believe that such an order had been made, it would constitute most substantial corroboration of Riccardi's story. There is no record of any such order, and no one testified to having heard the accused make either any such order or any statement designed to convey the idea that such an order had been or would be made. The only possible foundation for any claim that the accused made any such order or statement is a statement made by the clerk of the court (since deceased) to Mr. Filippini, when, in company with Riccardi and Mrs. Imperiale, he returned to the courtroom after court had adjourned and the judge had departed, and while the matter of his withdrawal was still unsettled. Mr. Filippini testified substantially that the clerk then informed him that the accused had made an order of "no bail," which was "the last straw," and it was at once concluded that he could do nothing for Imperiale, and he withdrew. We have no doubt of the truth of Mr. Filippini's testimony, and must accept it as an established fact in the case that the clerk of the court so stated to him. In view of certain insinuations in the course of the proceeding before us as to his attitude and testimony, we feel that it is due him to say that in our opinion there was nothing in his conduct in this very disagreeable episode in his professional career to reflect unfavorably in the slightest degree upon his character, and that his testimony throughout appears to us to be that of a fair and intelligent witness, sincerely endeavoring to state the whole truth. This statement, however, of the clerk to Filippini, and as Riccardi claims, to him, was admitted solely for the purpose of showing the influences directly used upon Filippini and Imperiale to bring about Filippini's withdrawal. Of course as against the accused, this testimony as to what the clerk said that the accused said was incompetent to show that the accused in fact said it, and objection was duly made to its being considered for any such purpose. Unfortunately the clerk died without having testified in any of the investigations relative to the matter before us. We have no disposition to needlessly say anything unfavorably reflecting upon his memory, especially in view of his inability to reiterate, explain, or deny, but it is obvious that he may have made this statement to Filippini without having any direction or information from the accused, and for the very purpose of assisting Riccardi in his effort to obtain Filippini's withdrawal. As the case now stands before us, such a theory is as probable as the theory implicating the accused. Strange as it may seem, the undisputed evidence is that the clerk of this court kept no record of orders relative to bail, and was not expected to keep any such record, even though the same were made in open court. If this be true there was no occasion for the judge to acquaint him with the fact

of any such order. Then, too, the discussion hereinafter contained as to the proof relative to the final order fixing the bail at $1,000 indicates that such order was made before the judge left the courtroom. Regardless of all this, however, under most elementary rules, evidence of this statement of the clerk was inadmissible to show the making of an order or statement by the accused.

[2] It is, however, in respect to the final order on bail, the order fixing the bail at $1,000 cash, that the story of Riccardi is opposed to the clear preponderance of the evidence. This was the order said by him to be made after Filippini's withdrawal and his own employment, and because of such change in attorneys. It is the testimony of all that this change in attorneys was not consented to until after court had adjourned for the day and the accused had left the courtroom. To obtain a reduction of the bail at that stage, it is admitted that it was essential to obtain an order fixing the bail at the reduced sum, signed by the judge, which, when deposited in the office of the bond and warrant clerk with the amount of bail so fixed, would authorize that officer to issue an order of release. Such an order, we have seen, Riccardi testified he obtained at McDonough's place of business. No such order has been produced. Furthermore, no one, except Riccardi, testified that he ever saw any such order. Mrs. Imperiale, who accompanied Riccardi to McDonough's place of business, would not testify that she saw or was told of any such order. In passing it may be said that Riccardi's visit to McDonough's place at this stage is entirely explainable upon the theory that it was for the purpose of securing the $1,000 to deposit as cash bail. Filippini testified that he was not shown any such order. There is absolutely no scrap of affirmative evidence, except that given by Riccardi, to the effect that any such signed order ever was in existence. And in so far as the official record evidence goes it is opposed to the theory that there was any signed order fixing bail, and also opposed to the theory that the reduction to $1,000 was made after the adjournment of court, and Filippini's withdrawal from the case. The uncontradicted evidence of many witnesses is to the effect that there was a difference in the form of the order of release issued by the bond and warrant clerk, between those issued when the amount of bail was evidenced by a signed order of the judge, filed in such office, and those issued when there was no such order and it was stated at the office by the party depositing the bail that the amount had been fixed in open court, without a signed order. In the latter class it was the uniform custom to accept the statement of the party as to the amount and to issue the order of release specifying the amount of the deposit, in view of the fact that the prison record showed the amount fixed in open court, if it was so fixed without a signed order, and if the fact of an order in accord with the representation stated and shown in the order of release did not appear in the prison record, the order of release would not be honored. If, however, there was a signed order fixing bail, which might be made out of as well as in court, and of which, consequently, there would be no prison record, it was the uniform custom to stamp with a rubber stamp, in one corner of the order of release, the words "This bail has been fixed at above sum by order of ———, judge of police court, No. ———," filling in the blanks with the name of the judge and the number of his department. The order of release in this case was produced in evidence, and is without these stamped words, showing, therefore, if the uniform custom was followed, as we may assume, that it was issued upon the representation to the bond and warrant clerk that an order had been made in open court, and that it was not issued upon an order signed by the accused.

In addition to this we have the city prison register in evidence, together with the testimony of Officer Norman, a prison keeper, who himself made the entry of $1,000 in the appropriate column thereof relative to Imperiale on that day from the sheet returned to him by the court bailiff with the prisoners still in custody, including Imperiale, when such bailiff returned such prisoners to the city prison after the adjournment of court. These prisoners had been so returned when Riccardi went back into the courtroom, after his visit to McDonough's office to obtain, as he said, the order fixing bail. The testimony of Officer Norman was clear and convincing, and, with his entry in the register, shows that when Imperiale was returned to the city prison that day, the court sheet returned with him showed a notation by the bailiff of the fact of his admission to bail in the sum of $1,000 cash. Officer Bates, the bailiff of the court, testified that he heard the accused first fix the bail at $2,500 cash, and that later, before leaving the bench, he told him to make the bail $1,000 cash. He further testified that he saw Mr. Coghlan go up to the bench and speak to the judge before this reduction. In consequence of this direction, in making notes on his daily list of prisoners at the close of court, he made a note of the fact that the bail had been so fixed, and it was this sheet returned to the prison with the prisoners from which the prison record was made. This notation, so far as appears, was the only record made of any order fixing bail in the Imperiale case. It is difficult to understand the reason for the looseness of the practice apparently prevailing in this department in the matter of bail orders made in open court, a practice entirely without sanction in law, but the evidence is undisputed that such "orders" were frequently made by orally notifying the bailiff of the amount, and

the bailiff was expected to make the record thereof by noting the amount on his daily sheet, for delivery to the prison authorities. The judge sometimes made a note on his personal docket and sometimes made no note. In this matter no entry at all appears on his docket. He explains this by saying that he made his entries for the information of the bailiff in filling out his sheet for the prison authorities, and that if the bailiff was personally notified by him there was no necessity for such an entry. Mr. Coghlan has a very dim recollection that while court was in session that morning he, as an attorney acting on behalf of Imperiale, requested a reduction of bail to $1,000, but his recollection is confessedly so dim as not to assist materially. Just what prompted the reduction of $2,500, to $1,000, by the accused does not satisfactorily appear to us, except that there is nothing to our minds satisfactorily establishing any improper influence operating on the accused in so doing, but the clear preponderance of evidence, excluding altogether from consideration the testimony of the accused and McDonough, and accepting, as we do, everything testified to by Mr. Filippini to be true, is to the effect that there was no signed order fixing bail, and that the final order fixing bail at $1,000 cash was made before the judge left the courtroom and before Filippini had withdrawn from the case. This being the situation, the case necessarily fails for want of proof in so far as the accused is concerned, both as to the theory of a no-bail order for the purpose of accomplishing the withdrawal of Filippini, and the reduction to $1,000, as soon as Riccardi was employed. It is suggested that there was an admission of wrongdoing on the part of accused in an interview between him and Riccardi in the presence of certain newspaper men, but we do not so construe the conduct and words of the accused, as testified to by Mr. Warner, one of the newspaper men. We have discussed the evidence in relation to this specific charge at considerable length in view of the fact that it is the charge mainly relied on. We are satisfied that it may not fairly be held that the charge is sufficiently sustained by proof to warrant us in finding the accused guilty thereon.

[3] The two remaining charges are that accused in each of two matters pending before him as a committing magistrate, one being the case of L. Ysussi, charged with assault with intent to commit murder, and the other being the case of G. Pasquale, charged with assault with intent to commit rape, agreed to receive, and did receive, a bribe of $100 from Peter P. McDonough upon the corrupt understanding and agreement that he should thereby be corruptly and unlawfully influenced in the decision of the case, and that he was thereby corruptly and unlawfully influenced to dismiss and did dismiss each of said cases corruptly and unlawfully. As to both these charges the only direct evidence of guilt on the part of accused is that of Riccardi, the attorney for the defendant in each case. He testified as to an arrangement in each case with McDonough, to whom he agreed to pay $100 to obtain a dismissal. He said substantially that McDonough said the amount was so small he would give it all to the judge. The cases were dismissed on different dates. Upon the dismissal of each case he paid the stipulated $100 to McDonough in his place of business. Accused was present on each occasion. As each payment was made McDonough delivered the money to the accused, who accepted it. So runs Riccardi's story. It is absolutely denied in all respects by both accused and McDonough. There is no such corroboration of Riccardi's evidence to be found in the record of these matters before the accused and his conduct as a magistrate with relation thereto, which was the only corroboration attempted, as in any degree to add to the weight of such evidence in so far as it purported to sustain the specific charge made. As to the Pasquale case, the assistant district attorney, Mr. W. P. Caubu, testified substantially that he stated to accused in open court that it was not a proper case for holding for trial in the superior court and consented to a dismissal, and a reading of the evidence introduced before the accused does not satisfy us that he was in error in so recommending. The evidence in the Ysussi case was not such as to make it clear to us that the defendant should have been held for trial. As to each of these specific charges we have, in the last analysis, only Riccardi's uncorroborated story, and it produces no measure of conviction in our minds. Therefore, each of these charges must fail in this judicial proceeding for want of proof.

We desire to say that we fully appreciate the motive of the bar association in instituting this prosecution, as well as that in the Sullivan Case, and the courteous and able assistance given us on the trials by the committee conducting it. We are fully aware that nothing but a most commendable desire to rid the bar of members believed by the members of the association to be unworthy prompted the making of the charges, and it may well be that their reasons for their belief were well based. But certainly charges of specific misconduct on the part of a member of the bar can be sustained by a court only upon satisfactory proof of the particular misconduct alleged, and that proof is, to our minds, wanting here.

The order to show cause is discharged and the proceeding dismissed.

We concur: SHAW, J.; WILBUR, J.; LENNON, J.

We dissent: OLNEY, J.; SLOANE, J.

LAWLOR, J. I dissent. According to the evidence of the accuser, Riccardi, in the corridor before court convened, was told by the officer who made the arrest about Imperiale and his owning three Pierce-Arrow automobiles. Riccardi scented the chance to work the system, so he immediately went to McDonough's and, upon a promise to share the fruits of the enterprise with him, enlisted his co-operation. Riccardi then went to the courtroom, where he was a witness of the proceedings. When the accused came on the bench the case was called, but the determination of Mr. Filippini's application for bail was deferred until the officer appeared. The statement of the officer that it was a serious case, which was accepted by the accused and the order of bail of $5,000 bonds or $2,500 cash, followed. Mr. Filippini took issue with the statement of the officer and addressing the court stated he had known the defendant, that he was a responsible man, and applied for lower bail. The accused, in a loud voice, answered, "that is the order." Mr. Filippini replied, "Very well, if that is the case I will see if I can raise it." Riccardi promptly returned to McDonough and informed him that Mr. Filippini was going to secure bail, and said McDonough had better send word to the judge to order higher bail, or no bail. This McDonough promised to do. A man at once left McDonough's office to go to the courtroom and Riccardi followed him. When Riccardi reached the court room he observed McDonough's man speak to the accused at the bench, and presently, as the accused was leaving the courtroom, he stopped to speak to clerk Kane. Neither of these conversations was heard by Riccardi. Riccardi next proceeded to try to get the case. He first had a conversation with Mrs. Imperiale outside the courtroom, the gist of which was that for $500 he would secure bail and Imperiale's release in ten or fifteen minutes; he also promised a dismissal of the case without a trial on the merits. As Mr. Filippini reached the sidewalk to take his automobile, Mrs. Imperiale came running up to tell him about what Riccardi, a man she did not know, had said to her. They went back into the building, met Riccardi, and after some talk near the telephone booth the trio entered the courtroom. The Riccardi proposal was taken up and discussed with Imperiale, who was in the dock. Mr. Sapala, Mrs. Imperiale's brother-in-law, was in the party. While this conversation was in progress, clerk Kane interrupted Mr. Filippini, whom he knew, and said to him:

"Mr. Filippini, by the way, you recollect in that Imperiale case this morning—the court has made a no bail order. 'Is that so,' I said, 'This is worse and more of it.'"

Mr. Filippini then told Imperiale he did not want anything to do with Riccardi "because he has a different system of handling cases in this court than I have," and left Imperiale to decide between them. Mr. Filippini finally said:

"Well, now, I will not have anything further to do with the case. Now you will have to take Mr. Riccardi. It is worse and more of it now. I will not have anything more to do with it."

The retirement of Mr. Filippini and the employment of Riccardi followed. Riccardi, accompanied by Mrs. Imperiale and Mr. Sapala, then went to the office of McDonough. Riccardi entered a rear room where McDonough joined him; Mrs. Imperiale and Mr. Sapala remaining in the waiting room. In the conversation between Riccardi and McDonough the former proposed that the bail be fixed at $1,000. McDonough went into another room and Riccardi states that while McDonough was in there he heard the voice of the judge. McDonough returned with a bail order of $1,000 signed by the accused, which he gave to Riccardi, together with $1,000 in currency. As Riccardi passed out he delivered an eulogium upon his own cleverness and told Mrs. Imperiale to go to his office. He took the bail order and the currency to the office of the warrant and bond clerk, received a signed order of discharge and returned to the courtroom to have Imperiale released, but he found Imperiale had been taken back to the city prison. The order of release was exhibited to Mr. Filippini, who had remained to witness the outcome of the bail matter, and the city prison records show that Imperiale was discharged from custody at 11:55 a. m.

The ultimate question to be decided is whether Riccardi's testimony is sufficiently corroborated to warrant an inference that the accused was a guilty participant in the scheme to eliminate Mr. Filippini from the case and fleece Imperiale out of $500.

From my own analysis of the evidence I am convinced it is shown not only that the accused had a hand in victimizing Imperiale, but that the fraud could not have succeeded without his co-operation. Riccardi, like a bird of prey, was waiting in the hall of justice for something to turn up, especially among his own countrymen. He testified he did not knew Imperiale. Somebody having knowledge of the case, therefore, must have told him about it and that Imperiale had property. It is not suggested how he got the information, if it was not from the officer. The officer said he had known Riccardi slightly for three years, that Riccardi first broached the subject, asking him if Imperiale was charged with manslaughter. It is conceded Imperiale was not to blame for the death of the child, and the question arises: Why did the arresting officer report to the accused it was a serious case? Did the accused know about the charge against Imperiale when he convened court? It was the custom of the

accused, according to his own testimony, to reach the neighborhood of the hall of justice half an hour before court time. He admitted that on such occasions he sometimes conversed with McDonough at or in front of his place of business about cases that came before him, but he made the same qualification as did the accused in the Sullivan disbarment proceeding—they never mentioned felony cases. I shall not repeat what I said in that case about McDonough's activities in the police courts as a professional bail-bond broker and his relationship with Sullivan, for the majority opinion states the same conditions prevailed between the accused and McDonough. I am sure no member of this court doubts that McDonough would speak to the accused about any case before him if he had any interest in it, and it is idle to think he did not speak to him about the Imperiale case. The accused and McDonough deny they saw each other that morning, or that the case was ever mentioned between them. In regard to what is said in the main opinion about the amount of the bail fixed by the accused, it is proper to point out that the question is not what would be proper bail in a manslaughter case, but rather whether the accused in this particular manslaughter case departed from his usual standards in such cases. If he did, it is a circumstance against him, independent of what would be proper bail. I think the accused showed every evidence of having an unusual interest in the case. He adopted completely the appraisal of the arresting officer without asking for or receiving the testimony of Imperiale or his witnesses as to the facts of the charge, and when Mr. Filippini explained his relationship with and knowledge of the character of the defendant, he sustained the order of bail with a warmth wholly unaccountable upon any theory of judicial balance. His demeanor and action were well calculated to inspire the defendant and his distracted wife with fear and apprehension, and to render them the more susceptible to Riccardi's devices. It must be kept in view that no record was made by either the accused in his docket or the clerk in his minutes, or the bailiff on his sheet, of this bail order, a circumstance not depending on Riccardi's testimony and which tends to justify an inference that the original order was only pretended to be made to help the scheme along. Such an entry might be evidence against him. I do not agree with the prevailing opinion that there was not even a suspicion of wrongdoing in the original fixing of bail. However, the solution of the first fixing of bail must depend in part upon what followed, and when all the evidence is considered no doubt will remain that it was a part of the plan to drive Mr. Filippini out of the case and make way for Riccardi.

With regard to the statement of clerk Kane to Mr. Filippini that the court made a "no bail" order: The testimony of Mr. Filippini is sufficient to prove it was made to him, and to corroborate Riccardi's testimony on the point, notwithstanding the bailiff testified that while he was in close proximity to clerk Kane at the time he did not hear the conversation. I do not agree with the majority opinion that it is as probable clerk Kane made the statement to assist Riccardi as it is that it implicated the accused. To my mind, the more natural inference, and the one more in keeping with the presumption of innocence and a regard for the memory of the deceased clerk, is that he acted upon the direction of the judge of the court. The presumption would be that the clerk regularly performed his duty and obeyed his superior officer. However, if the presumption of innocence is applied to the accused, is it likely the clerk would take the risk of making an unauthorized statement with the liability of exposure when Mr. Filippini became aware such an order was without warrant of law? The fact the "no bail" order did not appear in the judge's docket does not help the case of the accused for the reason that the original order of bail was not entered therein. With respect to the failure to produce the "no bail" order I shall later refer to the method of transacting business in that department and the practice of ignoring the plain provisions of the law. I concur with the majority opinion that the statement itself is only admissible for the limited purpose of showing its effect on Mr. Filippini and the Imperiales. The fact, however, that the accused, after McDonough's man had spoken to him at the bench, stepped over to the clerk's desk to speak to him, is substantive evidence against the accused in the chain of circumstances relied upon by the accuser, to be given such weight as each justice may deem it entitled.

Now as to the final order of bail: It will not be questioned that if the accused only pretended to make the original order of bail it would follow that McDonough also dictated the final order. The two events stand or fall together. The accused knew that Mr. Filippini had left the courtroom to raise the original bail and that he made no report to the court. It is not disputed the final order was made without any reference to this circumstance. Furthermore, it is plain the Imperiales and Mr. Filippini when they learned of the no bail order despaired of securing bail except through the medium of Riccardi, for the substitution of attorneys immediately followed. It is clear that if Riccardi was not responsible for McDonough having the final order made it must have been made without regard to Mr. Filippini and the Imperiales, for, as I have shown, the accused had curtly denied the application for lower bail and Mr. Filippini had left the courtroom to secure bail on the original order.

This brings me to a consideration of the

affirmative defense interposed by the accused, in addition to the denials of himself and McDonough, that the Imperiale case had ever been mentioned between them. It was not claimed that Riccardi had ever mentioned the subject to the accused and McDonough testified that Riccardi never spoke a word to him about bail in the Imperiale case. The testimony of the accused was that before he left the bench on that morning, on the application of Mr. Coghlan, the final order of bail was made. McDonough supplemented his above denial with the admission that Riccardi did come to his office on that morning, accompanied by Mrs. Imperiale and Mr. Sapala, and that Riccardi merely said they were waiting for Mr. Coghlan. McDonough also testified that Mr. Coghlan applied to him for $1,000 for bail in the Imperiale case and that he gave it to him. Mr. Coghlan was called as a witness to support the defense, but his testimony is so intrinsically indefinite that it would not support a finding that he had anything to do with procuring bail for Imperiale. For instance: If Mr. Coghlan figured in the matter of bail he must have done so during the forenoon of April 24th. The record shows the following:

"Q. What time of the day was it? I mean as to before or after noon. A. It was in the afternoon."

In other connections in his testimony the time is given as "in the forenoon," and in one instance the expression "in the morning, of course," was used. His testimony as to his applying to the accused for the bail order is, if anything, less definite. He admitted he did not know the time when, or the place where, he made the application, except that the court "would be naturally the place where it occurred." He admitted that he appeared in the trial of a case in the superior court the same morning and names the case and the department in which it was tried, but every effort failed to get him to make a definite statement as to the circumstances under which he came to ask for bail, when he asked for it, or what he did with the bail money when he got it. It is difficult to understand why, if there is any foundation for his testimony, he could not recall the circumstances under which he applied for the order and secured the money from McDonough, for it is conceded that as Riccardi contemplated an early visit to the eastern states he employed him to try the Imperiale case; that the bail was put in his name; and that he represented Imperiale during the absence of Riccardi until May 23d, when the charge was dismissed, at which time $250 was paid to him by Mr. Filippini. Moreover, the relations between Riccardi and Mr. Coghlan were of an intimate character, for at that time he was representing Riccardi personally in a criminal action and had been associated with him in other professional employment. Every reason is seen why he should be able to recall the circumstances, especially as it appears that he testified in a grand jury investigation of the Imperiale case about a year before he gave testimony in this proceeding. He does not even intimate that he gave the bail to the warrant and bond clerk, or that he had anything to do with the issuance of the order of release, or its presentation at the city prison. I am satisfied from the evidence that he never had anything to do with the matter of obtaining the order or securing the $1,000 bail money; that it was an invention pure and simple, and that he was brought into the proceeding to save the accused and McDonough, with whom for years he has been on terms of friendship. If Riccardi's testimony is entirely left out of view, and the transaction as it is revealed in the testimony of Mrs. Imperiale and Mr. Filippini is considered, this affirmative defense cannot stand. It throws out of balance every other circumstance in the case. Mr. Coghlan does not claim he spoke to either of the Imperiales or Mr. Filippini at that time, and the accused admits he did not mention to him that Mr. Filippini was representing Imperiale and had left the courtroom to get bail. The truth doubtless is that pressing Mr. Coghlan into service in this proceeding came as an afterthought. It appears that his connection with the Imperiale case got into the newspapers during the grand jury investigation; that one day in February, 1920, when he came home at 1 o'clock in the morning, the accused and McDonough were waiting for him in front of his house; and that the following Sunday he visited Riccardi at Los Gatos. He denies, however, that this visit had anything to do with the investigation. It is equally clear to me that the accused put Mr. Coghlan forward because of his conceded connection with the Imperiale case in the expectation that his testimony would refute Riccardi's story, minimize the effect of the testimony of Mr. Filippini and Mrs. Imperiale, and, upon the entire evidence, inject a doubt into the case.

But if the testimony of Mr. Coghlan lacked definiteness, that of the accused and McDonough is not open to the same comment, for it is plain they have not hesitated in their testimony to state that the bail was effected through Mr. Coghlan. Unquestionably this testimony is willfully false and furnishes corroboration of the story told by Riccardi. Innocent men do not commit perjury, nor seek to induce others to do so, and under a familiar rule of evidence their entire testimony should be distrusted. So far as their testimony is concerned, that of Riccardi should stand as undenied. It is worthy of note that when the accused was examined by the grand jury he made no reference to Mr. Coghlan making application for bail. The

bailiff of the court testified that he saw Mr. Coghlan approach the accused while he was on the bench that morning and speak to him. On cross-examination he stated that within a few minutes after Mr. Coghlan left the accused told him to make the bail $1,000.

"Q. At that time did you connect Mr. Coghlan with the reduction of the bail? A. I did not at that time, but I did very soon afterwards. Q. How soon afterwards? A. Well, I saw Mr. Coghlan in the case and then when the case came up there was a question of bail. I always did believe—I don't know—that Mr. Coghlan had that bail fixed. * * * I believe it. I don't know it."

His attention was called to his testimony before the grand jury that he answered, "Not that I know of," when he was asked if any one else made application for a reduction of bail after the first order was made; also, that he answered, "I would not," when he was asked if he would know the man who asked to reduce the bail.

"The Court: You testified that way before the grand jury? A. I did. Q. Mr. Webb wanted to know why you didn't tell them that you knew it was Mr. Coghlan? A. I didn't know it was Mr. Coghlan and don't know it now."

The main opinion does not discuss this affirmative defense, as such. It does, however, suggest that Riccardi going to McDonough's when he claimed he obtained the bail order signed by the accused "is entirely explainable upon the theory that it was for the purpose of securing the $1,000 to deposit as cash bail." This is at once a concession that Riccardi and not Mr. Coghlan got the bail from McDonough, and that Riccardi deposited it. In connection with the accused's testimony that he reduced the bail to $1,000 before leaving the courtroom, it is stated "his best recollection being that he reduced it on the application of Mr. N. C. Coghlan, who came into the case by arrangement with Riccardi." The only reference in the opinion to Mr. Coghlan's testimony is that he "has a very dim recollection that while court was in session that morning, he, as attorney acting on behalf of Imperiale, requested a reduction of bail to $1,000, but his recollection is so dim as not to assist materially." It is to be noted the opinion does not state Mr. Coghlan had come into the case on that morning, or that he acted as attorney for Imperiale for the purpose of bail. No other reference is made to the testimony of the accused that Mr. Coghlan was connected with the bail matter, and the testimony of McDonough is not mentioned at all.

I have expressed myself in the Sullivan disbarment proceeding to the effect that Riccardi testified under conditions peculiarly calculated to induce him to tell the truth. I also referred to the system which prevailed in the police courts at the time material here and the evil influence a professional bail-bond broker like McDonough would exercise upon the administration of justice. All that I said then applies with equal force in this proceeding. Yet we are urged to believe that in the Imperiale case where McDonough's money was at stake, the subject was never mentioned by him to the accused. Inferences are just as much evidence as are the facts from which they may be drawn, and the irresistible inference arising from the entire evidence is the inference which the Imperiales and Mr. Filippini drew from the action and bearing of the accused, the statement of clerk Kane, the securing of lower bail by Riccardi, his production of the bail money, and the release of the prisoner—that Riccardi was dealing with forces superior to the law itself. I cannot see that there can be any ground for doubt that the accused was apprised of the Imperiale case before he went on the bench that morning, that the amount of bail was unusual for him to set, that he resented Mr. Filippini's remarks and his insistence on lower bail, that he advisedly refrained from entering the bail order in his docket, that he made the bail order at the suggestion of McDonough and not on the application of Mr. Coghlan, and that Riccardi saw McDonough on the three occasions he has described, that through McDonough he got the bail order and from him received the bail money, and that he deposited the bail and secured the order of release.

In the face of the inferences, which indisputably arise from the evidence viewed in its entirety, Riccardi's testimony assumes a secondary importance—the silent and impressive circumstances surrounding the transaction indubitably show that while Riccardi never spoke to the accused about the case, the stealthy influence of McDonough was at work. The vital question in the case is: Why did the accused make the final order of bail? The majority opinion does not purport to rely on the testimony of the three principal figures in this defense; it does not deem Mr. Coghlan's testimony of material assistance and, with the exception of the one allusion to that of the accused, it ignores his testimony and McDonough's on the point. Concededly, if this defense were established the case of the accuser would fail. On the other hand, if it was founded on perjury no question of the sufficiency of the evidence to corroborate Riccardi's testimony should remain. The main opinion concludes that the testimony of Riccardi implicating the accused is "absolutely uncorroborated," and it further holds that in certain essential details it is opposed to a clear preponderance of the evidence independently of the denials of the accused and McDonough. This position of the prevailing opinion rests upon three propositions—there was no suggestion of wrongdoing in the fixing of the original bail, there is no competent evidence that a

"no bail" order was made, and, apart from the testimony of the accused and McDonough, and accepting everything Mr. Filippini testified to as true, the clear preponderance of the evidence is to the effect there was no signed order fixing the final bail, but that it was made before the accused left the courtroom. The first two propositions have been discussed by me, and I shall now consider the third.

It is to be noted the opinion does not state upon whose application the final court order was made, but in view of what it has said concerning Mr. Coghlan's testimony I may assume it does not conclude the application was made by him.

The majority view is that Riccardi is not corroborated as to how and under what circumstances the final order was made, and therefore the accusation fails of proof. It is pointed out in the opinion that, under the practice followed in the issuance of orders of release on bail, the order of release admitted in evidence would indicate the accused had not made a signed bail order, but that it was made in open court. The order of release is on blue paper, but does not contain a rubber stamp notation, and hence this means, according to the evidence, that the party depositing the bail must have stated to the warrant and bond clerk the order was made in open court, thereby refuting Riccardi's testimony that McDonough delivered to him in his office an order of bail signed by the accused. This must be so, it is argued, for the reason that under the evidence, if the order of release had contained the rubber stamp notation it would have been returned to the warrant and bond clerk, because the sheet which had been delivered to the bailiff that morning and upon which, as he claims, he had made the entry at the close of the session, shows the final bail order was made in open court.

I have not been able to accept the testimony of the bailiff that the entry on the sheet was made in pursuance of the direction he testified he received from the accused to "make the bail in the Imperiale case a thousand dollars." According to the testimony of the city prison officials and the records of the office the entry must have been on the sheet when it was delivered with Imperiale at the city prison. The bailiff was the only witness to the records who claimed to have an independent recollection of the Imperiale case as of the time it came up. For some unexplained reason bail orders in this department of the court were customarily given to the bailiff instead of to the clerk in matters coming up during the court proceedings. The conventional way, of course, would be to give all orders, bail and otherwise, to the clerk and for the bailiff to get his information from him. In this way a court record would be kept of the court business. This was not done in this department, at least so far as bail is concerned. The charter provides that the clerk shall keep full and complete records of all cases in the court and the disposition made thereof by the court (article 5, c. 8, § 10). The bailiff is to preserve order and to execute the orders of the court (Id., § 14). Besides the Imperiale case there were eleven other cases on the sheet that day, the information as to the disposition of which the bailiff testifies he got from the judge's docket, but as to the disposition of the Imperiale case he relied entirely on his memory and, indeed, could not say whether the docket contained any mention of it. I have heretofore touched upon his testimony as to Mr. Coghlan's asserted connection with the bail. The testimony of this witness, who, it seems, kept in his possession a duplicate of all these sheets, leaves some doubt in my mind as to the records of the Imperiale case, but I am free from doubt that the bail order was not made as testified to by him.

Now as to the order of release. Riccardi first testified that a man connected with his office deposited the bail. He finally testified, however, that upon further reflection he must have made the deposit and received the order of release himself. Both Riccardi and Mr. Filippini, to whom, according to the testimony of both, Ricardi exhibited his release, said it was on blue paper, but apparently neither of them was questioned as to whether it contained the rubber stamp notation. Mr. Filippini was so surprised and deeply interested in Riccardi's performance in securing bail that he went to see and had a long talk with the warrant and bond clerk after the order of release was exhibited to him by Riccardi, but this conversation was properly excluded. It does appear, however, that when Mr. Filippini entered the office a white paper dropped on the floor and that the incident was discussed between them, but what was said is not shown. Apart from the contention as to whether Riccardi received the bail order in McDonough's office, no particular importance should attach to the circumstance of whether or not a bail order was signed in any given instance, for when the accused was asked whether it was not the custom in his department of the court to sign an order of bail even when the order of bail was made in open court, he answered: "Yes, it was usually done; that in a few cases it was not done." It was probably the rare exception not to sign an order in that department, for otherwise the records of bail would, in most instances, depend on the bailiff of the court. No special stress, therefore, should be laid merely on whether or not a bail order was signed, nor on the failure to produce a signed order, for at that time no effort was made to preserve them.

The determination of the question as to the order of release must rest on the action

of the two officials—the bailiff in furnishing the data for the city prison records, and the warrant and bond clerk in issuing an order of release minus the rubber stamp notation. As I understand the matter, no record was kept by the warrant and bond clerk which would show who deposited the bail, nor the representations by such person in cases where a signed order of bail is not produced. The warrant and bond clerk has no independent recollection of the occurrence, and upon the face of the records, it would seem that the depositor of the bail must have represented that a signed order of bail had not been made. In my opinion, this was not the fact, and the truth of the matter must be sought elsewhere. It may be argued that if the bail was deposited by the man in Riccardi's office (he did not appear as a witness) he may have assumed and stated to the warrant and bond clerk the bail order was made in open court, and if by Riccardi himself, he may have declared it was a court order so as to protect the system against exposure, for he has testified that all his operations in that department were carried on through McDonough and never with the accused himself. These, however, are mere conjectures, and upon the evidence as to the contents of the order of release and the circumstances under which it was issued I entertain such a doubt, that if the decision turned on this question alone, I would resolve it in favor of the accused.

But it cannot be held that this question is decisive. The evidence as to why the accused made the final order of bail is so convincing I have no doubt of his guilt. Riccardi and the officer agree they had the conversation in the corridor that morning some time before the accused went on the bench. The officer left and Riccardi proceeded to McDonough's and had his first interview with him about the Imperiale case. It is unnecessary to again review the proceedings in court which resulted in Mr. Filippini leaving to get bail. Riccardi had his second interview with McDonough and was preceded to the courtroom by McDonough's man, who spoke to the accused. While negotiations were on the accused spoke to the clerk and left the courtroom. Upon the assumption that the bail orders during the proceedings are generally given to the bailiff it is clear why, if there was a "no bail" order, it was given to the clerk, for otherwise it would have appeared on the bailiff's sheet. Mr. Filippini retired to get bail and Riccardi made his third visit to McDonough's, obtained the bail money, Imperiale was released on schedule time, and all the surrounding circumstances proclaimed Riccardi as the genius of the occasion.

There was no question in the mind of Mrs. Imperiale, who had waited anxiously at McDonough's for her husband's deliverance, nor of Imperiale when he was released after being returned to the city prison, nor of Mr. Filippini, amazed at the performance, when Riccardi showed him the order of release, as to who had secured the results. In the face of such circumstances the denials of the accused and McDonough should carry no weight. In view of Mrs. Imperiale's great relief at the outcome too much stress should not be put on her failure to note whether Riccardi, when he emerged from the back room, had a paper in his hand, if that were the way he would carry such a paper, or whether or not he had the bail money.

I have said Mr. Coghlan testified before the grand jury. It is apparent the affirmative defense was never thought of until that occasion, for the testimony of the accused, who preceded Mr. Coghlan on the stand, is barren of any suggestion that the latter applied to him for a reduction of bail. In addition to what I have already said about this defense it is proper to refer again briefly to the evidence. It was through Riccardi Mr. Coghlan was employed in the Imperiale case. Riccardi's movements from the time he spoke to the officer until Imperiale was released from custody are accounted for, and Mr. Coghlan had not been seen by the Imperiales or Mr. Filippini during that time. No one has testified, not even Mr. Coghlan himself, that he was employed to secure bail. The truth of the matter probably is that Mr. Coghlan knew nothing about the case until after Imperiale was released, and that while Riccardi was attending to the matter of bail Mr. Coghlan was engaged in the superior court. It is evident that he only met the Imperiales on that day to arrange to have him try the case while Riccardi was in the east.

The Penal Code provides:

"A docket must be kept by * * * the police justice, or by the clerk * * * if there is one, in which must be entered each action and the proceedings of the court therein. * * *" Section 1428.

The provisions of this Code relative to bail are applicable to bail in police courts (section 1458). In matters of bail the bailiff seemed to discharge the duties properly belonging to the office of clerk, and only occasional entries were made in the docket by the accused. The evidence does not sustain the theory that it was through ignorance or carelessness the accused conducted the court in defiance of the law, but indicates that the methods followed were intended as a protection to him in carrying on operations such as those charged in the accusation. In the Imperiale case no entry appears of the original or final bail order. The two orders—one fixing and the other reducing the bail—should have been entered. Yet orders of bail in other cases do appear in the docket.

The first bail order was entirely disproportionate to the bail usually fixed by the accus-

ed in manslaughter cases, apart from the existing arrangement with the transportation companies in that class of cases. The accused, after the officer testified, said it was a very serious case and apparently nothing had intervened to change his mind as to its gravity. It may be inferred from the excessive bail and the other circumstances that the first order was only tentative. The purported "no bail" order, for obvious reasons, would not be entered. And if the final order had been entered the question might arise as to why the original order was not entered. If the final order was not made on the application of Mr. Coghlan, why, and under what circumstances, was it made? Concededly, not through either Mr. Filippini or Riccardi.

And it must not be lost sight of that in spite of these charges the accused and Riccardi were on speaking terms, and that they drank together. On an occasion within two months of the hearing, in the presence of some newspaper men, the following colloquy ensued:

"Judge Oppenheim: Did you ever say that you ever did business with me? Riccardi: Well, no, not exactly, but indirectly a hundred times, and the goods were always delivered. Judge Oppenheim: Very well."

Judge Oppenheim then turned around and walked away.

In view of the relationship between the accused, McDonough, and Riccardi, and the system under which they operated, I think the testimony of Riccardi as to the Leandro Ysussi case, in which the defendant was charged with intent to commit murder, and as to the case of Geralmo Pasquale, involving a charge of assault with intent to commit rape, it being alleged in the accusation that the accused received a $100 bribe to dismiss in each case, and that he did so, finds ample corroboration in the aggravated character of the cases. The method followed in each of these cases was to make repeated orders of continuance covering several months and finally, without even the formality of taking the evidence of the defendant, dismiss the case.

The accused should be disbarred.

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NATIONAL BANK OF CALIFORNIA AT LOS ANGELES v. EXCHANGE NAT. BANK OF LONG BEACH. (L. A. 5832.)

(Supreme Court of California. June 15, 1921. Rehearing Denied July 14, 1921.)

1. Trusts ⟸31—Agreement authorizing payment of note from funds due guarantor, collected by bank, held to create trust.

Under Civ. Code, § 2251, providing that the mutual consent of trustor and trustee creates a trust of which the beneficiary may take advantage at any time before its rescission, sections 2215, 2221, 2222, and 2258, that the trustee must fulfill the declared purpose of the trust and follow the directions of the trustor except as modified by the consent of all the parties interested, and section 2280, that a trust cannot be revoked by the trustor after its acceptance by the trustee and beneficiaries, except by their consent, unless the declaration of trust reserves the power of revocation to the trustor, a contractor's assignment and delivery to a bank of his warrant for electric light assessments against property owners, authorizing the payment, from the amounts collected and those realized from the sale of deficiency bonds, of a promissory note of which the contractor was guarantor, created a trust in favor of the holder.

2. Estoppel ⟸97—One to whom general representation, made known directly afterward, may act on it, though he did not hear it.

Only the person to whom a representation is made or for whom it is designed can act on or avail himself of it, but, if the declaration was intended to be general, one who did not hear it, but to whom it was made known directly afterward, or within the time allowed for acting on it, may act on it.

3. Estoppel ⟸97—Holder of promissory note payable from trust funds not estopped to claim benefit of trust by letter to attorney for maker, demanding payment.

The holder of a promissory note, provision for the payment of which was made by agreement of the guarantor, a contractor, with a bank, authorizing the application of funds realized from the collection of electric light assessments, the warrant for which he assigned and delivered to it in escrow, and the sale of deficiency bonds, was not estopped from claiming the benefit of the escrow instructions by a letter from its attorney to the attorney for the maker of the note that such arrangement was not satisfactory, and requesting immediate payment, though the latter informed the guarantor at once, who instructed the bank not to pay the claim without a further order from himself, the representation not having been made to the public generally or to any individual as a member thereof, but to an attorney, for the purpose of informing him further delay would not be granted, and not for the purpose of influencing the bank's conduct in connection with the trust.

4. Election of remedies ⟸3(1)—Bringing suit on promissory note not election not to take under trust from funds of which payable.

The commencement of a suit against the maker and guarantor of a promissory note was not an election by the holder not to take under a trust created by agreement between the guarantor and a bank, providing for payment of the note from a fund to be realized by the bank from the collection of moneys due the guarantor.

5. Assignments for benefit of creditors ⟸288—Moneys ordered paid to creditors by trustee belongs to them, though deposited in trustor's name.

Where a contractor assigned and delivered to a bank a warrant for electric light assessments, instructing it to collect the same, sell bonds for those unpaid, and from the money received to pay claims against him, including a promissory note, with interest, of which he was guarantor, the money, when collected, belonged to his creditors, though deposited in his name; his instructions having been accepted in writing by the bank as trustee.

6. Contracts ⟸187(1)—Rule third person may enforce contract for his benefit any time before rescission inapplicable to trusts.

Civ. Code, § 1559, providing that a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind, has no application to a case where a trust has been created in favor of such third person, such trust being governed by the provision of the Code with reference to trusts.

7. Assignments for benefit of creditors ⟸32—No consideration necessary for agreement to collect and pay trust funds to trustor's creditors.

Under Civ. Code, § 1040, no consideration was necessary for an agreement of a trustee to

collect electric light assessments owing the trustor, a contractor, or sell bonds in lieu of unpaid assessments, and pay the proceeds to trustor's creditors.

8. Appeal and error ⊂⊃1170(3)—Where rights of parties fully litigated under pleadings, technical error in complaint will not justify reversal.

Under Const. art. 6, § 4½, where evidence of the acceptance of a trust by the beneficiary and trustee of the receipt of the trust moneys by the latter, and of the nonpayment of the beneficiary's claim was fully presented, it was not error to overrule a demurrer to the beneficiary's complaint; a technical error if any therein not justifying reversal.

9. Assignments for benefit of creditors ⊂⊃98—Fact of additional oral instructions by trustor immaterial, unless agreed to be incorporated in written declaration of trust.

Under Civ. Code, § 2254, providing that all declarations of a trustor to his trustee before acceptance of the trust by the latter are deemed part of the declaration of the trust, except that when such a declaration is made in writing all previous declarations by the trustor are merged therein, the fact that a trustor, who instructed a trustee to collect moneys due him and pay his creditors from the proceeds, also instructed the trustee to hold all money so collected subject to his order, reserved the right to alter the instructions at his pleasure, and could add to or strike from the list of creditors, was immaterial, unless it was agreed that such instructions should be incorporated in the written declaration of trust.

10. Reformation of instruments ⊂⊃36(3)—Allegation of mistaken omission from written declaration of trust insufficient where facts not alleged showing how mistake made.

Where a trustor authorized a trustee to collect money due him and pay his creditors therefrom, an allegation that, by inadvertence and mutual mistake, an agreement that all moneys collected should be held subject to his order, he reserving the right to alter the instructions and to add to or strike from the list of creditors, was omitted from the written declaration of trust, is insufficient to justify a reformation of the instructions, it being necessary to allege the facts showing how the mistake was made, and that the parties intended to incorporate the agreement in the writing; proof of the terms of a trust being limited to written declarations thereof.

11. Assignments for benefit of creditors ⊂⊃317—Interest at 7 per cent. held included in amount owing beneficiary of trust fund on promissory note.

Where a trustor authorized his trustee to collect moneys due him and pay his creditor's claims therefrom, including a promissory note, with interest, it was not error to include compound interest thereon at 7 per cent., though the amount of interest was not specified; the trustor having been advised by correspondence between the holder of the note and the trustee that the indebtedness covered by the instructions included such interest.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the National Bank of California at Los Angeles, a corporation, against the Exchange National Bank of Long Beach, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Eugene C. Campbell, of Long Beach, and Geo. E. Cryer, of Los Angeles, for appellant.

John E. Biby, of Los Angeles, for respondent.

WILBUR, J. Plaintiff recovered judgment in the lower court for the sum of $2,604.44. Defendant appeals. Previous to December 10, 1914, K. T. Bennett had performed a contract for the installation of electric lights along American avenue in the city of Long Beach, for which there had been issued to F. B. Amend, his assignee, by the board of public works of the city of Long Beach, assessment No. 167, whereunder F. B. Amend was entitled to collect assessments aggregating $11,821.99 levied upon the property fronting upon said street, or in case of nonpayment thereof to have issued bonds for the unpaid assessments. On December 10, 1914, K. T. Bennett and his attorney and assignee, F. B. Amend, assigned and delivered the warrant and assessment to the defendant for collection, with written instructions for the disposition of the proceeds. These instructions authorized the defendant to collect the amounts due, and to receive and sell bonds issued for the unpaid assessments. It was directed that the money received from the sale of such bonds should be deposited with the defendant in the name of K. T. Bennett, and the same should be "subject to the instructions hereinafter given." These instructions authorized the payment of a large number of labor and materialmen claims incurred in the performance of the work, and specifically detailed in the instructions. The labor claims in the instructions were to be first paid, and thereafter any other labor claims which were so subsequently authorized by the assignors were to be paid, and it was then provided:

"Eighth. After you have either paid or received sufficient money to pay all of the aforesaid claims (the same being labor claims), you are then instructed to pay, upon receiving proper receipts therefor, the following amounts to the following parties, to wit."

Then follows a list of claims, the sixteenth being the following item, which is the subject of this litigation:

"National Bank of California * * * $2,000, interest $———."

The ninth item of the instructions refers to certain disputed claims, and the tenth was as follows:

"Tenth. Upon matters of law concerning the collection of said assessments, the making of demands therefor, the issuance of bonds, etc., you will please follow the advice and instructions of Messrs. Amend & Amend, and they will furnish you opinions in writing should you desire the same; they are also to act as counsel should any action be necessary in said collection."

The defendant accepted the instructions and indorsed such acceptance thereon at the time of delivery. At the time the instructions were given the plaintiff held a promissory note of the Western Construction Company for $2,000, dated May 6, 1914, bearing 7 per cent. interest, payable and to be compounded monthly, and also a certain written guaranty dated April 22, 1914, signed by James Irvine, K. T. Bennett, and E. Irvine, whereby said guarantors within the limits of $3,000 guaranteed the prompt payment of any indebtedness due to the bank by the Western Construction Company. It was this obligation of Bennett as guarantor which was intended by Bennett to be covered by the instructions to pay plaintiff $2,000.

December 11, 1914, plaintiff wrote to defendant, stating that it was informed of the transfer "and that Mr. Bennett has authorized you to pay this bank the amount of a note of $2,000 executed by the Western Construction Company and others," and asking for a confirmation, "stating that you have accepted the above-mentioned order from Mr. Bennett to the effect that on receipt of proceeds from the warrant you would pay to us the above amount, $2,000 and interest at 7% from August 5, 1914." On December 12th the defendant replied, acknowledging the receipt of the communication, and stating:

"We have accepted the escrow and are receiving payments by the lot owners covering this work. Our instructions from the assignors are that we must pay the labor claims first, then the material claims, and in the list of material claims is one of $2,000 in your favor. This matter will receive prompt attention."

On December 14th plaintiff requested information as to the amount to be collected on American avenue, and the total amount of claim, stating:

"We of course cannot expect you to give us a promise regarding the payment of our claim, but would like to know whether or not there will be sufficient money coming in to take care of same, and the time payment could be expected."

On December 15th defendant replied, stating that the total warrant was $11,821.99, but the amount of cash to be received could not be ascertained, but the total claims for labor and material amounted to $11,741.09. On December 19th Mr. Hyman Schwartz, attorney for the Western Construction Company and for James Irvine, wrote to the plaintiff, informing it of the above-mentioned assignment by K. T. Bennett, and on December 24th Mr. Trippet, attorney for the plaintiff, replied, stating:

"The arrangement that has been made to take care of this claim is not satisfactory to the bank, and I am instructed to request immediate payment."

Mr. Schwartz at once showed this letter to Mr. Amend, who upon December 31st informed the cashier of the defendant bank that plaintiff was dissatisfied with the arrangement made for the payment of its claim, and on January 2d gave the defendant written instructions not to pay said claim without a further order to that effect from himself. The defendant believed the statement made by Mr. Amend, and relied upon the same in withholding payment from the plaintiff and in paying out the money on the attachment hereinafter mentioned.

On December 23, 1914, Mr. Trippet had been instructed to bring suit against the Western Construction Company and the guarantors, James Irvine and K. T. Bennett, which was done December 30, 1914, and judgment upon said note and guaranty was obtained. Suit was also brought against the stockholders of the Western Construction Company to recover said amount.

On January 18, 1915, one R. S. Shotwell attached the interest of K. T. Bennett in the proceeds of said warrant in the possession of defendant, and on January 22, 1915, obtained a judgment of $3,300 in the attachment suit, and levied the execution upon the interest of K. T. Bennett in and to the proceeds of said warrant, which at that time amounted to the sum of $2,700, which amount was paid by the defendant to the sheriff on account of said levy. On February 1, 1915, in an action by a creditor of K. T. Bennett and James Irvine, the balance of the money in the hands of the defendant, amounting to $164.08, was ordered by the court to be paid to the receiver in that action. The defendant also paid the claim of $1,000 to John Roebling Sons Company, which, under the terms of the escrow agreement, was to be paid subsequent to the claim of the plaintiff. Basing its claim upon the proposition that the payments to Roebling Sons Company and to the sheriff upon execution were in violation of the instructions and amounted to a diversion of moneys payable to the plaintiff, it instituted suit and obtained the judgment appealed from.

One of the main questions in the case is whether or not the plaintiff repudiated the benefit of the agreement made on its behalf by the defendant and K. T. Bennett and F. B. Amend. The trial court found that F. B. Amend at the time he made the foregoing statements to the defendant concerning plaintiff had no authority from the plaintiff to act on its behalf for any purpose or in any manner whatsoever, and that such statement and

notice were given without the knowledge or consent of the plaintiff.

It should be observed that the only communications passing directly between the plaintiff and the defendant are those hereinabove set forth, in which the defendant stated its purpose to carry out the instructions given it by Bennett for the payment of the plaintiff's claim. If the communications from Trippet to Schwartz had been made by the plaintiff to the defendant perhaps it might be considered a repudiation of the arrangement made in plaintiff's favor and a consequent release of the defendant from the obligation it incurred by accepting the assignment and instructions from Bennett, but the evidence is and the court has found that such letter was not intended to be communicated to the defendant bank, and the case must be determined in the light of this finding.

[1] There can be no doubt that the original transaction created a trust in favor of the plaintiff bank. Section 2251 of our Civil Code provides as follows:

"The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission."

Section 2258, Civil Code, provides as follows:

"A trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner, and to the same extent, as an employee."

See, also, Civ. Code, §§ 2215, 2221, and 2222. It is further provided in section 2280 that—

"A trust cannot be revoked by the trustor after its acceptance actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued."

The general rule is thus stated in Am. & Eng. Ency.:

"Where property is transferred and accepted on the agreement and understanding that it or its proceeds are to be applied for certain designated purposes, an express trust is created complete upon the trustee's acceptance thereof, and the application of the property as directed enters into the consideration of the transfer." 28 A. & E. (2d Ed.) p. 904.

[2, 3] We will now pass to a consideration of some of the specific points made by the appellant.

First. Plaintiff is estopped to maintain the action. It is claimed:

"That the plaintiff's attorney published the statement to the effect that plaintiff repudiated the escrow instructions."

This contention is based upon the facts hereinbefore stated with relation to the communication from Trippet to Schwartz. The ordinary rule with reference to estoppel is thus stated by Bigelow in his work on Estoppel, 708, 709:

"Only the person to whom the representation was made or for whom it was designed can act upon and avail himself of it. * * * A person who receives statements at second hand, not intended for him, clearly has no right to act upon them. * * * If, however, the declaration was intended to be general, then it seems that one who did not hear it, but to whom it was made known directly afterwards, or within the time to be allowed for acting upon it, may act upon it."

The obligation to the defendant bank was not only an obligation of K. T. Bennett, but of his two joint guarantors, of the Western Construction Company, and of its stockholders as well. It is apparent that the Western Construction Company and James Irvine, who were being pressed for payment, sought through their attorney to secure delay by calling attention to the escrow agreement made by Bennett in favor of the plaintiff corporation. This escrow agreement involved the actual delay incident to collection of street assessments, and in addition such delay as might result from the issuance and sale of the bonds for the purpose of securing a fund. The obligation due the plaintiff was a promissory note executed May 6, 1914, due one day after date. Plaintiff's expression of dissatisfaction must be construed in the light of this additional delay, proposed not by K. T. Bennett, but by his associates represented by Mr. Schwartz. The letter to Mr. Schwartz was not intended for general publication. It was a communication between attorneys occupying confidential relations toward their respective clients, and intended for the benefit of the clients of Mr. Schwartz. The case of Mitchell v. Reed, 9 Cal. 204, 70 Am. Dec. 647, is cited by the appellant as authority for the proposition that the plaintiff is estopped in this case. In the case of Ghio v. Cline (App.) 187 Pac. 433, the District Court of Appeal, First Appellate District, Division 2, correctly stated that—

"Though this case has not been directly reversed or modified by the Supreme Court, there can be no doubt that it is contrary to the great weight of authority upon the doctrine of estoppel."

It is sufficient, however, to point out here that the facts do not bring it within the rule quoted from Bigelow or stated in Mitchell v. Reed, supra. In the case at bar the representation relied upon by the defendant was not made to the public generally, or to any individual as a member of the public, but to an attorney who was apparently seeking delay in contemplated litigation for the purpose of informing that attorney that such delay would not be granted, and not for the purpose of influencing the conduct of the defendant in

connection with the trust which it had already informed plaintiff it had accepted and would carry out. The instructions of Mr. Amend to the defendant bank in his letter of January 2d, and also by the indorsement upon the escrow instructions to "hold" this item, do not indicate that he understood that the plaintiff had wholly repudiated the arrangement in its behalf, but rather that he expected to negotiate further with plaintiff with reference thereto. Apparently this situation was overlooked when attachments were levied and ordered paid by Mr. Amend, attorney for K. T. Bennett. The defendant neglected to inform the plaintiff of the existence of such an attachment. Plaintiff was not estopped from claiming the benefit of the trust, and for the same reason it cannot be said to have waived the benefit of the escrow instructions on its behalf.

[4] Appellant claims that the commencement of the suit against the Western Construction Company, its stockholders and guarantors, was an election by plaintiff not to take under the trust. The answer to that contention is that there is no inconsistency between such action and a reliance upon the benefit of the escrow instructions.

[5] Appellant claims that the assignment of the warrant and assessment to the bank was for collection only, and that the assignor had control of the paper until it was collected, and hence retained the power to recall the instrument at any time before it was collected. The difficulty with this contention is that, in addition to the assignment for collection, instructions were given with relation to the use of the proceeds which put the fund collected beyond Bennett's control. This is equally true whether the escrow instructions provided for the deposit of the money in the name of Bennett or in the name of the several creditors to whom the money was to be paid. In either event the ultimate recipient of the money was designated in the escrow agreement, and the money belonged to such recipient when collected, whether deposited in the name of K. T. Bennett or not, for Bennett had given defendant instructions to pay out said money, and said instructions had been accepted in writing by the defendant.

[6] Section 1559, Civil Code, providing that a contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it, has no application to this case, where a trust has been created in favor of such third person. Such trust is governed by the provisions of the Code with reference to trusts.

[7] No consideration was necessary for the agreement of the defendant. Section 1040, Civ. Code; Kopp v. Gunther, 95 Cal. 63, 30 Pac. 301; Taber v. Bailey, 22 Cal. App. 617, 135 Pac. 975.

The various assignments of error with relation to the introduction of evidence do not affect the result, and do not require separate discussion.

[8] Appellant contends that the court erred in overruling defendant's demurrer to the third amended complaint. In view of the answer and trial upon the merits it is unnecessary to consider the special demurrer. The rights of the parties were fully litigated under the pleadings. The evidence of the acceptance of the trust by the defendant and by the plaintiff, of the receipt of the money by defendant, and of the nonpayment of the plaintiff's claim was fully presented to the court, so that a technical error, if any, in the statement of the causes of action in the complaint, would not justify the reversal of the case. Const. art. 6, § 4½.

[9] A more serious question arises from the attempt of the defendant to secure a reformation of the escrow instructions on the ground of mutual mistake. A cross-complaint for that purpose was interposed, wherein it was alleged that, in addition to the terms contained in the written instructions it was agreed between the defendant and K. T. Bennett and F. B. Amend that all moneys collected should be held subject to the order of K. T. Bennett and F. B. Amend, and that Bennett and Amend reserved the right to alter the instructions at their pleasure in relation to the disposition of the money so collected for the creditors named in said instructions, except as to creditors named in paragraph 5 thereof; that it was agreed that they could add other creditors to the list, or could strike out any of said creditors, and that all said moneys should be subject to the control and order of Amend and Bennett, and could be paid out at their order.

It was further alleged:

"That by inadvertence and the mutual mistake of the defendant and said Amend and Bennett, the aforesaid additional terms were omitted from said writing; and that said K. T. Bennett and said F. B. Amend are necessary parties to this amended cross-complaint, and their presence is essential to the complete determination of the controversy between the parties herein named."

A demurrer to this cross-complaint was sustained.

Section 2254 of the Civil Code provides:

"All declarations of a trustor to his trustees, in relation to the trust, before its acceptance by the trustees, or any of them, are to be deemed part of the declaration of the trust, except that when a declaration of trust is made in writing, all previous declarations by the same trustor are merged therein."

[10] The fact that additional instructions were given or agreed upon orally would be immaterial, unless it was also agreed that such instructions should be incorporated in the written declarations of trust. The above allegation that by inadvertence and mutual

mistake such agreement was omitted from the written declaration of trust is insufficient to show such a mistake as would justify a reformation of the instrument. It was necessary to allege the facts showing how the mistake was made. 34 Cyc. 974. It is not even alleged that the parties intended to incorporate the agreement in the writing.

The beneficiary is entitled to rely upon the rules of evidence which limit the proof of the terms of the trust to written declarations thereof. The demurrer to the cross-complaint was properly sustained.

[11] Appellant claims that the judgment should not have included compound interest at 7 per cent., which was in accord with the original obligation. It is apparent from the escrow instructions that interest was to be paid upon the $2,000 due the plaintiff. While the amount of this interest was not specified, appellant was advised by the correspondence between plaintiff and defendant that the indebtedness covered by the escrow instructions was $2,000 and interest at 7 per cent. from August 5, 1914. It was undoubtedly the intention of Bennett and of the defendant that the amount of the note and interest thereon should be paid from the proceeds of the assessment and warrant, and the judgment was in accordance with that agreement.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SLOANE, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

186 Cal. 330

COOPER et al. v. BUXTON. (L. A. 6591.)

(Supreme Court of California. June 23, 1921.)

Records ⊂=9(11)—Action to set aside decree of registration of title held barred.

An action to set aside a registration decree on the ground of mistake *held* governed, not by the three-year statute of limitations for actions for relief on the ground of mistake (Code Civ. Proc. § 338), but by Torrens Act, § 45, barring action for recovery of registered land not brought within one year after the registration, after which time persons injured must look to the relief provided by section 105 of the act respecting the "assurance fund."

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Sarah E. Cooper and another against Francis E. Buxton. From judgment for defendant, plaintiffs appeal. Affirmed.

George A. Skinner, of Long Beach, and Wheaton A. Gray, of Los Angeles, for appellants.

McCaughan & McCaughan, of Long Beach, for respondent.

OLNEY, J. This is an appeal by the plaintiffs from a judgment rendered against them upon demurrer to their complaint. The complaint is somewhat long, but the facts shown by it material for a decision of the case may be rather briefly stated.

One Buxton died possessed of certain real estate. The defendant is his surviving wife, and the plaintiffs are his children by a former marriage. Not very long before his death he had caused his real estate to be registered under the "Land Title Law" or Torrens Act. Stats. 1915, p. 1932; Deering's Gen. Laws, Act 1049. His wife, the defendant, joined him in the application. The application alleged the property to be community property. The court in the registration proceedings found it was community property, and it was registered as such. By Buxton's will the real estate, or his disposable interest in it, was devised to the plaintiffs. If it were community property, only one half was subject to his testamentary disposition, and the defendant, as the surviving spouse, would take the other half. On the other hand, if it were separate property, it was all subject to testamentary disposition and passed to the plaintiffs by the will. The complaint alleges that the property was in fact separate property, so that it passed to them, but that the defendant, in reliance upon the registration decree, claims one-half of it as community property.

We need hardly say that by the terms of the Torrens Act—whose validity and operation in this respect are not questioned—the registration decree, as long as it stands, is a conclusive adjudication in rem that the property was community property. To meet this situation, the complaint seeks to have the decree set aside on the ground of mistake, alleging that the allegations of the application for registration to the effect that the lands were community property were made through mistake, inadvertence, and ignorance of the legal consequences on the part both of Buxton and his wife, and that, induced by these allegations, the court made the decree in question. The vital point in the case, then, is: May the registration decree be set aside upon the facts alleged?

It is exceedingly doubtful if the allegations as to mistake are sufficient to make out a case for setting aside a judgment. But, assuming that they are, it would seem plain that, in view of the further fact that the action was not brought until more than a year after the registration, the action cannot be maintained under section 45 of the Torrens Act. The section reads:

"No person shall commence any action at law or in equity for the recovery of land, or assert any interest or right in, or lien or demand upon the same, or make entry thereon ad-

versely to the title or interest certified in the first certificate bringing the land under the operation of this act after one year following the first registration. It shall not be an exception to this rule that the person entitled to bring the action or make the entry is deceased, an infant, lunatic, or is under any disability, but action may be brought by such person by his next friend or guardian or by the administrator or the executor of a deceased person. It shall be the duty of the guardian, if there is any, to bring action in the name of his ward whenever it is necessary to preserve or enforce the ward's rights in registered land; provided, however, before such action shall proceed, it must be made to appear to the court that the person bringing such action or those under whom he claims, had no actual notice of the proceedings to register such lands in time to appear and file his objections or assert his claim. The provisions of this section shall in no way affect or disturb the rights of any person in said land, acquired subsequent to the registration thereof, bona fide and without knowledge and for a valuable consideration."

The answer which plaintiffs' counsel make to the asserted application of this section is that it does not operate to repeal subdivision 4 of section 338, Code of Civil Procedure, which provides that an action for relief on the ground of mistake may be brought at any time within three years after the discovery of the mistake, and that there is no inconsistency between the Code section and the section of the Torrens Act. There is, of course, an inconsistency between them, if the section of the act were intended to apply to an action to set aside a registration decree, and, if such were the intention, the section of the act must prevail over the general provision of the Code. The real question, as we view it, is whether or not the section was intended to apply to an action to set aside a registration decree as distinguished from an action for the recovery of the land or the assertion of some interest in it independently of the decree.

It will be noted that by its terms the section of the act applies to actions for the recovery of the property or the assertion of some interest in it, and makes no mention of actions directly attacking the registration decree. Nevertheless, when the nature and effect of the decree are considered, we see no escape from the conclusion that the section was intended to apply to actions of the latter character; that, in fact, it must apply to such actions if it is to be given any meaning at all. The registration decree is a judgment in rem, binding on all the world, and by section 34 of the act is made conclusive on every interest or claim in the property other than certain minor interests not material here. Its conclusive character in this respect does not wait upon the expiration of a year or any other period of time. It attaches with the decree becoming final. After that time no action can be maintained to recover the land or to assert an interest in it contrary to the decree. The decree must be first set aside before there can be any such recovery or assertion of interest. In other words, after the registration decree has become final, the only action by which the land can be recovered or an interest in it asserted except under the decree is an action such as the present, wherein it is sought to set aside the decree and then establish the asserted right to the land or to an interest in it. The section providing a limitation of one year must therefore apply to such actions, since it can apply to no other.

It is also worthy of note in this connection that an action to set aside a deed or other muniment of title to land on the ground of fraud or mistake, and thereupon to recover possession of the land, has been held to be an action to recover real property, so that the period of limitation prescribed for such actions applies to it. See Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820, and cases there cited. If this be true, it would seem that the present action is also one to recover the property (and certainly that is its final object), so that it would come within the express enumeration by section 45 of the actions which must be brought within a year of registration.

It is also to be noted that, while the act places such a brief limitation upon the time within which a registration decree may be set aside, it endeavors to provide by section 105 for relief in another manner to persons who have been unjustly deprived of their property by the decree, such other manner being by the way of compensation from the "assurance fund" created by the act, and that here the period of limitation is four years after the right of action accrues. In view of the general purpose of the act to make the registration decree conclusive and to facilitate transfers of real estate by making reliance upon the decree wholly safe, we think the inference is strong that it was intended that the decree should not be set aside after the brief period of a year, but that for any injustice worked by it the persons injured must then look to the different relief provided by section 105.

It is also to be noted that the one exception which the statute makes to the conclusive nature of the decree is the case of fraud, that this exception repeatedly appears in the statute, and that it is always confined to fraud alone and never includes mistake. If there be any exception to the operation of section 45, it would seem to be only the case of fraud, and the failure of the statute to unite with it the companion case of mistake would seem to indicate that it was not intended that it should be an exception.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

186 Cal. 256

SPRECKELS SUGAR CO. v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 9641.)

(Supreme Court of California. June 17, 1921. Modified June 23, 1921.)

1. Master and servant ⟸386(1) — "Annual amount" contributed as basis of compensation to dependents held to be contribution at time of injury.

Under Workmen's Compensation Act, § 14 (b), providing that the question of dependency shall be determined as of the time of injury, and section 9(c) (2), providing for a death benefit amounting to three times the "annual amount" devoted to support of partial dependents, where deceased employee left no dependents except his brother and brother's family, to whom for some years the deceased's contributions had averaged $145 per month, but to whom, because of the coming into earning power of a member of the dependent family, deceased had reduced his contribution to $45 per month during the three months prior to his death, the death benefit should be computed on the basis of $45 per month, the term "annual amount" meaning the annual amount of contribution at the rate at which deceased was contributing at the time of his injury, regardless of whether that rate had existed for a year or more or for less than a year.

2. Master and servant ⟸417(6) — Excessive compensation award reviewable as involving "lawfulness" and "jurisdiction;" "want of jurisdiction."

In view of Code Civ. Proc. § 1068, and Workmen's Compensation Act, § 67 (a), the latter providing for certiorari for the purpose of having the "lawfulness" of the Industrial Commission's order inquired into and determined, where the Industrial Commission, through error of law, allowed an excessive death benefit, it rendered an "unlawful" award, and one in excess of its "jurisdiction," so that the award was reviewable by the Supreme Court; determination of the "lawfulness" of the award covering a review of errors of law by the Commission, and "jurisdiction" meaning authority to do the particular thing done, so that a want of jurisdiction means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of something in excess of the authority possessed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction; Jurisdiction (of Courts).]

In Bank.

Proceeding under Workmen's Compensation Act by John H. Gamblin and others to recover compensation for the death of one Gamblin, employee, opposed by the Spreckels Sugar Company, employer. An award was made by the Industrial Accident Commission, and the employer brings certiorari. Award annulled.

R. P. Wisecarver, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco (L. C. Brown, of San Francisco, of counsel), for respondent Industrial Accident Commission.

D. W. Burbank, of San Francisco (F. J. Hambly and H. E. Smith, both of San Jose, of counsel), for respondents John H. Gamblin and others.

OLNEY, J. This is an application to review an award of the Industrial Accident Commission. There is no conflict in the evidence; the ultimate facts are found by the Commission, and the question presented is one as to whether upon those facts the award of the Commission can be sustained in respect to the amount which it allowed the dependents of one who was admittedly an employee, and had been killed by accident in the course of his employment.

It appears that the deceased employee left no dependents except his brother and his brother's family, consisting of his wife and two minor children. The brother was paralyzed and incapacitated, and for several years he and his family were supported wholly by the decedent, whose average monthly contribution for that purpose was $145. During these years, however, the brother's wife was training herself as a teacher at a normal school and the state university, and some three months before the accident to the decedent secured a position as a teacher, and from then on was herself in receipt of a salary. Her earnings went to the support of her family; it became but partially, instead of wholly, dependent upon the decedent, and the latter's contribution to its support fell to $45 a month. This was the condition of affairs existing at the time of the accident.

[1] The statute (Workmen's Compensation Act [St. 1917, p. 844], § 14[b]) provides that the question of partial or entire dependency shall be determined in accordance with the fact as the fact may be at the time of the injury to the employee. The present case is, then, one of partial dependency. The statute also fixes the amount to be allowed as a death benefit in a case of partial dependency. Section 9(c) (2) of the act reads:

"In case the deceased employee leaves no person wholly dependent upon him for support, but one or more persons partially dependent therefor, the said dependents shall be allowed * * * a death benefit which shall amount to three times the annual amount devoted by the deceased to the support of the person or persons so partially dependent."

The Commission computed the death benefit allowable in the present case by taking as the annual amount of the decedent's contribution the amount he had actually contributed during the year immediately preceding his death, both during the nine months when total dependency existed and during the three months of the partial dependency

which existed at the time of injury. The employer contends that this was erroneous; that the annual amount of which the statute speaks is not the amount actually contributed in the last or any other year of the decedent's life, but is the annual amount of the rate at which the decedent was contributing at the time of his injury, regardless of whether that rate had existed for a year or more, or for less than a year. Putting it concretely, the employer contends in this case that at the time of injury to the decedent a state of partial dependency existed, and had existed for three months, as found by the Commission; that likewise, as found by the Commission, the decedent, during the continuance of this partial dependency, had been contributing to the support of his brother at the rate of $45 a month, and that the annual amount of contribution upon which the death benefit should be computed is the annual amount of contribution at this rate, and not the amount of contribution for three months at this rate and for nine months at a rate which did not exist when the decedent was injured.

It is quite evident, we think, that the employer's contention is correct. The whole theory of the compensation act as to death cases is that the dependents of the employee killed through some hazard of his employment shall be compensated for the loss of the support they were receiving from him at the time of his injury. This necessarily means that the death benefit must be computed on the rate of contribution at that time. It is the rate which is the measure of the loss, not the gross amount which the decedent has happened to pay through any past year, or through any other period of time. A very simple illustration will make this plain. By reason of some circumstance—the death of his father, for example—the mother of an employee becomes partially dependent upon him, although she had not been previously dependent upon him at all. When this occurs he begins to contribute to her support at the rate say of $50 a month. He does this for three months, or perhaps for only one month, when he is killed. Manifestly the mother's loss of support is $50 a month, or $600 a year, regardless of how long that support has been continuing, and compensation for the loss must be upon that basis, and not upon the basis of what the son has actually contributed in the short time the condition of dependency has existed. In the present case, the facts as to dependency are merely reversed. A period of total dependency is succeeded by a short period of but partial dependency. During the first period the employee has contributed at the rate of $145 a month, and during the second at the rate of only $45 a month. It is plain that the loss of support to the dependents incurred by the employee's death is the latter rate.

In addition to this line of reasoning, based upon the fundamental theory of the act as to the compensation granted by it, there is the language of the act itself. It provides that not only shall the question of the condition of dependency as entire or partial be determined as of the date of injury to the employee, but also that the extent of dependency shall be determined as of that date. The provision of the statute that in cases of partial dependency the death benefit shall be proportioned to the amount of the annual contribution of the employee is but a provision that the death benefit shall be proportional to the extent of the dependency, so that the effect of the two provisions is that it is the annual contribution as of the time of injury that is to be taken. This can be only a rate of contribution, since it is a point and not a period of time by which the contribution is to be determined. We would add that the rate of contribution at the time of injury is by no means necessarily to be determined by the contributions made during the last month of the employee's life, as counsel for the Commission would seem to assume. There may have been no contributions in the last month. The employee may have been contributing in quarterly installments, for example, and the last month may not have happened to be a month of payment. But there would nevertheless be a rate of contribution existing as of the date of injury. It is this rate which the Commission must determine from all the facts in the case, and, when they have determined it, it is three times the amount of the annual contribution according to this rate which the law says shall be the amount of the death benefit.

[2] A number of arguments in support of the award are advanced, but with one exception they are all answered directly or indirectly, by what has been said, or else by the express language of the statute itself. The exception mentioned is not so much an argument in support of the award as it is one that the award, even though erroneous, cannot be set aside. It is that the power of the court to annul an award of the Commission is confined to those cases wherein the Commission has made a finding as to some jurisdictional fact which is not supported by the evidence, and that it does not go to a case where upon the facts found the Commission has authority to make an award, but has made one contrary to what the law calls for upon those facts. The difficulty arises from the different shades of meaning which the word "jurisdiction" has. As sometimes used, it means simply authority over the subject-matter or question presented. In this sense the Commission undoubtedly had jurisdiction in this case and its award was not without jurisdiction on its part. But the word is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently

means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of something in excess of the authority possessed.

A good illustration of a want of jurisdiction of this latter sort is the imposing by a court upon a person convicted of crime of a sentence in excess of that permitted by the statute. The court had jurisdiction to sentence the convicted person, but it did not have jurisdiction to impose a sentence not permitted by law; that is, it acted in excess of its power in so doing. Such excesses of jurisdiction can be reviewed on certiorari. The code section so provides (section 1068, Code Civ. Proc.), and, in particular, section 67(a) of the Workmen's Compensation Act says that any party affected by a final order of the Commission—

"may appeal to the Supreme Court of this state * * * for a writ of certiorari * * * for the purpose of having the lawfulness of the original order * * * inquired into and determined."

It is the lawfulness of the award in question that is now under consideration. Upon the facts found the statute prescribed the amount to be allowed as a death benefit, and the Commission, in allowing a different amount, rendered an unlawful award, and one in excess of its authority.

The award is annulled, and the matter involved remanded to the Industrial Accident Commission for such further proceedings and order as are not inconsistent with the views expressed herein.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

186 Cal. 292

In re PHELPS' ESTATE.

CHIPMAN v. LORD.

(S. F. 9644.)

(Supreme Court of California. June 18, 1921.)

Executors and administrators ⊜497—Statutory commission of executors covers services until final settlement and distribution.

Aside from any extra allowance for extraordinary services, the commission on the amount of estate accounted for by an executor as fixed by Code Civ. Proc. § 1618, is intended to be full compensation for all services during the entire administration to the time of final settlement and distribution, so that an executor cannot recover an additional allowance for ordinary services subsequent to the filing of a final account, the order of distribution on which was reversed on appeal and a different distribution ordered, after which two supplemental accounts were filed before final hearing, distribution and settlement of accounts.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Final accounting by W. F. Chipman, executor of the estate of Josephine A. Phelps, deceased. From an order refusing further compensation on objections by Virginia A. Lord, the executor appeals. Affirmed.

See, also, 179 Cal. 816, 178 Pac. 849; 190 Pac. 17.

W. C. Sharpsteen, of San Francisco, for appellant.

Ross & Ross, of Redwood City, for respondent.

SHAW, J. This is an appeal by W. F. Chipman, one of the executors of the estate of Josephine A. Phelps, deceased, from an order of the superior court, refusing to allow him further compensation as executor of the estate upon the settlement of his third supplemental final account thereof.

The final account and petition for distribution of the estate was filed on June 12, 1919. An order of distribution was made thereon, from which an appeal was taken, and thereupon the order was reversed, and the court below was ordered to make a different distribution thereof. On July 22, 1920, a second supplemental account was filed, showing the receipts and expenses of the executors during the interval between that date and the original decree of distribution. The petition for distribution and this account came up for hearing on August 5, 1920. Thereupon a third supplemental account was filed covering the interval between the filing of the second supplemental account and the time of hearing. In the second supplemental account the said executor asked that his compensation for his services as executor be fixed and directed to be paid.

The total value of the estate accounted for was $539,388.82, upon which the executors were allowed the regular statutory commissions as fixed by section 1618 of the Code of Civil Procedure, amounting to $4,071.94. An error of $45 here appears in favor of the executors. Upon the final hearing in August, 1920, Chipman asked for an additional allowance as executor for services subsequent to the filing of the final account in June, 1919. He did not file any claim showing any extraordinary services, but claims compensation on the theory that the estate was closed at the time he filed the final account in June, 1919, and that for his services as executor subsequent thereto he is entitled to compensation in addition to that fixed by the Code. It appears from the record that the services rendered subsequent to the account of June, 1919, consisted of the performance of the ordinary duties of an executor, such as the leasing of the property, collection of rents due on the property and of interest due on claims owing to the estate, and the paying out of such moneys as were

necessary for the completion of the administration.

Section 1618 aforesaid provides that the executor of an estate must be allowed certain commissions "upon the amount of estate accounted for by him," according to certain graded percentages upon the amount as therein fixed; that if there are two or more of them the "compensation shall be apportioned among them by the court according to the services actually rendered by them respectively"; that for any extraordinary services the court shall make a "just and reasonable" allowance, not exceeding one-half the regular commissions as fixed by the section, and that all contracts with an heir, devisee, or legatee for a higher compensation than that allowed by the section shall be void. It is plain from these provisions that, aside from any extra allowance that may be proper for extraordinary services, the commission fixed by the section is intended to be full compensation to the executors for all services rendered by them during the entire administration of the estate from the beginning thereof down to the time of the final settlement of the estate and the distribution thereof to the persons entitled thereto. The administration did not close at the time of the rendition and settlement of the account of 1919. The appeal then taken extended the administration, and when that order was reversed the full administration could not be complete until the final order of distribution was made, and all accounts of the executors adjusted and settled. The fees already received by the executors according to the statutory schedule were therefore full compensation for all the services which had been rendered from the beginning of the administration until the final settlement of the third supplemental account in August, 1920. The court below properly refused to allow further commissions.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

186 Cal. 243

McDOUGALD, Treasurer, v. FIRST FEDERAL TRUST CO. et al. ((S. F. 9510.)

(Supreme Court of California. June 17, 1921. Rehearing Denied July 14, 1921.)

1. Taxation ⊂=869—Inheritance of community property taxable.

Community property going to the wife upon the death of the husband is taxable as an inheritance.

2. Taxation ⊂=861—Inheritance law in force at time of death controls.

The inheritance tax law in force at the time of death controls as respects taxability of community property inherited by wife on husband's death.

3. Taxation ⊂=861—Where husband's conveyance of community property without consideration was avoided by wife, she took as heir as respects time of taxability of the property.

Where decedent transferred, to be held in trust, all the community property of himself and wife without the consent of the wife required by Civ. Code, § 172, and after his death the wife, by suit against the trustee and beneficiaries of the trust, recovered her half interest in the community property, the wife obtained the property as heir of her husband, the conveyance being treated as to her as a nullity, so that she was liable for inheritance tax thereon; and the date of the wife's taking of her interest in the community property would be the time of her husband's death as regards the inheritance tax law applicable.

4. Judgment ⊂=702—Judgment against husband's administrator seeking to intervene in wife's suit to recover community property held not to affect right of state to recover inheritance tax.

Where a widow sued under Civ. Code, § 172, to set aside her deceased husband's transfer of community property in trust, the denial of the application of the husband's administrator to intervene, he claiming the right to have the widow's half interest in the community property delivered to him for administration and for payment of the collateral inheritance tax, did not affect the right of the state to later collect such inheritance tax from the widow in a proper proceeding; the state not being a party to the action in which the administrator sought to intervene.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Proceeding by John E. McDougald, as Treasurer of the City and County of San Francisco, against First Federal Trust Company, as executor of the last will of Emma Shafter Howard, deceased, and others, to fix an inheritance tax. From a judgment fixing the tax, defendants appeal. Affirmed.

F. A. Denicke and H. S. Young, both of San Francisco, for appellants Anglo-California Trust Co. and Howard Inv. Co.

J. C. McKinstry and Charles S. Wheeler, both of San Francisco, for appellant First Federal Trust Co.

Charles S. Wheeler and Charles S. Wheeler, Jr., both of San Francisco, for other appellants.

Hartley F. Peart, of San Francisco (H. C. Lucas, of San Francisco, of counsel), for respondent.

WILBUR, J. This proceeding was instituted by the treasurer of the city and county of San Francisco for the purpose of having an inheritance tax fixed upon the community property interests of Emma Shafter Howard in the estate of her husband, Charles Webb Howard. The property was appraised at $302,565.85 and the tax fixed under the law of 1905 at $6,589.14. The husband died July 17, 1908.

[1, 2] As it is well settled that the community property going to the wife upon the death of the husband is taxable as an inheritance under our laws (Estate of Moffitt, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. [N. S.] 207), and that the inheritance law in force at the time of death controls (Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788), the only questions arising in this case grow out of the fact that in 1903 the decedent transferred all the community property of himself and wife without her consent (see section 172, Civ. Code) to the Central Trust Company to be held in trust under the terms and conditions of a written declaration of trust. After the death of her husband Mrs. Howard brought a suit against the trustee and the beneficiaries of the trust whereby she recovered her half interest in the community property.

[3] The interests of the wife in the community property secured to her by this litigation, by reason of the provisions of section 172, Civil Code, are no longer in doubt. She obtains the property as an heir of the husband. As to her the conveyance is treated as a nullity. Dargie v. Patterson, 176 Cal. 714, 720, 169 Pac. 360. As the wife takes the property as an heir of the husband, and as the conveyance is ignored in determining her rights, it would seem clear that she would be liable for an inheritance tax.

[4] Some point is made of the fact that the administrator of the husband's estate intervened in the action brought by the widow to recover her half interest in the community property and claimed the right to have the widow's half interest in the community property delivered to him for the purpose of administration and for the payment of the collateral inheritance tax. This application was properly denied. Dargie v. Patterson, supra. The right of the state of California to an inheritance tax was not litigated in that proceeding, the state was not a party thereto, and the judgment in favor of the wife has no bearing upon the right of the state of California to recover an inheritance tax except as it shows that the widow has successfully maintained her right to succeed to the community property awarded to her by the judgment.

It would also seem clear from the case of Dargie v. Patterson, supra, that the wife took her interest in the community property at the time of the death of the husband. Appellant points out that under the law of 1903 the wife's interest in the community property was not taxable. If, therefore, the right of the wife was vested in her at the time of the transfer to the trustee, October 1, 1903, or relates back to that date, then the property is not taxable. The claim is that the entire title passed from the husband by his conveyance, that the widow succeeds to the title of the trustee as to one-half of the property, and that under these circumstances section 1 of the act of 1905, in effect at the time of the death of the husband, does not apply for the reason that such section imposed a tax only upon property which shall pass by will or by the intestate laws of this state from any person who may die seized and possessed of the same while a resident of this state.

It is not only claimed that the property in question did not pass by will or by the intestate laws of this state, but also that the property did not pass from a person who was seized or possessed of the same at the moment of his death. The first contention is disposed of by what we have heretofore said in regard to the method by which the wife takes her half of the community property, namely, by succession. The same consideration likewise disposes of the second contention. While it is true that the title passed from the husband at the time of the transfer and could not be attacked as invalid by any one except the wife, the conveyance of this community property, having been made without consideration and without her consent, was voidable at her option. When she exercised her option to have the transfer set aside as to her interest in the community property and secured a judgment of the court having the transfer decreed void as to her interest, the effect of this judgment was to void the transfer from the beginning. The legal consequence of her action was that, so far as she was concerned and so far as her interest in the community property was concerned, the husband remained seized of the property as community property until the moment of his death, at which time it passed to her by law of succession to the same extent as if he had never made any conveyance thereof.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

186 Cal. 225

SCHEUERMANN v. KUETEMEYER et ux. (S. F. 8944.)

(Supreme Court of California. June 16, 1921.)

1. Trial ⊂=142—Nonsuit denied, where fact alleged is reasonably inferable.

While, to withstand motion for nonsuit, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged, yet, if the evidence is such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, nonsuit must be denied.

2. Highways ⊂=184(3)—Nonsuit is improperly granted on evidence that in daylight pedestrian was struck from behind by automobile.

Where evidence showed that in broad daylight, about noon, a pedestrian on a gravel strip along the side of a paved highway was struck without warning by an automobile coming from behind, nonsuit in his action for damages against the driver of the automobile was improperly granted, though, by reason of the plaintiff's becoming unconscious when struck, he was unable to show exactly how it was that the machine happened to hit him, for the accident was inferably caused by the negligence of the driver of the car.

In Bank.

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Action by August G. Scheuermann against Henry F. Kuetemeyer and wife. From a judgment for defendants, plaintiff appeals. Reversed.

F. A. Berlin, of Oakland, for appellant.

Snook & Church and Chas. E. Snook, all of Oakland (George M. Naus, of Oakland, of counsel), for respondents.

ANGELLOTTI, C. J. This action was brought by plaintiff to recover damages for personal injuries received by him as a result of being struck by an automobile driven by Mildred Kuetemeyer, the wife of her codefendant. The automobile, according to the testimony of Mrs. Kuetemeyer, was bought from the earnings of her husband, and was owned by her husband and herself. The accident was alleged to be due to the negligent operation of the automobile. At the close of the plaintiff's case, a motion for a nonsuit was made by defendants, and this motion was granted by the court. Plaintiff appeals from this judgment of nonsuit.

The only ground specified for a nonsuit, that is discussed in any of the briefs, or that merits consideration, is the failure of the evidence to sufficiently show any negligence in the operation of the automobile. Plaintiff's case, as shown by the evidence introduced on his behalf, may be stated in comparatively few words:

On June 14, 1917, some time between 11 a. m. and noon, the plaintiff, returning from a call upon a relative, was walking in a westerly direction upon a public highway leading from Niles to Hayward, in Alameda county, at a point near Hayward. The highway was 24 feet wide, and consisted of a paved strip 16 or 18 feet wide, and, on each side of this strip, a strip of gravel and cement 3 or 4 feet wide. Plaintiff was walking along the gravel strip on the northerly side of this highway, the right-hand side as he walked in a westerly direction. While so walking, in a place where, of course, he had the right to be, he was suddenly and without warning violently struck from behind by the automobile driven by Mrs. Kuetemeyer, who was also proceeding in a westerly direction along this highway. The result was that he was thrown to the ground, rendered unconscious, and seriously injured. Having been without warning of the approach of the machine from behind until struck and rendered unconscious, he was not able to disclose further how the thing happened. So far as appears, the only other persons who observed the accident are Mrs. Kuetemeyer and the two ladies who were with her in the automobile, and none of these ladies has testified with relation thereto. Mrs. Kuetemeyer, called by the plaintiff, did testify that she was driving the machine, which was a Ford automobile, at the time of the accident, that it belonged to her husband and herself, that she had a chauffeur's license to drive, that she had driven a machine about once a week for two months and felt competent to run it, that it was her machine that struck plaintiff, and that the machine was bought from the earnings of her husband.

The plaintiff testified that Mr. and Mrs. Kuetemeyer called on him the next day while he was disabled, and that Mrs. Kuetemeyer tried to explain "that she had to get out of the way and run into" him. Mr. Becker, the uncle of plaintiff, to whom plaintiff had made his visit prior to the accident, testified that he was brought back to his place after the accident in defendants' machine, and that Mrs. Kuetemeyer said she wanted to make things right; that they ran the man down and could not help it, because there were so many machines together; that she ran the man down, and wanted "to make right what is right"; that she "run the man down off from the road." A Mr. Lazarus testified that, driving along this road in his own machine, he came to the place of the accident and stopped there, owing to the presence of "a lot of machines and more or less excitement." He found defendants' machine turned "right across the road," the front wheel "more or less in the gutter," the plaintiff in the machine, apparently injured and dazed, and Mrs. Kuetemeyer standing

beside it. Some one asked him to turn the machine around, and he did so and put it on the road. It is conceded, of course, that the width of the paved portion of the road was ample to permit two machines to pass.

[1, 2] While the evidence introduced by plaintiff did not show exactly how it was that Mrs. Kuetemeyer happened to allow her machine to come into contact with plaintiff, we are utterly unable to perceive any good reason for holding that it did not make a sufficient prima facie case of negligence in the matter of her operation of the machine to go to a jury or trial judge for determination of the fact. Of course, it cannot be disputed that the motion for a nonsuit admitted the truth of the evidence in behalf of plaintiff and every inference of fact that might reasonably be drawn therefrom. It is true, as was said in Janin v. London, etc., Bank, 92 Cal. 14, 27, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82, that the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged, and that "it must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists"; but, where the evidence is such that "a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists," it is a sufficient answer to a motion for nonsuit. We are not concerned here with any question of the application of the doctrine of res ipsa loquitur, as to which a great deal is said in the briefs. The simple question is whether the matters appearing are such as to reasonably warrant, in the absence of any explanation or denial, an inference of negligence on the part of the driver of the car. We venture to say that it seems to us to be the natural inference, and that any conclusion to the contrary would be based on pure conjecture and surmise. In broad daylight, about 12 o'clock noon, a pedestrian is walking along a public highway, on his own side of the road, and off the paved portion ordinarily used by machines, when he is suddenly struck from behind by an automobile that has come upon him without any warning of its approach.

There is nothing to indicate any basis for a conclusion of negligence on his part. The driver of the machine is at its wheel, and there is nothing to indicate that there was anything wrong about the machine itself. In fact, it does appear that it was driven away after the accident. The paved portion of the highway was amply wide for the passage of two automobiles. There is testimony that the driver had admitted that she ran plaintiff down "off from the road," but could not help doing so; the explanation why she could not being most general and very vague. Her own testimony showed that she was a comparatively inexperienced driver, having driven the machine only about once a week for two months. There was nothing to indicate the existence of any emergency requiring the driver to leave the paved portion of the highway. The thing that happened, the leaving of its course by an automobile and the running down by it from behind of a pedestrian who is lawfully pursuing his way along the unpaved portion of the highway, in entire ignorance of its approach and without any negligence whatever on his part, is certainly not a thing that ordinarily happens if the driver is exercising due care; that is, if there is nothing wrong with the machine itself. We have seen that there was apparently nothing wrong with the machine.

In determining in favor of plaintiff the question of the correctness of the ruling of the trial court in granting the motion for a nonsuit, it is not essential to hold that the evidence on his behalf created a "presumption" of negligence on the part of the driver, or, uncontradicted, as matter of law established his case, but simply that it was such as to warrant the jury or trial judge, as reasonable men, to infer therefrom that the accident was due to negligence on the part of the driver of the car. That it was such we have no doubt whatever.

Learned counsel for respondents relies particularly upon three decisions of this court, none of which appears to us to be at variance with our conclusion. In Tower v. Humboldt Transit Co., 176 Cal. 602, 169 Pac. 227, a street car, operated on railway tracks, had run into the plaintiff as she lay partly on one of the rails, unconscious because of having fainted while crossing the track, she said. It was dark, or between dusk and dark. There was a conflict in the evidence on the question of negligence on the part of the employees of the defendant. They claimed that, though exercising reasonable care, they did not see her in time to avoid the accident. Under these circumstances the trial judge instructed the jury in such a way as to apply the doctrine of res ipsa loquitur; the effect of the instruction being, as said by this court, to make "mere proof of the accident suffice to impose on the defendant responsibility for such injury." Upon the facts of that case it was held, as is clear, that "the instruction was inapplicable, and therefore misleading." Manifestly, the strictures of the court as to the instruction were correct. The court did not intimate that the evidence was not sufficient to support a verdict in plaintiff's favor, and expressly said so.

In Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38, there was a collision between the wagon on which plaintiff was riding and the defendant's automobile. The trial court directed a verdict in defendant's favor. It was said that in that kind of a case "negligence is not to be inferred from the mere fact of injury," or from the

mere fact of collision producing an injury, which is, of course, true, not only as to that case, but as to this also. The court said:

"The testimony on behalf of plaintiff was very indefinite, and, giving it all the weight which it could fairly bear, it went no further than to show that there had been a collision between the wagon and the automobile. *There was a total lack of proof of any circumstances from which it might * * * be inferred that the collision was caused by any want of care on the part of the driver of the automobile, rather than by the negligence of the driver of the wagon, or by accident without fault on the part of anyone.*" (Italics ours.)

A very different situation is here presented, as we have seen. Here it is certainly true that if the motion for a nonsuit had been denied, and the defendants had failed to offer any evidence, the evidence on behalf of plaintiff, in the absence of any attempt at explanation by defendants, would have furnished ample support for a decision in his favor.

In Depons v. Ariss, 188 Pac. 797, an appeal from a judgment on the merits in favor of the defendants, it was correctly said that in this state negligence is not presumed from the mere fact of injury, and it was held that negligence could not be implied from the particular circumstances surrounding the accident, as shown by the evidence in the case. In other words, the circumstances of that case were not such as to reasonably warrant an inference of negligence. A reading of the opinion will demonstrate the material difference in facts between that case and this. It must be held that the trial court erred in granting the motion for a nonsuit.

The judgment is reversed.

We concur: OLNEY, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; SHAW, J.; LAWLOR, J.

186 Cal. 326

In re LUBIN'S ESTATE. (L. A. 6695.)

(Supreme Court of California. June 23, 1921.)

1. Wills ⟸14—Jewish synagogue held "charitable corporation" within statute prohibiting bequests to such within 30 days before testator's death.

A Jewish synagogue organized for religious purposes under Civ. Code, §§ 593–605, is a "charitable corporation" within section 1313, prohibiting bequests to such unless executed at least 30 days before testator's death, though its by-laws provide that its members shall be elected by its board of directors and shall pay an admission fee, and limit the full privileges of the Congregation to members; such by-laws being merely regulations to carry out the object of its incorporation and guard against the admission of unworthy members, and not to benefit solely the members of the organization, which exists for the benefit of all of like faith.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Charitable Corporation.]

2. Wills ⟸13(2) — Cemetery maintained by Jewish synagogue held "charitable use" within statute prohibiting bequests to such within 30 days before testator's death.

A cemetery conducted by a Jewish synagogue organized for religious purposes under Civ. Code, §§ 593–605, is a "charitable use" within section 1313, prohibiting bequests to persons in trust for such uses unless executed at least 30 days before testator's death, though a higher fee is charged nonmembers than members of the Congregation; the privilege of burial being open to all members, and there being no restriction on membership by those of the Jewish faith other than the charging of an admission fee to guard against the admission of unworthy members.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charitable Use.]

In Bank.

Appeal from Superior Court, San Diego County; Edgar A. Luce, Judge.

In the matter of the Estate of William Lubin, deceased. From an order on final distribution holding bequests to a Jewish synagogue void, the legatee appeals. Affirmed.

J. Weinberger and Johnson W. Puterbaugh, both of San Diego, for appellant.

Wm. L. Morrison, A. Rosenthal, and Wright & McKee, all of San Diego, for respondent.

OLNEY, J. One William Lubin died, leaving a will whereby he made two bequests to the Congregation of Beth Israel of San Diego; one of $5,000 for beautifying its cemetery, and one of $1,000 for beautifying its temple. The will was made within 30 days of the testator's death, and because of this fact the probate court on final distribution held the bequests void under section 1313, Civil Code. The Congregation appeals.

The material portion of section 1313, Civil Code, reads:

"No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator."

The claims of the appellants are that it is not a charitable corporation, and also, as to the $5,000 bequest, that the beautifying of the cemetery is not a charitable use. It is difficult to see anything of substance in either claim.

[1] The appellant is a Jewish synagogue organized for religious purposes under the

sections of the Code (sections 593–605, Civ. Code) providing for the formation of corporations for religious, social, and benevolent purposes. That such a society or corporation is a charitable one within the legal meaning given to the word "charitable" is beyond question. 11 Cor. Juris, 320; Estate of Hinckley, 58 Cal. 457; Estate of Hewitt, 94 Cal. 376, 29 Pac. 775; Estate of Hamilton, 181 Cal. 758, 186 Pac. 587. The contention of the appellant is that, although it is a religious corporation, it is not a charitable corporation, because its by-laws provide that its members shall be elected by its board of directors and shall pay an admission fee, and that the full privileges of the Congregation are limited to members. The argument is that because of these limitations the appellant is not an organization for public benefit, either for the benefit of the public generally or for a particular class of the public, but is for the benefit of the particular individuals who make up the membership, and therefore comes within the rule of Estate of Dol, 187 Pac. 428. The immediate answer to this is that the by-laws relied upon do not have the effect of limiting the purpose of the corporation to that of benefiting in a religious way only those particular individuals who happen at the time to be members of the corporation. The appellant's articles of incorporation specify:

"That the purposes for which it is formed is for (sic) the purpose of religious worship after the manner of the Jews, and for constructing a synagogue for that purpose, and acquiring real estate for the site of such synagogue and for burial purposes."

The by-laws themselves begin with a somewhat fuller statement of the objects of the organization, specifying in effect that they are adopted for the furtherance of those objects. They commence thus:

"The members of this Congregation, anxious to preserve, cherish, and exercise the doctrines and precepts of the Mosaic religion, solicitous of perpetuating the time-hallowed ancestral institutions for the establishment of public worship in accordance with the principles and ritual of reform Judaism, desirous of maintaining schools for the instruction of the youth in the principles of Judaism, and wishing to make proper provision for the interment of the dead —have adopted the following constitution and by-laws."

It is manifest that the by-laws are merely regulations adopted for the more effective carrying out of the objects so stated; that those objects are primarily to form a religious body for worship according to the Jewish faith, and far transcend any such exceedingly narrow purpose as that of benefiting solely those who happen to belong to the organization; and that the provisions as to admission to membership are merely regulations designed to safeguard the organization against the admission of unworthy members, and are in no wise intended to so narrow the broad and beneficent purposes declared as fundamentally to change their character. In fact, any such narrowing of the purposes for which the appellant exists would be an essential departure from the spirit of the faith which it professes to follow. We have no hesitation in holding that the appellant is a religious organization organized and existing for the benefit of all of like faith. It is therefore a charitable organization within the legal meaning of that word.

[2] As to the claim that the beautifying of the appellant's cemetery is not a charitable use, it proceeds upon much the same argument. It is not contended that a cemetery may not be a charitable use, but it is contended that the cemetery of the appellant is not such because it is not a place of public burial for all persons alike, but for those of the Jewish faith only, and of these for those only who are members of the Congregation. A cemetery may, of course, be conducted for profit or in some other manner that precludes it from being considered as charitable in nature, just as a hospital may be. But it may also, like a hospital, be conducted in such a manner as to make it charitable in nature, and when, as here, it is conducted by a religious organization charitable in nature and as one of the religious objects of the organization and for the benefit of those of the faith which the organization professes, its charitable nature would seem to be clear. Such is the established rule. 11 Cor. Juris, 324, and cases there cited. As to the limitation of the absolute right of burial to those who are members of the Congregation, suffice it to say that the practice has been to admit all who are members of the Jewish faith, although a higher fee is charged nonmembers than members, and also that since the privilege of burial is open to all members, and there is no restriction on membership by those of the Jewish faith other than the regulation mentioned designed to protect the Congregation against unworthy members, the privilege is, in effect, open to those of the Jewish faith as a class. This is sufficient.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

186 Cal. 199

MORA v. FAVILLA. (S. F. 9213.)

(Supreme Court of California. June 16, 1921.)

1. Municipal corporations ⊂=816(8)—In suit for injuries on wet walk, allegation of contributory negligence held not to limit proof to intoxication.

In an action for personal injuries by falling on a wet sidewalk, defendant's answer that such injuries were contributed to and proximately caused by plaintiff's intoxicated condition and his carelessness and negligence did not limit plaintiff's contribution to the accident to proof of a state of intoxication, but covered want of care in any other particular.

2. Negligence ⊂=6—Violation of ordinance negligence.

An act in violation of an ordinance is presumptively an act of negligence and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances.

3. Trial ⊂=296(4, 5)—Instruction to find for defendant if contributory negligence proximate cause of injury held not prejudicial.

In an action for personal injuries, where the jury was instructed that a want of ordinary care by plaintiff concurring or co-operating with defendant's negligence as the cause of the injury constitutes contributory negligence, an instruction to find for defendant if plaintiff's negligence was the proximate cause of the accident, even if too broad, was without prejudice.

4. Municipal corporations ⊂=822(4)—Instruction suggesting proof of intoxication essential condition to finding plaintiff injured on walk contributorily negligent erroneous.

In an action for personal injuries by falling on a wet sidewalk, an instruction that it was for the jury to determine whether plaintiff was intoxicated at the time of the accident, and, if he was not and the injury was sustained without any contributory negligence on his part, to find a verdict in his favor, was erroneous, as suggesting that proof of intoxication was essential to finding him contributorily negligent.

5. Trial ⊂=253(9)—Instruction to find for plaintiff if not negligent erroneous, not requiring proof of defendant's negligence.

In an action for personal injuries by falling on a wet sidewalk, an instruction that, if plaintiff was not contributorily negligent, to find a verdict for him, was erroneous as instructing a verdict for plaintiff without reference to proof of defendant's negligence.

6. Municipal corporations ⊂=822(5)—Instructions on care required of plaintiff held within issues of fact shown by evidence.

In an action for injuries by falling on a slippery sidewalk washed with a hose during prohibited hours, instructions that, if plaintiff knew the walk was wet and failed to use ordinary care, and knew or had reason to know it was dangerous to pass over it, and there was another safe and convenient way he could have taken, and that if defendant warned him and requested him not to pass over it, plaintiff could not recover, *held* within the issues raised by the evidence.

7. Municipal corporations ⊂=805(1)—One not justified in walking on slippery sidewalk if he knew or should have known of its condition.

Though a sidewalk is made slippery by the negligence of another in washing it with a hose during prohibited hours, one is not justified in passing over it if he had knowledge or warning of its condition and knew or ought to have known that he was liable to slip and fall, and if he could have avoided it by slight change of route.

8. Municipal corporations ⊂=817(3)—Presumption pedestrian can safely make detour around dangerous place in sidewalk.

In an action for injuries by falling on a slippery sidewalk caused by defendant's negligence in wetting it with a hose, though there was no evidence of any conveniently safe alternative to avoid passing down the walk, it may be presumed as a matter of common knowledge, the locality of the accident being a downtown residence street, that there were sidewalks on each side and a roadway between, and that it was not so congested with travel that a pedestrian could not make a detour around a dangerous place in a sidewalk.

9. Municipal corporations ⊂=821(26)—Whether one injured by falling on wet sidewalk should have avoided same for jury.

In an action for injuries by falling on a slippery sidewalk, it was for the jury to determine whether or not in the exercise of reasonable prudence plaintiff should have made an attempt to avoid it.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Dino Della Mora against C. Favilla. Judgment for plaintiff, and defendant appeals. Reversed.

O'Gara & De Martini, of San Francisco, for appellant.

Frank J. Egan and Jos. A. Brown, both of San Francisco, for respondent.

SLOANE, J. This appeal is by defendant from a judgment awarding damages to the plaintiff for personal injuries suffered by him in falling upon a wet and slippery sidewalk in front of defendant's premises.

On a former trial of the action the verdict of the jury and judgment was for the defendant. On appeal an order for a new trial granted by the trial court was affirmed. Mora v. Favilla, 37 Cal. App. 164, 173 Pac. 770. On the second trial the verdict and judgment appealed from fixed plaintiff's damages at the sum of $2,500. This amount was reduced to $1,800, with the consent of plaintiff, as a condition made by the trial court in denying defendant's motion for another new trial.

The alleged negligence of defendant consisted in his having wet down the sidewalk with a hose just prior to the time that plaintiff was injured, about 10 o'clock in the forenoon, in violation of a city ordinance which prohibited the wetting down or washing of sidewalks between the hours of 8 in the morning and 6 in the evening.

The walk in question is on Montgomery street in the city of San Francisco, and at a steep place in the street presenting a grade of about 20 per cent. In attempting to pass down this strip of sidewalk the plaintiff slipped and fell, breaking his leg.

[1] The defendant by his answer alleged contributory negligence on the part of plaintiff. Plaintiff's negligence was sufficiently pleaded. It was averred:

"That during all said times plaintiff was intoxicated, reckless, indifferent, and thoughtless as to the consequences of his movements; that any and all injuries, if any, received and sustained by plaintiff as set out in the complaint on file herein were so received and sustained by him and caused to him solely by reason of his intoxicated condition aforesaid and of his own recklessness, negligence, and lack of ordinary care; that the alleged injuries to plaintiff were contributed to and proximately caused by the said intoxicated condition of plaintiff, and the carelessness and negligence aforesaid, and if it had not been for said intoxicated condition, carelessness, and negligence of plaintiff, no injury or injuries would have been suffered by or inflicted upon plaintiff because of or as a result of the conduct of defendant complained of in said complaint."

The alleged contribution of plaintiff to his accident is not limited to proof of a state of intoxication, but covers negligence and want of care in any other particular.

[2] Conceding the sufficiency of the evidence to make a prima facie showing that defendant was guilty of negligence in turning water upon the sidewalk at the time of day indicated, and that the plaintiff was not guilty of contributory negligence in attempting to use the walk with full knowledge that it was wet, we agree with the contention of defendant that material issues in the case were taken from the jury by erroneous instructions given for defendant and by refusal to grant certain instructions asked by plaintiff.

Instruction numbered 1, complained of on this appeal, is not in itself subject to serious criticism. It instructs the jury that the violation of an ordinance constitutes negligence in itself.

An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, and while the defendant is permitted to rebut such presumption by showing that the act was justifiable or excusable under the circumstances, until so rebutted it is conclusive. Harris v. Johnson, 174 Cal. 56, 58, 161 Pac. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; Shearman and Redfield on Negligence, p. 13; Cragg v. L. A. Trust Co., 154 Cal. 663, 667, 98 Pac. 1063, 16 Ann. Cas. 1061; Squier v. Davis Standard Bread Co., 181 Cal. 533, 185 Pac. 391.

[3] In this instruction as it stands there is no condition stated as to the effect of contributory negligence on the right of recovery, but respondent claims that such omission is cured by instructions numbers 5 and 6, which correctly define contributory negligence, and inform the jury that it must find for the defendant if the plaintiff was guilty of contributory negligence at the time of the happening of the accident in question, and if such negligence on his part was the proximate cause of the accident.

It is objected that the statement in this instruction as to the contributory negligence being the "proximate cause" of the accident is too broad. In view of the fact, however, that in the instruction immediately preceding the jury was told that a want of ordinary care by plaintiff "concurring or co-operating with the negligent act of the defendant" as the cause of the injury constitutes contributory negligence, this instruction may be held without prejudice.

[4, 5] But in summing up the charge to the jury the court in an oral instruction used the following language:

"Some evidence has been introduced here as to the condition of the plaintiff with respect to sobriety at the time of the injury in question. You have heard this testimony, and you are to determine from that what in fact was his condition. It is a question of fact for you to determine whether he was at that time intoxicated or not. If you should find that he was not, and that the injury was sustained without any contributory negligence on his part, then it is your duty to find a verdict in favor of the plaintiff."

Coming after the written instructions presented by the parties to the action, in an oral statement of the law of the case by the court, the instruction was likely taken by the jury as a summing up of the view of the court upon the questions presented. It contains two grounds of objection: First, it suggests that proof of a state of intoxication on the part of plaintiff is an essential condition to finding him guilty of contributory negligence; and, secondly, it instructs a verdict in such case for the plaintiff without reference to proof of the defendant's negligence. In fact, the earlier part of this oral charge practically fixes the negligence of the defendant as a matter of law. The trial judge says:

"Now, the plaintiff in this case has established, concededly, a violation of the ordinance. That of itself was negligence on the part of the defendant."

There was an attempt under the evidence in behalf of defendant to show that the sidewalk was in such a dirty and dangerous condition by reason of boys of the neighborhood

having been sliding down the incline of the walk on greased boards as to justify washing it off at any time of day irrespective of the inhibition of the ordinance. This condition was disputed on behalf of plaintiff, but it may well be contended that the facts in evidence raised a question for the jury as to whether or not the defendant was guilty of negligence in washing the sidewalk, although in violation of the ordinance, or even that the water on the sidewalk was the proximate cause of plaintiff falling and suffering injury. It is common knowledge that it is difficult to remove grease with water, particularly cold water from a hose, and it may well be that the remains of the grease which defendant had attempted to remove caused plaintiff to fall. And, in any event, it was for the jury to determine, in the light of this claim of necessity for washing the sidewalk, whether the act of using the hose at the forbidden time of day established a want of ordinary care and prudence. It may sometimes happen that prudence and safety to life and limb require the doing of an act which otherwise would be a violation of law. Squier v. Davis Standard Bread Co., 181 Cal. 533, 535, 185 Pac. 391. It is difficult to escape the conclusion that there was prejudicial error in the construction of the law given by the instruction. Taken in connection with the refusal of the court to give certain instructions asked by defendant, which would have cured error in the instructions given, we think a new trial should be had.

[6] The following instructions, presented on behalf of defendant, were refused:

"(13) If you find from the evidence that plaintiff knew that said sidewalk was wet and he did not use the care that a person of ordinary prudence would have used in passing over said sidewalk under the circumstances, and in consequence fell and suffered his injuries, then I instruct you that plaintiff cannot recover. * * *

"(15) If you find from the evidence that plaintiff at the time he attempted to pass over said sidewalk in front of defendant's building situate on Montgomery street, in this city, and designated as Nos. 1130–1132 Montgomery street, knew that it was dangerous or unsafe to attempt to pass over said sidewalk, or knew or had reason to know and should have known that it was imprudent for him to attempt to pass over said sidewalk, and you further find that there was at hand another safe and convenient way which he could have easily and readily have taken in going the way he desired to go, and that nevertheless he attempted to pass over said sidewalk, and in consequence fell and came to his injuries, then I instruct you that plaintiff was negligent in attempting to pass over said sidewalk and cannot recover.

"(16) Even if defendant was negligent because he violated Ordinance No. 1035, respecting the washing of sidewalks, which was read in evidence, and even if you find that the washing of said sidewalk did cause or occasion plaintiff's fall and his injuries, still, if you find that the said sidewalk was at the time plaintiff attempted to walk over it in such condition that it was then apparent and would have been apparent then to any person of ordinary prudence who was about to walk over said sidewalk or attempted to walk over said sidewalk that it was dangerous to attempt to cross said sidewalk, and you further find that defendant warned plaintiff that said sidewalk over which he was about to pass had been washed and requested him not to pass over said sidewalk, but to pass in the street, and you further find that plaintiff could have easily and conveniently avoided passing over said sidewalk by taking another safe and convenient way, and that there was plainly at hand another safe and convenient way which he could easily and readily have taken in going the way he desired to go, and that nevertheless he attempted to pass over said sidewalk, and in consequence fell and received his injuries, then I instruct you plaintiff cannot recover, and you must find in favor of defendant.

"(17) If you find that the said sidewalk in front of defendant's said building was before and at the time defendant began to wash said sidewalk greasy, and in consequence dangerously slippery and seriously dangerous to defendant, the members of his family then living in said building, and to pedestrians that should pass over said sidewalk, and seriously impaired to defendant the enjoyment of said building, then I instruct you that the defendant had the right to remove said danger from said sidewalk by the reasonable use of the means necessary to remove said danger, even though he did so within the hours of 8 o'clock a. m. and 6 o'clock p. m."

These proposed instructions state the law with substantial correctness, and, we think, were within the issues of fact before the jury on the evidence.

Plaintiff himself testified that as he approached this strip of sidewalk the defendant was in front of his premises turning the water upon and over the sidewalk from an inch and a half hose, and that the water was running over the surface of the walk. He therefore knew that the sidewalk was wet. Defendant states in his testimony that he warned plaintiff of the condition of the walk. He testified:

"When plaintiff came out of Mrs. Modena's house he was coming down in this manner (witness illustrates by staggering), and when he was in front of me and I told him to pass on that side for it was damp on this side. He was about to approach and pass in front of me; he don't want to go on the other side, but he come on towards me, * * * and at the same time he fell on the ground."

[7] Conceding that defendant was negligent and that the sidewalk was in a dangerous condition by reason of defendant's fault, this did not justify the plaintiff in passing over it if he had knowledge or warning of its condition, and if he knew, or ought as a reasonable man to have known, that he was liable to slip and fall.

The evidence presented an issue on this

point, and plaintiff was entitled to an instruction as to plaintiff's duty under such a state of facts.

The fact that defendant had wrongfully and unlawfully created a dangerous condition of the sidewalk would not excuse plaintiff in exposing himself to injury if he knew or had warning of the dangerous condition and could with a slight change of route have avoided it.

[8, 9] It is said there is no evidence in the record that there was any conveniently safe alternative open to plaintiff to avoid passing down this walk. It sufficiently appears that the locality of the accident was a downtown street of the city of San Francisco. It may be presumed as a matter of common knowledge that there were two sides to the street with sidewalks on each side, and a roadway between. It also may be inferred from the record that it was a residence district and presumptively not so congested with travel that a pedestrian could not safely make a detour around a dangerous place in the sidewalk. It, at most, was fairly a matter for the jury to determine whether or not in the exercise of reasonable prudence the plaintiff should have made an attempt to avoid this wet sidewalk. The instruction as to his duty in the premises, if he knew or was warned of his danger, should have been given.

We think also the instruction should have been given informing the jury that the presumption of negligence from disobedience of the ordinance forbidding turning water on the sidewalk after 8 in the morning was not conclusive, but was subject to rebuttal by evidence of an overruling necessity for such act to avoid more serious danger to pedestrians passing over that portion of the street.

There was sufficient evidence bearing on this point to require its submission to the jury under such an instruction.

The judgment is reversed.

We concur: SHAW, J.; LENNON, J.

WILBUR, J. I concur in the judgment of reversal. By Ordinance No. 1035 of the city and county of San Francisco, it is declared unlawful for any person to wash or cause to be washed any sidewalk or street, with a hose or otherwise, between the hours of 8 o'clock a. m. and 6 o'clock p. m. It was conceded by the defendant that some time between 9 and 10 o'clock a. m. he washed down the sidewalk in front of his premises using a hose for this purpose. The court correctly instructed the jury in instruction No. 8:

"Hence such act was in violation of the ordinance, and that violation constitutes negligence in and of itself. In order, however, for any plaintiff who brings an action to recover damages for injuries sustained or alleged to have been sustained on account of the injuries suffered, it must appear that the injuries suffered resulted from negligence on the part of the defendant, and that such negligence was the immediate and proximate cause of the injuries of which plaintiff complains. Now, the plaintiff in this case has established, concededly, violation of the ordinance. That of itself was negligence on the part of the defendant. Now, then, in order to enable the plaintiff, however, to recover upon that ground, it must appear that the violation of the ordinance directly contributed to the plaintiff's injury."

The court instructed the jury to the same effect in instruction No. 1 and in instruction No. 2. By instruction No. 1 the jury were informed:

That a violation of the ordinance constituted negligence, and that, if they found "that the plaintiff slipped and fell by reason of the wet condition of the sidewalk so caused by the defendant, and that the plaintiff thereby broke his leg, that your verdict should be for the plaintiff for such amount as you believe from the evidence the plaintiff is entitled to."

Instruction No. 2 was to the same effect, concluding as follows:

"And thereby caused the same to become wet, and that by reason of the wet condition of said sidewalk, and without any negligence on his part, plaintiff slipped and broke his leg, your verdict must be for the plaintiff."

By instruction No. 3 the jury were informed that the negligence of the defendant in order to justify a recovery must be the proximate cause of the plaintiff's injury.

Two defenses were relied upon by the defendant: First, that the washing of the sidewalk was necessary by reason of the fact that the walk was dirty and greasy; the second, that the plaintiff was guilty of contributory negligence in that he was intoxicated, "and because of his intoxicated condition plaintiff failed to exercise ordinary care for his own safety; that during all of said times plaintiff was intoxicated, reckless, indifferent, and thoughtless as to the consequences of his movements;" that his injuries were received by reason of his intoxicated condition aforesaid and of his own recklessness, negligence, and lack of ordinary care.

With reference to the first defense: It appeared from the defendant's evidence that he discovered the day before that boys were sliding down the sidewalks on greased boards, and as a result the sidewalk had become greasy and slippery. The next day, Sunday, he swept the sidewalk, washed it, and scrubbed it. Defendant testified that he had completed the task of cleaning the sidewalk, and that it had been completely cleansed and the dirt and grease removed more than 20 minutes before the accident happened; that the sidewalk was damp, but not wet or slippery, at the time of the accident. Conceding that it is proper to show in defense of such an action that an act which is within the literal prohibition of the ordinance is nevertheless justifiable and excusable under all the circumstances, either

because the act was not within the intent of the legislative body or because some higher obligation required it to be disregarded under the circumstances, it nevertheless appears that under the facts shown by the defendant the court should have held, as it did, that no such excuse or justification was shown, and that therefore the violation of the terms of the ordinance was negligence per se.

With reference to the question of contributory negligence: The defendant testified that the sidewalk was merely damp at the time of the injury, but the plaintiff, on the other hand, testified that the defendant was engaged in washing the sidewalk at the time he approached and was discharging water thereon from an inch and a half hose; that the sidewalk was very wet and slippery; that he took one step and found that the sidewalk was slippery, and when he put his foot down for the second step he slipped and fell before he had an opportunity to retreat. The defendant, on the other hand, testified that he warned the plaintiff of the condition of the sidewalk and advised him to avoid the wet portion of the sidewalk; that plaintiff stopped and talked to him for some time, and upon turning to leave suddenly fell and broke his leg. In this condition of the record the court gave instruction No. 5, defining contributory negligence as follows:

"Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care as, concurring or cooperating with the negligent act of the defendant, is the proximate cause of the injury complained of, but to constitute a defense it must be affirmatively shown by the defendant, unless it has been shown by, or can be inferred from, the evidence of the plaintiff."

The court also gave the oral instruction quoted in the main opinion. It might be inferred by the jury from this latter instruction that it was necessary for them to find that; the plaintiff was intoxicated in order to find that he was guilty of contributory negligence, notwithstanding the fact that contributory negligence was defined in instruction No. 5 as a lack of ordinary care. If it was not negligence as a matter of law for the plaintiff to walk on a wet sidewalk where the conditions were perfectly obvious in broad daylight, where he had observed those conditions and proceeded after such notice to walk upon the sidewalk, a point which we need not determine, it is clear that the defendant was entitled to definite instructions calling the attention of the jury to the law bearing upon that particular question. For this reason I think that instructions 13 and 15 should have been given. I am not certain that instruction 16 should have been given, because under this instruction the plaintiff might have been held negligent for failure to observe the condition of the sidewalk. Perkins v. Sunset T. & T. Co., 155 Cal. 712, 722, 103 Pac. 190. In view of the plaintiff's testimony that he did observe that the sidewalk was wet and was being washed down by the defendant, the instruction was unnecessary, and the matter was fully covered by instructions 13 and 15. I do not agree that instruction No. 17 should have been given. The defendant testified that he observed the slippery condition of the sidewalk about 3:30 p. m. Saturday. This was in ample time to have washed it off in the evening of Saturday or before 8 o'clock Sunday morning, and this opportunity to clean the sidewalk within the period authorized by the ordinance would render his efforts to do so by washing with water within the prohibited hours inexcusable, even if it be conceded that otherwise he would be justified after 8 a. m. Sunday in removing grease or dirt by the use of water. Moreover, the court will take judicial notice or the fact that other means of removing grease, not prohibited by ordinance, were much more effective for that purpose, gasoline, for instance.

I concur: OLNEY, J.

ANGELLOTTI, C. J. I concur in the judgment.

In view of the circumstances of this case defendant was entitled to have it very clearly made known to the jury that, notwithstanding his violation of the ordinance with the result that he was guilty of negligence, the plaintiff could not recover unless such negligence was the proximate cause of the injury. The situation was such that the jury might reasonably have concluded that the fall of plaintiff was not due to the wetting of the sidewalk by defendant. The trial court did in one place tell the jury in general language that plaintiff could not recover unless defendant's violation of the ordinance "directly contributed to the plaintiff's injury," but, taking the charge as a whole, in my opinion it did not so clearly present the matter with relation to the facts of this case as to make it entirely plain that it was essential to plaintiff's case for him to establish by a preponderance of the evidence that his fall was caused by defendant's violation of the ordinance. Under the circumstances certain instructions requested by him on this subject should have been given, viz. defendant's requested instructions 9, 11, and 14.

I think, too, that certain requested instructions going to the question of contributory negligence should have been given, and concur in what is said by Mr. Justice SLOANE on this point.

The case is, to my mind, a close one in the facts, and I cannot regard the matters to which I have referred as unsubstantial.

It does not seem to me that the evidence was such as to afford support for a conclu-

sion that there was any sufficient justification or excuse for defendant's violation of this ordinance. Certainly the fact that the sidewalk was very "dirty" would not be sufficient to do this, and the theory that it was suddenly discovered to be so "greasy" as to be dangerous to pedestrians unless cold water from a hose was at once applied appears to me to be so insufficiently supported by substantial evidence as not to be worthy of serious consideration. In so far as this phase of the case is concerned, I do not think there was any error on the part of the trial court. But on account of the other matters to which I have referred I concur in the judgment.

I concur: LAWLOR, J.

186 Cal. 133

BESSHO et al. v. GENERAL PETROLEUM CORPORATION et al. (L. A. 6116.)

(Supreme Court of California. June 11, 1921.)

1. Mines and minerals ⊂=81 — Evidence held sufficient to support implied finding that lessee's possession was such as to put subsequent lessee on inquiry.

In an action by a lessee against an oil company, which was assignee of a subsequent lease, evidence *held* sufficient to support implied finding of jury that plaintiffs' possession was such as to put the subsequent lesseee on notice or inquiry as to the character of plaintiffs' claim.

2. Mines and minerals ⊂=81—Notice to lessee of possession of former lessee notice to assignee.

Whatever operated as notice to a lessee of the claims of a former lessee in possession also served as notice to his assignee.

3. Mines and minerals ⊂=81—Mere cultivation by lessee under unrecorded lease may be sufficient to put subsequent lessee on inquiry.

Mere cultivation of premises by a lessee on a portion of which the owners of the premises reside may be such actual, open, notorious, visible, and exclusive possession thereof as will serve to put a subsequent lessee on notice or inquiry as to the claims of the former lessee.

4. Mines and minerals ⊂=81—Actual notice of prior unrecorded lease unnecessary to constitute constructive notice.

In a controversy between persons who had leased the same premises, the question is not whether the second lessee actually noticed anything growing on the premises, but whether the first lessee's particular possession was sufficient to constitute constructive notice to him, whether it would put a prudent man upon inquiry; the first lessee's lease being unrecorded.

5. Mines and minerals ⊂=81 — Oil corporation held liable to prior lessee for damage done to crops.

An oil corporation, obtaining a lease on land, was liable to a prior lessee for damage done to crops, even though it did not know that there was a prior lease, where in its lease it agreed to pay for any injury done to crops of lessor, since, having so stipulated, it could not claim that it was a bona fide purchaser, and did not take lease in the belief that it would not be responsible for damage done by its operations to the crops on the land; the prior lessee suing in tort.

6. Guardian and ward ⊂=44 — Execution of lease by guardian in personal capacity binding on ward.

Where a mother, who was duly appointed guardian of her minor children, who collectively owned an undivided half interest in land, executed a lease of the property and signed it only in her personal capacity and not as guardian, it was valid as against her wards.

7. Tenancy in common ⊂=49—Lease by tenant in common binding on other tenants when ratified.

A lease of an entire tract made by one tenant in common is binding on the other tenants when ratified by them, and one method of ratification is the acceptance of benefits under the lease by the cotenants.

8. Guardian and ward ⊂=70 — Accounting by cotenant guardian for proceeds held to show ratification of lease by ward cotenants.

Where a mother who was duly appointed guardian of minor children, her cotenants, executed a lease signed by her only in her personal capacity and not as guardian, and accounted to the court for the proceeds from the land, and one of her children, an adult, expressly assented to the lease, *held* that the wards ratified the lease, even though they were parties to a subsequent lease of the same property to a third person.

9. Landlord and tenant ⊂=139(4) — Evidence held sufficient to sustain finding that landlord jointly participated with subsequent lessee in damaging crops of first lessee.

In an action by a lessee for damages done to crops by a subsequent lessee drilling for oil, evidence *held* sufficient to support an implied finding of the jury that conduct of landlord amounted to more than a passive permission on her part to the commission of the tort, and amounted to co-operation which would render her jointly liable.

10. Landlord and tenant ⊂=139(4)—Measure of damages for co-operation with subsequent lessee in injuring crops.

Where lessor co-operated with subsequent lessee oil company in injuring crops of plaintiff lessee, who brought action against the oil company and the lessor for damages without alleging or claiming that lessor was liable for a breach of the covenant of quiet enjoyment, the measure of damages was not the amount of the proportion of the rent paid by the plaintiff from the time of the damage to the termination of the lease, but was the actual damages sustained.

11. Action ⊂=38(1)—Held that there was no misjoinder of causes of action.

A complaint in an action by a lessee against lessor and subsequent lessee, alleging that the subsequent lessee, an oil corporation, "with the previous knowledge, authorization, consent, and

co-operation of the said S. [lessor] wrongfully * * * proceeded to * * * construct on said property an oil well derrick, * * * and destroyed plaintiffs' nursery stock," *held* to state but one cause of action, and that for injury to property; no relief being sought on the ground of a breach of covenant.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by G. Bessho and others against the General Petroleum Corporation and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

A. L. Weil, of San Francisco, and Fredericks & Hanna, J. H. Ardis, and W. S. Knott, all of Los Angeles, for appellants.

Evans & Pearce, Evans, Abbott & Pearce and W. E. Evans, all of Los Angeles, for respondents.

LAWLOR, J. We hereby adopt the following from the opinion of the District Court of Appeal of the First Appellate District as correctly stating the facts:

"This is an appeal from a judgment in favor of the plaintiffs in an action to recover damages for the destruction of certain flowers and rose cuttings being grown by said plaintiffs upon a certain tract of land, consisting of about five acres, owned by the defendant Sarah E. Ralph and her five children as tenants in common, which lands had been made the subject of two leases, under the first of which the plaintiffs claimed the right to the exclusive possession and use of said property, and under the second of which the other defendant, General Petroleum Corporation, had entered upon said premises for the purpose of boring for oil, and had thereby caused the damage to their flowers and rose cuttings of which the plaintiffs complain.

"The facts attending the making of these two leases are the following: On November 5, 1915, Sarah E. Ralph, as lessor, gave to the plaintiffs herein a written lease of said premises for a period of three years in the usual form of such leases, containing a covenant of quiet enjoyment. The said lessor, while purporting by the terms of said lease to let to said plaintiffs the whole of said premises, signed the same in her own right only, and did not purport to execute the same as guardian of her children, who collectively owned an undivided one-half interest in said property, although at the time of the making of said lease she was such guardian, and resided with said children in a dwelling house upon one corner of said premises, the use of which, with the outbuildings and a small orchard immediately surrounding the dwelling house, was excepted from the provisions of said lease. The plaintiffs as lessees under said lease began the propogation of flowers, particularly of rose cuttings, upon the remaining portion of said land, and while they were cultivating the same were given permission to use one of the small outbuildings otherwise reserved to the lessor. They did not, however, record their lease. While they were thus engaged in using the land for the purposes above stated one L. A. McCray approached the said Sarah E. Ralph with a proposition to take a lease of the same premises for the purpose of prospecting for oil, and on November 10, 1917, the said Sarah E. Ralph and all of her children joined in the execution of a second lease to said L. A. McCray for the period of five years from the date thereof. This lease when obtained by said McCray was immediately transferred and assigned by him to the defendant General Petroleum Corporation, and was recorded by the latter on February 4, 1918. On February 9, 1918, the said General Petroleum Corporation entered upon said premises, and proceeded to explore the same for oil, in the course of which they worked the destruction of the plaintiffs' flowers and rose cuttings, in consequence of which this suit was brought by the plaintiffs both against the General Petroleum Corporation, who had immediately worked such destruction, and against said Sarah E. Ralph, as one of the makers of said second lease. Upon a trial of the cause the plaintiffs recovered a judgment against both of said defendants for the sum of $1,500 damages for the destruction of their said property, and from such judgment this appeal on behalf of both of said defendants has been taken.

"The contention of the appellant General Petroleum Corporation upon this appeal is that the said L. A. McCray was a lessee in good faith and for a valuable consideration of the premises in question without notice, actual or constructive, of the rights or claims of the respondents herein under their prior but unrecorded lease, and that the said appellant having purchased from said McCray said lease for a valuable consideration and without notice, either actual or constructive, of any prior rights or claims of the respondents herein, and having duly recorded said lease prior to its entry upon the said premises, became entitled thereby to a priority of right to the possession and use of said premises as against any prior claims of the plaintiffs therein.

"The validity of this contention depends upon whether the possession of which the said plaintiffs had of said premises at the time of the execution of said second lease to said McCray and of its assignment to said appellant was such as to put said McCray and his assignees of said lease upon notice or inquiry as to the rights of said plaintiffs in the premises.

"It is conceded at the outset of this discussion that the subsequent purchaser or lessee of premises in good faith and for a valuable consideration and without notice, either actual or constructive, of the rights or claims of persons holding a prior unrecorded lease or deed of the same premises, take the same free of such prior rights or claims. The exception to this rule is this: That if the prior grantee or lessee of the premises under an unrecorded deed or lease has gone into actual possession of the same, such possession may operate to put subsequent purchasers or lessees of the premises upon notice or inquiry as to their prior rights or claims thereunder. The respondents herein contend that their possession of the premises in question was of such a character as to impart notice to both said McCray and to the General Petroleum Corporation, its agents and officials, as to their prior rights and claims, or at least to put them upon inquiry as to the basis of right or claim behind the said plaintiffs' possession. The said appellant, on

the other hand, contends that the said plaintiffs' possession was not of that character, and that the mere fact that said plaintiffs were engaged in cultivating the premises in question, upon a portion of which the owners of the premises resided, was not such actual, open, notorious, and exclusive possession thereof as would serve to put either its assignor or itelf upon notice or inquiry as to the plaintiffs' claim of right therein, based upon their prior unrecorded lease."

[1, 2] 1. We are of the opinion that the evidence is sufficient to support the implied finding of the jury that respondents' possession was of such a character as to serve to put McCray, the original lessee of the second lease, upon notice or inquiry as to the character of respondents' claim. Whatever operated as notice to him also served as notice to his assignee, the oil corporation, which occupies the same position as the original lessee.

According to the evidence, appellant Mrs. Sarah E. Ralph, whose true name is Mrs. Lovada E. Ralph, had leased the land to respondents two years before the alleged wrongful acts were committed. She testified:

"Mr. Bessho worked there all the time after I made the lease with him in 1915, and he had stuff growing there all the time."

Respondent Bessho testified he planted the carnations two years previously, which would be about April, 1916, or 18 months before McCray secured the second lease. He further testified he had the property under cultivation ever since he leased it, and raised, among other things, strawberries; that he had set out most of the sweet peas in September, 1917, two months prior to the execution of the second lease. It thus appears there were flowers growing on the premises when the second lease was made. They were planted in long beds and rows, which method of cultivation might suggest to one observing the property that they were raised for the market. The area which the respondents cultivated was apart from the portion occupied by Mrs. Ralph. McCray testified:

"I first saw the land several months before the lease was made. I was just driving along the road. * * * I was out there within a couple of weeks of the time that I got the lease. * * * The property adjoins the road that I traveled on. You could see the property from the road. I never noticed that there was anything growing on it, and never noticed any one working on it. I supposed Mrs. Ralph was the owner, and that was all there was to it. * * * And when I passed along the road adjoining this lot before I got this lease I probably could have seen anything that was growing on the lot. I did not make any inquiry as to whether or not any one was working on the lot."

[3] The oil corporation cites a number of authorities to the proposition that possession, to serve as constructive notice to a future lessee or purchaser, must be open, notorious, and visible; that it must indicate the occupant. Among these authorities is Randall v. Allen, 180 Cal. 298, 180 Pac. 941, in which it was said:

"If, for instance, the land is part of a larger tract, all of which is uninclosed, and one not the owner enters upon the particular piece under color of title and cultivates it in the same manner as the adjoining portions of the tract, there is a possession adverse to the real owner which if continued for the statutory period will ripen into title. But such possession will not constitute notice to a prospective purchaser of latent equities or of rights claimed under some unrecorded instrument."

The same case quotes the following from Cox v. Devinney, 65 N. J. Law, 389, 47 Atl. 569:

"The fact that lands are under cultivation does not, of itself, suggest that any one other than the reputed owner of the premises is in possession of them. In order to charge a purchaser with notice, the occupation must be of a character which would put a prudent person upon inquiry; it must indicate that some one other than he who appears by the record to be the owner has rights in the premises. Coleman v. Barklew, 3 Dutcher, 357."

These authorities correctly state the rule, but the facts herein do not come within its operation.

Randall v. Allen, supra, has reference to a situation where the occupier of a part of a tract cultivates it in the same manner as does the occupier of the remainder. In Cox v. Devinney, supra, the one occupant claimed that his possession, which consisted merely of cultivation, was sufficient to constitute notice. In the case at bar Mrs. Ralph was living with the children on the property reserved from the demised premises, the respondents living a short distance away. The leased land was, from about April, 1916, continuously up to the time of the trial, used for the production of flowers in large quantities. Mrs. Ralph had also reserved the fruit from the orchard. There was no similarity in the manner of the use of the respective holdings. An additional circumstance is the fact that one part was occupied by an American family and the other by Orientals. It cannot be doubted that under the circumstances shown the possession indicated the occupant to such an extent that a prospective lessee would be put upon inquiry.

[4] McCray stated he never noticed there was anything growing on the land, or that any one was working on it; that he supposed Mrs. Ralph was the owner, "and that was all there was to it." However, the question is not whether he actually noticed anything growing, but whether this particular possession was sufficient to constitute con-

structive notice to him; whether it would put a prudent man upon inquiry.

In Scheerer v. Cuddy, 85 Cal. 270, 24 Pac. 713, the property was an office building. The owner leased some of the rooms to a lodge. These rooms were kept locked. The purchaser assumed the lodge rooms were vacant. The court, in holding that the purchaser was to be charged with notice of the lessee's possession said:

"It was his duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact must be regarded as the strongest evidence of bad faith on his part. The burden of making the proper inquiry was cast upon him by the mere fact of actual possession on the part of the appellant. If it were allowed that by failure to acquaint himself with the fact of possession on the part of another than the vendor the vendee could avoid the effect of the rule above stated, he could purposely avoid any inquiry on the subject, and thereby evade the rule and its consequences entirely."

In view of all the facts it cannot be maintained there is not sufficient evidence to support the implied finding of the jury that McCray was, under the circumstances, to be charged with notice of respondents' possession.

[5] We may add, however, that it seems quite plain the oil corporation is responsible, regardless of whether McCray took the lease with or without notice of the prior lease to the respondents. Plainly, the oil corporation was responsible for the damage it did unless when it took and paid for its lease it did so in the belief that it would not be responsible for damage done by its operations to the vegetation and plants upon the land. Only in case it had that belief could it be protected as a bona fide purchaser against liability for such damage. If it did not have that belief it was not a bona fide purchaser as to such liability. That the oil corporation did not have any such belief appears beyond denial from the fact that in its lease it agreed to pay for any injury done to the trees, fruits, or other crops of the lessor. The fact that the agreement extends only to trees, fruits, or other crops of the lessor is wholly immaterial.

It would be material if the recovery sought were upon this provision of the lease. But the recovery sought is not on the lease, but on the ground that the oil corporation tortiously injured the property of the respondents. The only possible defense to a recovery on that ground was that the oil corporation took its lease as a bona fide purchaser with the belief that as lessee it had the right to injure crops upon the land without paying compensation. But the provision of the lease mentioned directly negatives any such belief.

[6] 2. The point is made by the oil corporation that the lease from Mrs. Ralph to respondents is void because, while the other tenants in common were parties to the second lease, they were not to the first. In the case of Whyler v. Van Tiger, 2 Cal. Unrep. 800, 14 Pac. 846, a woman, who had been appointed guardian of a minor, made a lease of a parcel of the ward's land in her own name. She had never taken the oath of office, and letters of guardianship were never issued to her. It was claimed the lease was invalid because she had not executed it as guardian, but the court held the lease valid, and that it gave the lessee the right to the premises against one claiming under the ward. In the case at bar Mrs. Ralph was the duly appointed guardian of the minor children. Under such circumstances, a lease made by her of the property of the wards would be valid, though signed by her only in her personal capacity, and not as guardian.

[7] The proposition is clear that a lease of an entire tract made by one tenant in common is binding on the other tenants when ratified by them, and one method of ratification is the acceptance of benefits under the lease by the cotenants. In the case of Schwartz v. McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112, it was held that where a lease was made of the whole premises by one cotenant, and the lessee went into possession and paid rent under the lease for some time, it would be presumed, in the absence of proof to the contrary, that the lease was made with the knowledge and consent of the cotenants, and in that case the lessee was held liable on the lease.

[8] The evidence shows Mrs. Ralph accounted to the court for the proceeds from the land, and that one of the children, an adult, expressly assented to the lease to the respondents. In such a situation the first lease must be held to be ratified and binding, even though the wards were parties to the second lease and not to the first.

[9] 3. We shall next consider the points specially made on behalf of Mrs. Ralph. The first of these is that there is no evidence to support the implied finding of the jury that she is jointly liable for the destruction of respondents' property. The evidence shows that Mrs. Ralph, with a full knowledge of all the facts, gave the oil corporation the second lease, thereby putting it in a position to injure the respondents. J. W. Madrill, head of the land department of the oil corporation, testified that on several occasions just after February 1 he talked with Mrs. Ralph. She said there would be some "damage to the sweet peas, or something else, that you would have to look after." F. Chappellet, field manager, who was listening, stated that: "Mr. Madrill would undoubtedly take care of whatever was right." On February 9, when the machinery was moved on the land, Mrs. Ralph, according to the testimony of Mrs. Bessho, told her "not to worry about it, and

that they would pay everything. Mrs. Ralph said repeatedly that oil company will pay everything, so don't worry about it." The jury may have inferred from this that Mrs. Ralph gave encouragement to the entry, and that from this and all the other circumstances, including the fact of the making of the second lease, the conduct of Mrs. Ralph amounted to more than a passive permission on her part to the commission of the tort, but amounted to co-operation. This would render her jointly liable to respondents. This also disposes of her further contention that the court erred in refusing her motion for a nonsuit.

[10] The next point is that her acts did not constitute a breach of the covenant of quiet enjoyment, and that even if an eviction and consequent breach of covenant were found, the damages assessed against her cannot exceed the amount of the proportion of the rent paid to her by the respondents from the time of the damage to the termination of the lease. The complaint does not allege, nor do respondents claim, she is liable for a breach of the covenant of quiet enjoyment. This difference in rent, therefore, is not the proper measure of damages.

[11] It is urged the demurrer on the ground of misjoinder of causes of action—one arising out of a breach of covenant being joined with one arising out of a tort—should have been sustained. The allegation in the complaint is that the oil corporation "with the previous knowledge, authorization, consent, and co-operation of the said Sarah E. Ralph wrongfully * * * proceeded to * * * construct on said property an oil well derrick * * * and destroyed plaintiffs' nursery stock." Neither in this allegation, nor in any other, is relief sought on the ground of a breach of covenant. There is but one cause of action stated, and that is for the injury to the property.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; SLOANE, J.

SHAW, J. I concur in the judgment upon the ground that the evidence is sufficient to show that the possession and use by Bessho of all of the five acres not used in connection with the house was of such a character that it would indicate to an ordinary observer that it was not used in connection with the occupation of the house as a dwelling, but was held in possession for purposes distinct, different, and separate from the possession of the person occupying the house and yard, and hence that it was sufficient to put the lessee on notice that it was held in a different ownership.

I concur: LENNON, J.

186 Cal. 294

STATE v. SAVINGS UNION BANK & TRUST CO. et al. (Sac. 2922.)

(Supreme Court of California. June 20, 1921.)

1. Courts ⊂=99(1)—Judgment ⊂=581—Reversed judgment is not conclusive in another action, and not the law of the case, the action being different.

Where a judgment in an action by an administrator to recover a bank deposit had been reversed and remanded by the appellate court and hearing denied by the Supreme Court before the trial of an action by the state against the bank to have the deposit escheated, the former judgment was not a former adjudication with respect to the issues, and did not establish the law of the case, as it was a different action.

2. Escheat ⊂=6—Judicial procedure is necessary for escheat of lands for failure of heirs.

The state cannot take possession of lands which it claims by escheat for failure of heirs without some form of judicial proceedings by which the escheat is perfected.

3. Escheat ⊂=6—Statute does not escheat bank deposit without legal proceedings.

Under Code Civ. Proc. § 1273, providing that all deposits in a bank which have remained unclaimed for more than 20 years after the date of the last deposit or withdrawal of principal or interest shall escheat to the state, the escheat is in the nature of forfeiture, which takes place whether the owner is living or dead, and as such it will be strictly construed, and therefore does not occur by the mere expiration of the period, but only upon judicial proceedings by the state, so that a demand by the administrator of the depositor after the expiration of the 20-year period, but before the escheat is judicially declared, defeats the right of the state.

4. Constitutional law ⊂=303—Statute escheating bank deposit without legal proceedings is contrary to due process.

A statute providing for the escheat of unclaimed bank deposits to the state without any proceedings against the depositor would divest the depositor of his property without due process of law contrary to Const. art. 1, § 1, and Const. U. S. Amend. 14.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the State of California against the Savings Union Bank & Trust Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Lovett K. Fraser, of San Francisco, Herbert V. Keeling, of Lakeport, and Ornbaun & Fraser and Pillsbury, Madison & Sutro, all of San Francisco, for appellants.

U. S. Webb and Frank L. Guerena, both of San Francisco, for the State.

SHAW, J. This is an action begun in the superior court of Sacramento county, upon

the authority of section 1273 of the Code of Civil Procedure, to obtain a judgment declaring that the sum of $12,525.52, on deposit in the defendant Savings Union Bank & Trust Company in the name of William Anderson, has "escheated to the state, and commanding said bank to forthwith deposit" said money with the state treasurer, as in that section provided. Judgment was given for the plaintiff in accordance with the prayer of the complaint.

The history of the case presents some unusual features. In 1868 William Anderson deposited money with the defendant corporation, then known as Savings & Loan Society. The account was continued until in 1891 there was $6,198.19 to the credit thereof. After that time there were no further deposits or withdrawals made. The accumulated interest up to January 1, 1917, increased the amount to $12,525.52. In 1878 Anderson settled in Lake county and there resided until his death, which occurred on August 13, 1892. He was unmarried. There was no administration had upon his estate until in March, 1917, when Mack Mathews, public administrator of that county, was duly appointed administrator thereof. On June 11, 1917, Mathews, as such administrator, began an action in the superior court of San Francisco county against said defendant corporation to recover said sum of money. On June 22, 1917, the Attorney General, on behalf of the state, intervened in that action, claiming that the fund belonged to the state of California. On July 30, 1917, the state began the present action in the superior court of Sacramento county for the purpose first above stated. Said Mathews appeared and answered, denying that there had been an escheat, and set up the defense that the action in San Francisco county to recover the money was then pending. The San Francisco case first came to trial, and judgment was given for the defendants. From that judgment plaintiff Mack Mathews appealed to the Supreme Court. While this appeal was pending the present action came to trial in Sacramento county and resulted in the judgment here appealed from. The appeal of Mathews from the judgment in San Francisco county was transferred to the District Court of Appeal, and on August 26, 1919, the judgment of that court was given reversing the judgment of the superior court therein and declaring that there had been no escheat, that the money belonged to the estate of Anderson, and that the administrator thereof was entitled to payment of the deposit. Mathews v. Sav. Union Bank & Trust Co. (Cal. App.) 184 Pac. 418. The defendant and the intervener petitioned this court for a rehearing of said cause, and their petition to that effect was denied.

Section 1273 aforesaid provides that—

"All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase and proceeds thereof, escheat to the state."

It then provides that, when the Attorney General is informed of such deposits, he shall begin an action in the name of the state in the superior court of Sacramento county against the bank in which the deposit is made and the person named as depositor therein, and that upon the trial, if it be determined that the moneys in the defendant bank or banks are unclaimed as first above stated, that court must render judgment "declaring that said moneys have escheated to the state and commanding said bank or banks to forthwith deposit all such moneys with the state treasurer," to be kept, received and paid out as "in the case of other escheated property." The facts proven bring the case within the conditions of the first clause of the section as above quoted. This section was added to the Code by the Legislature of 1915. Stats. 1915, p. 107. Section 15 of the Banking Act had previously provided that all moneys on deposit in any bank to the credit of depositors who had not made a deposit or withdrawn any part thereof or the interest for 20 years and had not filed any notice with the bank showing his or her present address should be deposited with the state treasurer as provided in section 1234 of the Code of Civil Precedure. Section 1234 is a part of the chapter providing for the voluntary dissolution of corporations, and section 1234 relates to the disposition of unclaimed moneys on deposit in savings banks and the like upon such dissolution and directs payment thereof to the state treasurer. It did not provide for any suit to declare an escheat or provide for an escheat in any manner, but it did provide that the moneys so paid in "must be received, invested, accounted for, and paid out, in the same manner and by the same officers as is provided by law in the case of escheated estates, and in section twelve hundred and seventy-two." In 1915 the Legislature amended section 15 of the Banking Act (St. 1909, p. 87) so as to provide that such moneys should "be deposited with the state treasurer after judgment in the manner provided in the Code of Civil Procedure," referring to section 1273 thereof. The aforesaid decision of the District Court of Appeal was to the effect that an escheat under these sections did not take effect until final judgment in the action, as provided for in section 1273 of the Code of Civil Procedure, and that the money did not escheat nor title thereto pass to the state at the expiration of the 20 years mentioned in said section.

[1] The judgment in the action before the District Court of Appeal does not constitute a former adjudication with respect to this case, because the District Court reversed the judgment and remanded it for a new trial, so that at the time the judgment in the present case was rendered there had been no judgment in the other action. The decision of the District Court is not the law of the present case because it was not rendered in the same action. The Attorney General earnestly insists that it is an erroneous statement of the law and asks that it be overruled.

Upon further consideration we are satisfied with the law as stated in that decision. Further argument renders it appropriate to make some additional observations on the subject.

The precise claim of the state is that the declaration in section 1273 that the money which has remained on deposit 20 years under the conditions therein stated "shall, with the increase and proceeds thereof, escheat to the state," accomplishes an instantaneous escheat; that the only purpose of the action therein provided for is to obtain an adjudication that the escheat had already occurred and an order for the transfer of the money from the bank to the state treasurer; that it is really for the protection of the bank against other claims to the money, and is not in any sense for the benefit of the person who made the deposit or those claiming under him; and that neither the original owner nor his heirs, assigns, or personal representatives may claim the money by virtue of a demand made after the 20 years had run. The sole questions presented are whether or not the statutes so provide, and, if they do, whether or not they are invalid for the reason that in that event they provide for the taking of property without due process of law.

[2] Under the ancient common law there were escheats of two kinds. The first included all cases where the owner of land died without competent heirs to take the property. In these cases it was said that, because there was no one else to take it, the land reverted to and vested in the king, who "was esteemed in the eye of the law the original proprietor of all the lands in the kingdom." 1 Cooley's Bl. *302; Bouvier's Law Dic. "Escheat." In this country the respective states have the attributes ascribed by the law of England to the crown in this respect, and the state is the recipient of all escheats caused by lack of heirs or otherwise. This form of escheat proceeds on the theoretical assumption that the line of descent has failed, and that there are technically no heirs in existence. There is a variation thereof where persons who would otherwise be heirs are barred from inheriting. It is, however, "a presumption of law that every intestate has left some one on earth entitled to claim as his heir, however remote." People v. Roach, 76 Cal. 297, 18 Pac. 409. Practically, therefore, omitting the variation above mentioned, it is meant that no lawful heirs can be found. The other form of escheat at common law occurred where the owner of the property had committed felony or treason and had thereby forfeited his right to hold the same. 2 Cooley's Bl. 73, 246; Bouvier's Law Dic., supra. An escheat under subdivision 9 of section 1386 of the Civil Code occurs when there are no heirs, and it is of the kind first mentioned, which does not imply or require a forfeiture as a condition precedent thereto. With respect to either kind of escheat our decisions held that some judicial procedure is necessary to perfect the escheat.

"By the civil law as well as the common law, the king cannot take upon himself the possession on an estate said to have escheated, until the fact is judicially ascertained by a proceeding in the nature of an inquest of office; and in this there is a difference from the case of a forfeiture for want of the performance of conditions precedent; for in the latter, the conditions never having been performed, the title has not vested. An alien may hold real estate against every one, and even against the government, until office found." People v. Folsom, 5 Cal. 379.

This doctrine has been repeatedly stated and followed in subsequent decisions. De Merle v. Mathews, 26 Cal. 477; Racouillat v. Sansevain, 32 Cal. 386; State v. Smith, 70 Cal. 156, 12 Pac. 121. There is some conflict of authority on this question, some states holding to the doctrine that title to an escheat vests immediately in the state upon the happening of the act which causes it (4 Kent 424), but in this state, as above shown, the other doctrine is followed.

[3] The escheat provided for in section 1273, and upon which it is here claimed that the title vested absolutely and immediately in the state, is an escheat of the second kind. It takes place whether the owner of the deposit is living or dead and is accomplished without any fault of his. Although he may be well aware that he has the deposit and may intend to keep it for his own use, the claim of the state is that he is deprived thereof at once at the expiration of the 20-year period regardless of his wishes in the matter. It is in the nature of a statutory forfeiture, and the rules applying to forfeitures are therefore applicable.

"Statutes declaring a forfeiture are not to be extended beyond their direct meaning by implication, unless such implication is imperatively necessary by reason of the subject matter or terms of the statute." Northwestern, etc., Co. v. Lambert, 166 Cal. 755, 137 Pac. 1119.

[4] It is also clear that the effect of the statute as it is claimed to be by the state would be to divest a person of his title without any proceeding against him for that purpose and would manifestly be a taking of property without due process of law. Under

the provisions of the Fourteenth Amendment of the Constitution of the United States, and of section 1, art. 1, of our Constitution, such taking would not be within the power of the state, and the statute purporting to provide therefor would be void.

"When a legislative provision is capable of two constructions, one consistent and the other inconsistent with the provisions of the Constitution, it is a well-recognized principle of construction that the statute should be given that construction which will make it harmonious with the Constitution and comport with the legitimate powers of the Legislature." Chesebrough v. San Francisco, 153 Cal. 567, 96 Pac. 291.

In view of these rules of construction, and of the fact that the statute would be utterly void if given the meaning attributed to it by the Attorney General, we are of the opinion that the provision of section 1273 that bank deposits unclaimed for 20 years, as there stated, shall escheat to the state, must not be taken as intending to provide for an immediate escheat, but as providing that the same shall be taken over by the state as an escheat when so adjudged in the action so provided for. This is the effect of the decision in Estate of Miner, 143 Cal. 194, 76 Pac. 968, although in that case this particular statute was not considered; that case having been decided before its enactment. For these reasons, in addition to those given by the District Court of Appeal, we think the court erred in holding that the property had escheated to the state.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOANE, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.

186 Cal. 309

ALDEN v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY. (L. A. 6807.)

(Supreme Court of California. June 20, 1921. Rehearing Denied July 18, 1921.)

1. Wills ⟹317—Statute prescribing issues on which jury trial can be demanded does not limit issues in probate proceedings.

The provision of Code Civ. Proc. § 1312, declaring that certain enumerated issues of fact raised by a will contest shall be tried before a jury if either party demands a jury trial, does not limit the issues of fact which can be raised in such proceeding to the enumerated issues.

2. Wills ⟹274—Petition for probate must allege testator was a resident of the county at time of death.

Under Code Civ. Proc. § 1300, requiring the petition for probate to set out the jurisdictional facts, and section 1294, requiring wills to be probated in the county in which decedent was a resident at the time of his death, a petition for probate must allege the residence of decedent within the county.

3. Wills ⟹274—Petition for probate is foundation for proceedings to contest a will.

Though the forms of pleading to contest probate of a will are specifically declared, the petition for probate must be taken into account as the very foundation of the proceeding, since the filing of an opposition before a will has been admitted to probate is predicated on the fact that probate proceedings are pending, in view of Code Civ. Proc. §§ 1307, 1312.

4. Wills ⟹337—Residence of testator is issue made by pleadings in probate proceedings as to which "new trial" may be granted.

In proceedings to oppose the probate of a will, the issue of the residence of testator within the county at the time of his death is an issue of fact raised by the pleadings within Code Civ. Proc. § 590, so that a new trial thereon may be granted under Code Civ. Proc. § 656, defining a new trial as a re-examination of an issue of fact, and section 657, authorizing the granting of new trials, in view of Code Civ. Proc. § 1714, making the Code sections relating to new trials apply to will contests.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, New Trial.]

5. Wills ⟹277—Contestant must raise issue of residence of testator or be precluded by implied finding.

A party opposing the probate of a will must raise the issue of the residence of testator within the county at the time of his death, and have it tried on its merits, or he will be estopped thereafter to raise it by a pro forma or an implied finding of the court on that issue.

6. Wills ⟹337—Fact that issue of testator's residence was tried separately does not prevent new trial thereon.

The fact that the issue of the residence of the testator within the county at the time of his death was separately tried before the contest of the will does not prevent the court from granting a new trial on that issue, after a finding for the contestant thereon which resulted in the dismissal of the probate proceedings for want of jurisdiction.

7. New trial ⟹2—Not granted on collateral questions of fact not calling for formal trial.

A new trial will not be granted after rulings of the court on questions of fact collaterally raised which do not call for formal trial, and where no provision is made for framing issues under the proceedings.

In Bank.

Petition by Lena Alden for writ of prohibition to the Superior Court of the State of California in and for the County of Los Angeles. Writ denied.

Thomas B. Leeper, of Sacramento, for petitioner.

Mattison B. Jones and Jones, Wilson & Stephenson, all of Los Angeles, for respondent.

SLOANE, J. Petitioner is asking for a writ of prohibition to restrain the superior court of the county of Los Angeles from taking further proceedings in the matter of the probate of the will of William Lowell Bundy, deceased, under an order granting a new trial.

Petition had theretofore been filed in said court for the probate of the last will of said decedent, wherein it was alleged that at the time of his death said decedent was a resident of the said county of Los Angeles.

The petitioner here, Lena Alden, thereupon filed opposition to the probate of said will, denying that decedent was at the time of his death a resident of said county of Los Angeles, and averring that he was at all times a resident of the county of Sacramento, and setting up as further grounds of opposition that decedent was incompetent to make a will, and that the same was signed by reason of undue influence and duress. It was also alleged that decedent, prior to the execution of the will, had been judicially declared an incompetent person, and that such judgment of incompetency remained in full force and effect; that during all of said period one M. P. Barnes was the duly appointed, qualified, and acting guardian of the person and estate of said incompetent.

The hearing upon the petition for probate, opposition, and answer thereto was regularly set down for trial, and upon the day set, in pursuance of a previous order of the court, the issues were segregated, and the trial was had upon the sole issue of the place of residence of the decedent.

Several days were consumed in the hearing, many witnesses were examined on the part of both proponent of the will and contestant, the evidence being directed largely to the mental capacity of the decedent to choose a place of residence, during the period of his adjudged incompetency, the evidence disclosing that at the time he was declared incompetent he was a resident of Sacramento, but had been living in Los Angeles thereafter and for some time prior to and up to the time of his death.

Upon this hearing, which was had before the court without a jury, the court made its findings of fact and conclusions of law, and adjudged in pursuance therewith that decedent was at the time of his death a resident of Sacramento, and thereupon made its order or judgment of dismissal of the proceedings for want of jurisdiction in the superior court of the county of Los Angeles to entertain the same.

The proponent of the will thereafter, in due time and in manner provided by law, moved for a new trial on the ground of insufficiency of the evidence to support the findings and judgment of the court. The court granted the motion and ordered a new trial. It is petitioner's contention:

"That a new trial will not lie in a probate matter such as this, where the court has merely decided the question of residence which is a preliminary prerequisite to its acquiring jurisdiction to hear the issues in the case," and that the "determining of the right of the court to hear the issues in the case is not a trial of the issues, and an order dismissing the petition for want of jurisdiction is not a decision within the meaning of section 657 of the Code of Civil Procedure, which authorizes the granting of a new trial."

The fact appears that the determination of the question before us rests solely upon whether or not the trial of the dispute as to decedent's residence comes within the terms of section 656 of the Code of Civil Procedure. That section defines a new trial as "a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee." According to the provisions of section 590 of the Code of Civil Procedure:

"An issue of fact arises: 1. Upon a material allegation in the complaint, controverted by the answer; and, 2. Upon new matters in the answer, except an issue of law is joined thereon."

The proceedings here arose upon the contest of a probate of will. It is expressly provided under section 1714, Code of Civil Procedure, that the Code sections relating to new trials, so far as not inconsistent with provisions of the Code title governing probate proceedings, apply to "cases of contests of wills." There was in this case a trial of a question of fact before the court and a finding and decision thereon which resulted in a judgment of dismissal of the proceedings to probate the will, or what in an ordinary action would be termed a judgment of nonsuit. The only material matter in dispute is whether or not the issue so prosecuted was upon a material allegation presented by the pleadings.

[1] The provisions of section 1312, Code of Civil Procedure, appealed to by petitioner here, are not conclusive or even persuasive on this point. That section does not purport to define or enumerate all the issues that may be raised upon opposition to the probate of a will, but merely such issues as must be submitted to a jury if a jury is demanded. It authorizes written grounds of opposition to the probate, and declares that any issues of fact thus raised, involving the competency of the decedent to make a will, the freedom of the testator from duress or undue influence, the due execution of the instrument, or any other question affecting the validity of the will, shall be tried before a jury, if either party demands a jury trial.

There may be, and obviously are, other issues of fact that frequently are put in issue, questions of jurisdiction, of the right of the contestant to oppose the admission of the will to probate, matters which may be pleaded in abatement of the proceedings. The circumstance that these are matters which do not demand a jury trial is not significant, as a jury trial under our procedure is not a condition to a motion for new trial. All issues of fact do not have to be tried by jury. Section 592, Code of Civil Procedure, declares that in matters not otherwise directed "issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury."

[2, 3] The matter in dispute, therefore, resolves itself into a question as to whether or not the issue of residence upon which this case was tried and determined was an issue of fact arising on the pleadings. As a matter of fact the issue is presented by the pleadings, in the petition for the probate of the will, the written opposition to the probate, and the answer to the opposition. It is true that there is no express requirement under the Code that the jurisdictional facts as to the residence of decedent at the time of his death shall be set out in the written opposition by contestant; but it is required by section 1300 of the Code of Civil Procedure that the petition for probate shall set out the jurisdictional facts, and one of the essential jurisdictional facts, as set forth in section 1294, is that wills must be probated in case of a resident of the state "in the county in which the decedent was a resident at the time of his death." The matter of contesting probate of a will is in the nature of a special proceeding, and the forms of pleading are specifically declared, but it seems clear that in such a contest the petition for probate must be taken into account as the very foundation of the proceeding, since the filing of an opposition before a will has been admitted to probate is predicated on the fact that proceedings for admitting the will to probate are pending. Code Civ. Proc. §§ 1307, 1312.

[4] It may be true that it is the duty of the trial court to ascertain the facts as to residence, whether pleaded or not, but we see no reason why this circumstance should make it unnecessary to plead the issue, or render it any less an issue of fact under the pleadings when thus presented.

[5] In Estate of Latour, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441, in which want of jurisdiction was raised on appeal because decedent was not a resident at the time of his death of the county where probate proceedings were pending, Mr. Justice Angellotti, writing the opinion, makes a point of the fact that "there was no issue of fact made as to this in the lower court," and the court in that case holds that:

"While it is true that nonresidence is not a ground of contest, it is clear that contestant could have legally made her objection on that ground in the lower court. This court will not upon appeal review the conclusions of a trial court as to facts essential to its jurisdiction concerning which such court was vested with the power to hear and determine, at the instance of a party who has appeared in that court in the action or proceeding, and has omitted there to in any way urge his objection, but has proceeded therein upon the theory that the court had jurisdiction."

It therefore follows that it is the right of the contestant and is important that he make the question of residence an issue, and have that issue tried on its merits; otherwise he is estopped by a mere pro forma or an implied finding of the court. Estate of Griffith, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381; In re Eickhoff, 101 Cal. 600, 36 Pac. 11; Estate of Dole, 147 Cal. 188, 194, 81 Pac. 534.

In matters affecting the probate of a will, the facts of the death of the testator and his place of residence at the time of his death are issues as vital to the proceedings as the facts of marriage and residence in the state and county where action is commenced are to an action for divorce; and it has long been settled that a complaint in divorce which fails to allege the marriage and statutory residence fails to state a cause of action, and that findings on these issues are required to uphold the judgment. Haskell v. Haskell, 54 Cal. 262; De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045; Faulkner v. Faulkner, 90 Wash. 74, 155 Pac. 404; 19 Corpus Juris, p. 107.

Yet there is the same legal duty upon the trial court to determine these questions of jurisdiction before granting a divorce as in determining the jurisdicton in the matter of the probate of a will; and in the divorce procedure there is not, or has not been until recently, any express requirement under the Code that the jurisdictional facts be pleaded as is required in a petition for probate.

This court has held (In re Bauquier, 88 Cal. 302, 26 Pac. 178, 532) that objection to the appointment of an executrix named in a will for want of integrity raised an issue of fact which could be considered on motion for a new trial, and the court in its opinion there says:

"It would be impracticable to enumerate the cases in which a motion for a new trial is appropriate in probate proceedings, but it may be stated generally that whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon, an issue of fact arises which, after its decision, may be re-examined by the court upon a motion for a new trial."

While the scope of application of Code provisions relating to new trials has been restricted in probate proceedings by Code

amendments since the foregoing decision (section 1714, Code Civ. Proc.), it has not in any way been limited so as to affect their application to contests of wills.

In People v. Bank of San Luis Obispo, 152 Cal. 261, 268, 92 Pac. 481, 484, a special proceeding under the Bank Commissioners' Act (Stats. 1903, p. 368), this court adopts and enlarges the rule laid down in the preceding citation as follows:

"The rule is that whenever, under the pleadings in a suit, an issue of fact is presented to a court, which is to be determined by the preponderance of evidence submitted on the issue, a party is entitled, after a decision or finding of the court on such issue, to have the court reexamine it upon a motion for a new trial, and this rule applies whether the action be one at law or equity, or in special cases or special proceedings. This is the general rule as to all trials where an issue of fact is involved and determined, * * * and there is nothing in the act taking away the right to move for a new trial, and nothing in the provision of the Code limiting its exercise to actions or proceedings other than special proceedings of the character here involved."

The decision of the District Court of Appeal in Estate of O'Neill, 32 Cal. App. Dec. 311, cited by petitioner, was vacated by order of this court, and a rehearing had herein, and a decision was reached upon other grounds and without passing upon the question involved here. Hardiman v. Church, 191 Pac. 1106.

In any event, while points in the O'Neill Case were raised on a state of facts very similar to those presented here, it is apparent from the argument advanced that the conclusion to the effect that the question of residence, which, as here, was tried separately and as preliminary to the attack on the will, was not an issue in the case, was largely influenced by the contention that is made here, namely, that the issues of fact which could be presented in the contest of probate of a will are limited to the objections enumerated in section 1312 of the Code of Civil Procedure, as objections which demand a jury trial.

[6] As already pointed out, issues are constantly presented in actions where the parties are entitled to a jury, which, if standing alone, could be tried without a jury, and which, where a jury trial is had, are commonly submitted to the jury with other issues of the case. Neither does the fact that for convenience of the parties and the court this issue as to residence was tried first and separately change its status as an issue in the case. It was so tried because, if decided adversely to the proponent of the will, it would determine the proceedings and make unnecessary the taking of evidence on the other issues of the case. Had the issues all been tried at once, and, after submission, decided for contestant solely on a finding that the decedent was not a resident of Los Angeles county at the time of his death, would it be contended that there had not been a trial, and that a motion for a new trial could not be predicated upon the insufficiency of the evidence to support such finding?

[7] This view of the law does not trench on the general rule that motions for new trial do not lie from rulings of the courts on questions of fact collaterally raised, and which do not call for formal trial, and where no provision is made for framing issues under the proceedings, such as proceedings supported by affidavits, applications to set apart exempt property, family allowances, and proceedings of similar character. In re Heldt, 98 Cal. 553, 33 Pac. 549; Leach v. Pierce, 93 Cal. 614, 29 Pac. 235; Shipman v. Superior Court, 150 Cal. 425, 88 Pac. 1090; Estate of Heywood, 154 Cal. 314, 97 Pac. 825; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Estate of Franklin, 133 Cal. 584, 65 Pac. 1081.

It would seem good practice and good policy to sustain the right of motion for new trials upon such questions of jurisdiction as is presented in this proceeding. They are decisive of the case where the facts do not sustain the jurisdiction, and if there has been a mistrial, or the court finds the evidence insufficient to support the finding, it would seem advisable to afford a speedy opportunity for a new trial, rather than to incur the inevitable delay of a hearing on appeal.

When we consider that the point involved was conclusive of the right of proponent of the will to maintain the proceeding; that it was clearly made an issue by the pleadings; that it involved a hearing lasting several days, in which many witnesses on both sides of the controversy were examined; that evidence was taken which, by stipulation of the parties, was to be used on other branches of the contest, if jurisdiction was upheld; that the court made elaborate findings of fact, and entered a judgment of dismissal of the action thereon, it would be going far in limitation of proceedings for a new trial to hold that there had not been a trial upon "an issue of fact" in this proceeding.

The writ is denied.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LENNON, J.; LAWLOR, J.

186 Cal. 261

CHAMBERS, State Controller, v. LAMB. (L. A. 5843.)

(Supreme Court of California. June 17, 1921.)

1. Taxation ⟸869—Community property conveyed to wife in contemplation of husband's death not exempt from inheritance tax.

The fact that property conveyed to a wife by her husband in contemplation of death was community property does not exempt any of it from the inheritance tax imposed by St. 1905, p. 341.

2. Taxation ⟸895(4) — Inheritance tax on "transfers in contemplation of death" based on value at date of transfer; "property."

Under St. 1905, p. 341, § 1, taxing transfers in contemplation of death, and section 28, defining "property" as the real or personal property of grantor "passing or transferred" to grantee, and "transfer" as "the passing of property" in possession or enjoyment, present or future, by inheritance, descent, devise, deed, etc., property conveyed to a wife by her husband in contemplation of his death, by a deed stipulating that full title, control, and enjoyment passed to her at the time of its delivery, should be valued as of the date of the delivery of the deed, not as of the date of grantor's death; for "transfers in contemplation of death" include transfers inter vivos, and the vesting in interest of the rights passing is the transfer taxed, so that an increase in value after such vesting is not part of the taxable value; § 5, as to appraisal of future, contingent, or limited estates as of the date of transferor's death being inapplicable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property; Second Series, Transfer in Contemplation of Death.]

3. Taxation ⟸879(1) — Inheritance tax on "succession" is tax on "transfer."

In view of Civ. Code, § 1383, defining "succession," the inheritance tax on transfers in contemplation of death (Stats. 1905, p. 341), not being limited to transfers effective on the transferor's death, is not a tax on the "succession" in the limited sense of the acquisition of rights on the death of another, "succession" being synonymous with "transfer," as defined by the act, section 28, including the passing of property in possession or enjoyment, present or future, by inheritance, succession, deed, or otherwise.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Succession; Transfer.]

4. Taxation ⟸887—Inheritance tax on transfer in contemplation of death attaches when transfer completed, though due and payable on death of transferor.

Under St. 1905, p. 341, § 1, imposing an inheritance tax on transfers in contemplation of death, liability for the tax attaches when the transfer is completed, though by section 7 the tax is "due and payable" on the death of the transferor, the imposition of a tax and its maturity being distinct and separate stages in the process of taxation.

In Bank.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by John S. Chambers, as Controller of the State of California, against Elizabeth Lamb, to fix the amount of an inheritance tax. From an order fixing the amount, defendant appeals. Remanded, with directions to modify the order.

R. Y. Williams and A. W. Rutan, both of Santa Ana (Garret W. McEnerney, of San Francisco, of counsel), for appellant.

John W. Carrigan, Edwin H. Pennock, and Harold R. Smith, all of Los Angeles (Robert A. Waring, of Sacramento, of counsel), for respondent.

LENNON, J. The present appeal is taken from an order fixing the amount of an inheritance tax to be paid to the state of California by Elizabeth Lamb, defendant and appellant. At the hearing in the court below, plaintiff John S. Chambers, as controller of the state of California, and Elizabeth Lamb, defendant, stipulated as follows: In February, 1909, William D. Lamb executed and delivered to Elizabeth Lamb, his wife, a deed conveying to the latter full title to certain community property, complete dominion and control of the said real property passing from the husband to the wife at the time of the delivery of the deed. The deed was executed in contemplation of death. It was recorded in 1910, and the husband died in 1911. In February, 1909, the full market value of the property described in the deed was $194,775, but in the interval between the delivery of the deed and the death of William D. Lamb, in 1911, the value enhanced to $212,775, an increase of $18,000. The trial court decreed that the value of the property at the date of decedent's death was the valuation to be placed upon the property in computing the inheritance tax, allowed a deduction of $3,854.44 for state and county taxes for the fiscal year 1911-1912, and fixed the amount of the tax at $4,248.01. Appellant claims that the value of the property at the date of the delivery of the deed should be taken as the basis for the computation of the tax, and therefore that the amount of the tax fixed by the trial court exceeds the amount actually due from appellant by $450, or 2½ per cent. of $18,000.

[1, 2] It is conceded that the deed was made in contemplation of death, and that the imposition of the tax in the instant case is controlled by the terms of the Inheritance Tax Law of 1905 (Stats. 1905, p. 341). The fact that the property conveyed to the wife was community property does not exempt any portion thereof from the inheritance tax imposed by the act of 1905. Estate of Moffitt, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A.

(N. S.) 207; Estate of Sims, 153 Cal. 365, 95 Pac. 655. It is further conceded that the Inheritance Tax Act of 1905 does not in exact terms prescribe whether the tax should be measured by the value of the property at the date of the transfer or at the death of the transferor in the case of a transfer in contemplation of death such, as in the present case. The portions of the act of importance for present purposes are:

"Section 1. All property which shall pass, by will or by the intestate laws of this state, * * * which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor, vendor, or bargainor, or intended to take effect in possession or enjoyment after such death, * * * shall be and is subject to a tax hereinafter provided for; * * * and such tax shall be and remain a lien upon the property passed or transferred until paid. * * * The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed, and only upon the excess over the exemptions hereinafter granted."

"Sec. 7. All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent."

Section 5 of the act, which in effect requires an appraisal as of the date of the death of the transferor, is limited to future, contingent or limited estates, and has no application to transfers, such as that in the instant case, which do not create estates of that character. Estate of Miller, 195 Pac. 413, 418.

We have, therefore, a taxable transfer inter vivos passing property the value of which changed between the date of the transfer and the death of the transferor, and a transfer tax act containing no express provision as to which valuation shall be adopted in ascertaining the amount of the tax. Which valuation is the more logical as a basis for measuring the tax is the question for solution.

Section 1 of the act of 1905 provides for a tax on transfers—

"made in contemplation of the death of the grantor * * * *or* intended to take effect in possession or enjoyment after such death." (Italics ours.)

Therefore, a transfer is taxable under the statute of 1905 when accompanied by an intention that it shall take effect immediately and irrevocably if, at the time of the transfer, the transfer is in that particular state of mind technically known as "in contemplation of death." In other words, the term "transfers in contemplation of death," as used in the act of 1905, includes transfers inter vivos. Estate of Reynolds, 169 Cal. 600, 147 Pac. 268; Spreckels v. State, 30 Cal. App. 363, 158 Pac. 549; State v. Pabst, 139 Wis. 561, 121 N. W. 351. It follows that rights acquired under a taxable transfer may vest prior to the death of the transferor.

Under the general scheme of our inheritance tax laws and the interpretation accorded them by the courts, signal significance is attached to the time of the actual vesting of rights. It is the vesting in interest of the rights passing between the parties which constitutes the transfer tax by the act. Estate of Kennedy, 157 Cal. 517, 108 Pac. 280, 29 L. R. A. (N. S.) 428; Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961. The death of the transferor adds nothing to the transfer if full rights have passed to the grantee prior to that time. Upon this reasoning it was held in Hunt v. Wicht, supra, that, when rights under the transfer vest prior to the death of the transferor, the law in effect at the time of the vesting of the rights, and not that in force at the date of the death of the transferor, is the law which governs the tax. Similarly, in Felton's Estate, 176 Cal. 663, 169 Pac. 392, it was held that the amount of the tax must be assessed according to the rates prescribed by the statute in force at the time the transfer took effect, and not according to the rate fixed by a later statute in force when the transferor died. In the instant case it is stipulated that full title, control, and enjoyment passed to the grantee in 1909, at the time of the delivery of the deed. In other words, as stated in Hunt v. Wicht, supra—

"The succession to the property by the grantee, which is the thing attempted to be taxed, was complete upon the delivery of the deed."

Logic and consistency compel the conclusion that the property should be valued, for the purposes of the tax, as of the date of the delivery of the deed. Any other interpretation would be contrary to the spirit of the act of 1905. Thus, section 1 of the act provides that all property transferred by deed in contemplation of death is subject to taxation and that "the tax so imposed shall be upon the market value of such property." Section 28 of the act defines "property" as—

"The real and personal property or interest therein of the * * * grantor, * * * passing or transferred to individual * * * grantees."

The word "transfer" is defined as including—

"The passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift or appointment in the manner herein described."

Concisely stated, the basis for the measurement of the tax is the market value of that which changes hands as the result of the act of transfer. Applying these provisions and definitions to the instant case, the tax is

imposed upon the market value of the real property passing by the deed of William D. Lamb. $194,775 was the value of the property which thus passed to the transferee. While the property had attained the value of $212,775 at the time of the death of the transferor, the additional $18,000 was not part of the value of the property "passing" from the grantor to the grantee; it was an increase in value subsequent to the transfer, and during a period when the transferee was the owner thereof. The value of the property passing between the parties being the basis for the tax, the increase in value after the actual vesting of rights under the transfer is not to be rated as part of the taxable value.

The authorities cited by respondent in support of the contention that the property should be valued as of the date of the death of the transferor are not in conflict with the rule above announced. In Matter of Davis, 149 N. Y. 539, 44 N. E. 185, it was determined that an estate in remainder created by will must be appraised as of the date of the death of the transferor, when title vested, and not as of the date of the death of the life tenant, when possession passed. In Felton's Estate, supra, property was valued as of the date of the death of the transferor, although title passed prior thereto. It appears from the opinion in that case that the question here under discussion was not there raised, and there is nothing to indicate that the property involved in that case altered in value between the time of the transfer and the date of the death. That case cannot, therefore, be considered as passing upon the point here in issue.

[3] The argument is advanced by respondent that the cases hold that the inheritance tax is upon the succession, rather than upon the property (Estate of Kennedy, supra; Hunt v. Wicht, supra), and that "succession" can occur only upon the death of the transferor. This argument is due to a misunderstanding of the meaning of the term "succession" as used in the cases quoted. Succession is defined in section 1383 of the Civil Code as "the coming in of another to take the property of one who dies without disposing of it by will." It frequently possesses the somewhat broader meaning of "the acquisition of rights upon the death of another." As previously stated, however, the tax imposed by the act of 1905 is not limited to transfers taking effect upon the death of the transferor, but includes gifts inter vivos in contemplation of death. The statement that the tax is upon the "succession" would therefore be incorrect if that term were used in the limited sense of the acquisition of rights upon the death of another; and it is obvious that the word "succession," appearing in the cases cited, is synonymous with "transfer," as defined by the inheritance tax acts.

[4] The fact that the tax is "due and payable" upon the death of the transferor is not inconsistent with the rule that the liability for the tax attaches whenever the transfer is completed. The imposition of a tax and its maturity are commonly regarded as distinct and separate stages in the process of taxation. County of San Diego v. County of Riverside, 125 Cal. 495, 58 Pac. 81; Frost v. State, 153 Ala. 654, 45 South. 203; Westhus v. Union Trust Co., 164 Fed. 795, 90 C. C. A. 441.

The case is remanded, with directions to the trial court to modify the order appealed from in accordance with the above.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

186 Cal. 110

GUARANTY TRUST & SAVINGS BANK v. CITY OF LOS ANGELES (STOWELL et al., Interveners). (L. A. 6420.)

(Supreme Court of California. June 7, 1921. Rehearing Denied July 7, 1921.)

1. Appeal and error ⟸871—Extent of review of final and interlocutory decrees stated.

Where an appeal was on the judgment roll alone, but only one decree mentioned was entered within 60 days from notice of appeal, the only effectual appeal is from that decree, and unless the preceding decrees mentioned were interlocutory, reviewable on appeal from the last decree, they cannot be considered, and, if the preceding decrees were final and the one appealed from merely for enforcement purposes, the preceding decrees may be examined only to ascertain which is the final judgment and whether the decree appealed from is supported by the record as a supplemental decree.

2. Appeal and error ⟸871 — Interlocutory and final decrees in action on tunnel assessment bonds, distinguished.

In an action on bonds for a tunnel assessment under the street improvement law, where the city failed to answer after overruling of a demurrer, a default decree declaring that the tunnel was held by the city in trust for plaintiff and others who were entitled to intervene, directing that such persons be brought in as parties, and providing that the tunnel should be sold as upon foreclosure in case the city failed to pay, *held* merely interlocutory; the final judgment being the one entered after the bringing in of such parties, determining the amounts due the respective parties, and purporting to determine all the issues.

3. Appeal and error ⟸871 — "Final decree" and "order" defined.

A decree which finally disposes of all the issues raised between all the parties to an action and finally settles and adjudicates all rights

in controversy is "final," while an "order" is a decision made during the progress of the cause settling some point of practice or question collateral to the main issue if made before judgment, or settling some question necessary to be determined in carrying into execution a final judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment; Order.]

4. Appeal and error ⊂⊃871—Decree may be final although future court orders necessary.

A decree is none the less final because some future orders of the court may become necessary to carry it into effect, and, if the judgment disposes of the merits of the action and terminates the controverted issues, the fact that further proceedings remain to be taken in the court to make it effective does not affect its finality.

5. Appeal and error ⊂⊃871—Supplemental decree in action on tunnel assessment bonds held merely order after judgment.

In an action on tunnel assessment bonds, where there was a final judgment determining the amounts due the respective parties and ordering the tunnel sold as upon foreclosure in case the city failed to pay, a supplemental decree, stating that the city elected to retain the tunnel and pay the money, fixing the terms of payment, etc., *held* merely an order of the court after judgment for the purpose of carrying out the provisions of the final judgment, so that, on appeal from a later modified supplemental decree, which was the final judgment on the merits, preceding orders were reviewable.

6. Municipal corporations ⊂⊃871—Decree in tunnel assessment action held not unconstitutional as requiring city to make gift of money.

In an action on tunnel assessment bonds, a decree requiring the city to restore to plaintiffs and interveners or to the contractors money furnished such contractors for the construction of the tunnel, *held* not to make a gift of such money contrary to Const. art. 4, § 31, and such judgment, being given by the court having jurisdiction of the subject-matter and parties, was binding and conclusive.

Department 1.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action on bonds for tunnel assessment by the Guaranty Trust & Savings Bank against the City of Los Angeles; N. W. Stowell and others, interveners. Judgment for plaintiff and interveners, and defendant city appeals. Affirmed.

Charles S. Burnell, J. H. O'Connor, Harry W. McNutt, Swanwick & Donnelly, W. W. Hindman, Byron D. Seaver, W. C. Petchner, John B. Yakey, John J. Craig, Thomas C. Ridgway, and Milton K. Young, all of Los Angeles, for appellant.

Herbert Cutler Brown, of Los Angeles (Delphin M. Delmas, of Los Angeles, of counsel), for respondent.

SHAW, J. [1] The appellant, city of Los Angeles, filed its notice of appeal on December 9, 1919, stating therein that it appeals from the modified supplemental decree entered on October 14, 1919, and from the judgments or decrees entered respectively on January 12, 1918, March 29, 1918, July 3, 1918, August 15, 1918, and January 17, 1919, and from each of them. Inasmuch as the only decree mentioned which was entered within 60 days before the filing of the notice of appeal is that of October 14, 1919, it follows that the only effectual appeal is from the decree of October 14, 1919. The appeal is on the judgment roll alone, and we cannot on this appeal consider the validity or merits of any other decree than that of October 14, 1919, unless the preceding decrees are merely interlocutory orders or judgments of a character that makes them reviewable on appeal from the last decree. If either of the preceding decrees was the final judgment on the merits, and the decree appealed from was an order or decree made after final judgment for the purpose of carrying out or enforcing such final judgment, then the preceding decrees may be examined only for the purpose of ascertaining which one is the final judgment and whether the decree of October 14, 1919, is supported as a supplemental decree by the record on which it is founded.

The appellant contends that the decree of October, 1919, is the final decree in the case, that the previous ones are merely interlocutory decrees, and consequently that the entire judgment roll may be reviewed on this appeal. The respondents, on the other hand, contend that the decree of October 1919, is nothing more than a supplemental decree or order to carry out and enforce the final judgment in the action, which they say was the decree entered August 15, 1918. In order to determine this question it is necessary to consider the nature of the action and the subsequent proceedings leading up to the judgment of August, 1918.

The city of Los Angeles in 1912 began a proceeding under the street improvement law for the construction of a tunnel in Hill street in that city, the expenses of which were to be paid, under the proceedings, by an assessment against the property within a district established by the city for that purpose. The contract was let for the construction of the tunnel in pursuance of this proceeding; it was completed and accepted by the city in 1913, and thereupon the usual assessment for the contract price and expenses was levied upon the property within the district. A large number of owners of property within the district paid the assessment. Others allowed bonds to be issued on their property for the assessment against the same as provided by the statute under

which the proceeding was conducted, and many of these bonds afterwards passed from the contractors into the hands of other persons, among them the plaintiff and several of the interveners. Thereafter, in an action which finally came to this court on appeal, it was determined that the whole proceeding for the construction of the tunnel, including the assessment and issuance of the bonds, was absolutely void. Thompson v. Hance, 174 Cal. 572, 163 Pac. 1021. The complaint alleges that the plaintiff had purchased from the contractors some of the bonds so issued, amounting to $9,095.15. It also sets forth the proceedings for the assessment, the fact that it was declared void as aforesaid, and alleges that the entire proceeding was inaugurated and carried on by the persons concerned, other than the property owners, in good faith and in the belief that it was authorized by law, and that a large number of the property owners, acting in the same belief, paid the assessment or suffered bonds to issue on their property; that all were acting under a misapprehension and mistake of law, all supposing that they knew and understood it, and making substantially the same mistake, but that others of the property owners, who did not so believe, brought the action which resulted in the decision aforesaid that the proceeding was utterly void. Plaintiff alleged that it brought the action in behalf of itself and all others who were united in interest with it and who should elect to come into the action. The prayer was that it be ascertained what amount was due to the plaintiff and other parties who might come in as interveners on account of the payments made or bonds held by them; that after such adjudication the city of Los Angeles be given 20 days in which to elect whether it would pay the amounts so found to be due, and if it announced its intention to pay, that it be given time and afforded facilities and accommodations such as its financial condition and means should render reasonable in which to pay, but that if it failed to pay or to announce its election to do so, then, either, first, that the tunnel be sold to satisfy the amount of money due, in the same manner as property is sold under a foreclosure of a mortgage, or, second, that the tunnel be decreed to be the property of the parties in whose favor the adjudication was made, and for such other and further relief as to equity may seem meet. The theory of the complaint was that the tunnel had been built with the money which the plaintiff and the several interveners had furnished to the contractors on the faith of the validity of the assessment and bonds aforesaid; that it had become the property of the city of Los Angeles without any consideration, and that in consequence thereof the city held the tunnel as property belonging to the plaintiff and the interveners and in trust for them. The object of the action obviously was to enforce this trust either by selling the property and distributing the proceeds to the beneficiaries of the trust, or by declaring the property to be the property of the plaintiff and interveners, and providing that if it desired to hold it, the city could do so by paying the plaintiff and the interveners the amounts they had paid for its construction.

The city filed a demurrer to this complaint, which was overruled by the court, and the city failed to answer. Thereupon the court entered the default of the city for failure to answer and rendered a decree declaring that the tunnel was held by the city in trust for the plaintiff and the interveners and for other persons who should be held entitled to come in, and, further, that a large number of persons were entitled to come in as interveners who had not as yet come in and whose presence as parties was necessary to a complete determination of the action, and directing that they be brought in as parties, and that for that purpose a supplemental complaint be filed and served upon them, and further ordering that when the amount to be paid to the several parties interested in the fund was ascertained the city be allowed twenty days in which to elect to retain the tunnel and pay the amount, in which case it should be given reasonable time and facilities to make such payment; that when payment should be made the several parties should receive their due proportion thereof as should be determined by the decree of the court, but that if the city failed to pay, that it should forthwith deliver to the parties adjudged to be equitably entitled thereto the tunnel aforesaid; and, further, that the city's right, title, and interest in and to said tunnel had by force and virtue of the decree passed to and vested in said parties and that since partition thereof could not be made without prejudice to said owners that the same be sold as upon foreclosure sale of a mortgage and the amount realized be distributed to the parties respectively in proportion to his right as the same should be determined by the court.

[2] This so-called judgment was interlocutory in its nature. Although it declared the rights which the court concluded the plaintiff and the parties then before the court had with respect to the tunnel, it is evident from the fact that other parties having similar rights were necessary to a complete determination of the case, and direction was given for bringing them in, that it was not intended to be final. In accordance with this direction, a supplemental complaint was filed and served upon a large number of persons who had either paid assessments or held bonds issued thereon. Such persons filed complaints in intervention, demurrers were filed thereto by the city and were overruled, and decrees or orders similar to that just

mentioned were entered on March 29th and July 3d, 1918. Finally, however, on August 15, 1918, the parties ordered to be brought in having all appeared or having declined to appear, the court entered a judgment, reciting that the cause came on regularly for final hearing, all the parties being represented by their respective counsel. This judgment recites the beginning of the action, the filing of the several complaints in intervention and of the demurrers thereto, the orders overruling the demurrers, the refusal of the city to answer the several complaints; that thereupon the court determined the amounts due to the respective parties interested on account of said assessment and bonds. Then follows the judgment of the court that the city held the tunnel in trust for the plaintiff and interveners; that if it chose to do so it would be allowed to retain the tunnel by paying into court for the persons entitled thereto the sum of money so ascertained as due them, which are set out in detail, amounting to $144,526.81; that the city be granted twenty days from the entry of the judgment in which to elect whether it would pay said amount; that if within that period it announced its intention to pay, it should be given such time and afforded such facilities to make such payment as the court should deem reasonable, and that if it did pay the same, the amount should be distributed to each party according to the apportionment made in the decree; that if within the twenty days it should fail to so elect to retain the tunnel, it should then deliver the said tunnel to the parties entitled thereto, that is, the plaintiff and the interveners, and that "all its right, title, interest and claim in and to the said tunnel do by force and virtue of this decree, ipso facto, pass to and vest in said parties"; also that thereupon the tunnel be sold as upon the foreclosure of a mortgage and the amount realized be distributed among the parties according to their interest.

[3, 4] We think there can be no doubt that this judgment constitutes the final judgment in the action. It was not made until all the parties whom the court deemed necessary were brought in and made parties to the suit so that the entire controversy could be determined. It purports to and does determine all the issues presented by the pleadings of all the parties, and it ascertains and states the rights of the parties arising thereon, and the relief to be given for the enforcement of those rights. This constitutes a final judgment. "A decree which finally disposes of all the issues raised between all the parties to an action and finally settles and adjudicates all the rights in controversy is final." 2 Ency. of Pl. & Pr. 65. An order "is a decision made during the progress of a cause * * * settling some point of practice or some question collateral to the main issue presented by the pleadings," if made before judgment, or settling some question "necessary to be determined in carrying into execution the final judgment," if made after judgment. The final judgment "is the determination of the court upon the issue presented by the pleadings, which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject-matter in litigation, and puts an end to the suit." Loring v. Illsley, 1 Cal. 27, 28. "A decree is none the less final because some future orders of the court may become necessary to carry it into effect; * * * nor because, when the merits of the controversy are adjudicated upon, and the equities of the parties definitely settled, an account is directed to be taken to ascertain what sum is due from one to the other, as the result of the decision made by the court" (Freeman on Judgts. § 24); or where, as the result of the judgment, the defendant or plaintiff is required to pay money in order to have it carried out and a subsequent order is necessary for the purpose of determining that the money had been paid and the conditions complied with (Freeman on Judgts. § 28). "If the judgment stand the test of the inquiry as to whether it disposes of the merits of the action, and terminates the controverted issues, the fact that further proceedings remain to be taken in court to make it effective does not affect its finality." 2 Spelling on New Trial, § 483. See, also, Zappettini v. Buckles, 167 Cal. 32, 138 Pac. 696, where the subject is elaborately treated.

The so-called judgment of January 17, 1919, recites that the city had elected to avail itself of the privilege of retaining the property and paying the amount therefor fixed by the aforesaid decree, as therein provided. Thereupon the court entered a supplemental order or decree to the effect that the proposition of the city to retain the tunnel and pay the money was accepted; that the city thereby became indebted to the respective parties plaintiff and interveners in certain specified amounts to each; and that payment thereof be made by the city in five installments as therein set forth. Thereafter, in October, 1919, the plaintiff moved the court to modify the said last-mentioned supplemental decree in certain particulars. The motion was granted, and thereupon the court, on October 14th, entered the modified supplemental decree from which the present appeal is taken. In this decree the court ordered that the plaintiff and interveners recover a certain sum which the parties had agreed to accept on account as the consideration for extending the privilege given to the city to retain the tunnel; and providing that the remainder of the sum due the parties be paid in five installments annually, and declaring that when all the payments should be made, as therein pro-

vided, the title and interest of the plaintiff and interveners in the tunnel should be extinguished and the same should become and be the property of the city of Los Angeles free and clear of any claim of the said parties thereto, but that if the city should fail to pay, as thus provided, its privilege should expire, and the tunnel should remain the property of said parties free of all claim by the city.

[5] The last-mentioned supplemental decree was nothing more than an order of the court after judgment, made for the purpose of more effectually carrying out the provisions of the final judgment entered in August, 1918. The appellant concedes that if this be the correct view of the case it has no objection to urge against this supplemental order.

[6] The main point urged in support of the appeal is that the city was never under any obligation to restore to the plaintiff and interveners, or to the contractors, the money so furnished to such contractors for the construction of the tunnel; that the effect of a judgment requiring such restoration was to compel the city to make a gift of such money to the parties claiming it; that this is forbidden by the provisions of section 31 of article 4 of the Constitution, and consequently that the entire proceeding, including the final judgment of August, 1918, is absolutely void and constitutes no foundation for the supplemental decree attempting to enforce it. It is clear that there is no foundation for this claim. The entering of the judgment of August, 1918, was not a gift by the city to any person. The plaintiff and the interveners asserted their claims in a court of general jurisdiction in good faith and for the purpose of obtaining relief in that court. The court had jurisdiction of the action and of the parties thereto. It gave its judgment accordingly, declaring that the city held possession of the tunnel, but that it held the same in trust for the use and benefit of the plaintiff and the interveners and that it was the property of the plaintiff and interveners, at the same time giving the city the privilege of retaining the same on payment of the money which had been furnished by the other parties and with which the tunnel had been constructed. The judgment, being given by a court having jurisdiction of the subject-matter and of the parties and having become final, is binding and conclusive. Such a judgment declaring that property held by a city for public use is the property of a private individual is, after it has become final, conclusive upon the city and the public. San Francisco v. Holladay, 76 Cal. 18, 17 Pac. 942; People v. Holladay, 93 Cal. 247, 29 Pac. 54, 27 Am. St. Rep. 186; Strand Imp. Co. v. Long Beach, 173 Cal. 769, 161 Pac. 975. There was a controversy between the parties over this question. The judgment determined it against the city and gave it the option to retain the property by paying certain sums of money. Its payment thereof was in no sense a gift. On the contrary, it was the consideration paid by it for the restoration of the property to which it had been adjudged to have no title except for the benefit of others.

The judgment appealed from is affirmed.

We concur: LAWLOR, J.; OLNEY, J.

186 Cal. 307

In re HENNING'S ESTATE. (L. A. 6801.)

(Supreme Court of California. June 20, 1921.)

Wills ⊂=130—Letter held not a will.

A letter in which writer stated that he was coming East for the purpose of getting married and expecting to leave on a certain date and be married on a certain date, if the girl he had picked out would have him, and discussed his own love affair and that of another, and contained the clause: "If there is anny troble on the roade That is get hurt ore sick thay [Edison Company] look after me and if I should get killed there is plenty of money to put me away in fine shape. Then i want you to have everything"—was not testamentary in character, and court did not err in refusing to probate it.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

In the matter of the estate of George E. Henning, deceased. From an order refusing probate to a letter claimed to be a will, proponent appeals. Affirmed.

Gates & Randles, of Los Angeles, for appellant.

Lester Wm. Roth, of Los Angeles, for respondent.

WILBUR, J. This is an appeal from an order denying probate to a letter written by the deceased dated May 15, 1920, to his brother, the petitioner, for its probate. Like most letters, it is entirely written, signed, and dated in the handwriting of the deceased. The letter is too long to quote. The writer states that he is coming East for the purpose of getting married. He expected to leave Los Angeles on July 3d, to arrive at Thurmont, Md., July 8th, and be married July 15th, if the girl he had picked out would have him. The writer discusses his own love affair and that of Hazel, who was willing to get married, but whose "Little Slim man" is very slow about asking her. The only possible justification for the claim that this letter is testamentary in character is the following:

"If there is anny troble on the roade That is get hurt ore sick thay [Edison Company] look after me and if I should get killed there is plenty of money to put me away in fine shape. Then i want you to have everything."

From the whole letter, however, it is evident that the deceased was contemplating matrimony rather than death. The judgment of the trial court was correct.

Order affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

186 Cal. 151

PARKS v. GATES. (Sac. 2919.)

(Supreme Court of California. June 14, 1921.)

1. Waters and water courses ⊂=247(2)—Injunction against interference with irrigation ditch warranted.

In a suit to enjoin defendant from interfering with plaintiff's irrigating ditch over certain land, a finding that title to the land was in plaintiff, subject only to an easement in favor of defendant for road purposes, is sufficient to support a judgment for plaintiff, irrespective of whether he had a prescriptive right to use the ditch over defendant's right of way, in the absence of any showing that the maintenance of the ditch interfered with the easement.

2. Easements ⊂=12(1)—Direct grant of right of way for road conveys easement only.

Rights of way under Civ. Code, § 801, and Pol. Code, § 2631, being easements, a direct grant of a right of way for a road carries with it only an easement, nothing passing by such a grant but that which is necessary for its reasonable and proper enjoyment.

3. Deeds ⊂=97—Being read as whole, habendum may be limitation on estate granted.

To determine the effect of a deed, the whole instrument must be read together, and the habendum may be resorted to as a limitation on the estate granted.

4. Easements ⊂=12(1)—Grant of land for purpose of granting right of way held limited to grant of easement.

A fee-simple title, being presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser was intended (Civ. Code, § 1105), and grants being interpreted as any other contract (Civ. Code, § 1066), a deed conveying a strip of land "for the purpose of granting * * * a right of way" from grantee's premises expressed an intention to limit the interest conveyed to an easement for a right of way rather than merely to indicate grantor's motive in making the grant.

5. Waters and water courses ⊂=154(1)—Easement to maintain irrigating ditch acquired as incident of conveyance.

Where an irrigating ditch was constructed over two tracts of land for the use of all the land while it was owned by tenants in common, the easement of maintaining such ditch through the portion acquired by one cotenant in severalty after division of the land between them by interchange of deeds passed to him, under Civ. Code, § 1104.

6. Waters and water courses ⊂=247(2)—Prescriptive right to maintain ditch established.

In a suit to enjoin the obstruction of an irrigation ditch, evidence *held* sufficient to show plaintiff for more than six years had been continuously, openly, and adversely, with full knowledge of defendant, maintaining and operating same under circumstances sufficient to establish a prescriptive right.

In Bank.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Suit by W. S. Parks against Emery Gates. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Hatton and Hatton & Scott, all of Modesto, for appellant.

L. L. Dennett, Dennett & Zion and J. C. Needham, all of Modesto, for respondent.

SLOANE, J. This appeal is from a judgment enjoining defendant from obstructing and interfering with plaintiff's maintenance and use of an irrigating ditch across a 24-foot strip of land, the fee title to which is claimed by both parties.

The history of the transaction, as appears from the record, shows that some years prior to this litigation one Hurlburt and the respondent Parks owned as tenants in common a tract of land comprising 176 acres. Later, by an interchange of deeds, Hurlburt became the owner of the north 76 acres of the tract and Parks became the owner of the south 100 acres. During the period that Hurlburt and Parks owned the entire property in common, there existed a roadway running from the northern tract, upon which farm buildings were situated, through and near the center of the southern tract, and to and connecting with a county road on the south. On October 31, 1908, about three months after the deeds between Hurlburt and Parks conveying these separate tracts in severalty, Parks executed a deed to Hurlburt of the strip of land in dispute which followed the line of this roadway, by a conveyance containing in its granting clause the following recital:

"Does grant, bargain and convey: All of that certain lot or parcel of land situate, lying and being in the county of Stanislaus, state of California, and bounded and particularly described as follows."

Here follows a description by courses and distances of this disputed strip of land, with the concluding words:

"This grant is for the ———— of granting to party of the second part a right of way from his premises to the county road."

Subsequently, by mesne conveyance from Hurlburt, the north 76 acres and the strip in dispute were conveyed by straight bargain and sale deeds to the defendant Gates.

In this connection it will be helpful to an understanding of the entire situation to also state that the irrigation ditch in question was located upon the 176 acres of land, while the entire tract was owned in common by Hurlburt and Parks, and extended from the northerly line of the tract toward the east side, across the 76-acre tract, and partly across the 100-acre tract, and then turned west and extended across this roadway into the westerly side of the 100-acre tract. It was constructed and used for conveying water from the Turlock irrigation canals for the irrigation of these lands of Hurlburt and Parks, and was used by respondent Parks thereafter during all the time subsequent to his acquiring title in severalty to the south 100 acres, and up to the time of the commencement of this action. It is for filling up and obstructing this ditch where it crosses the road, by defendant, that this injunction was sought.

The contention of appellant is that the deed of October 31, 1908, vested in him the title in fee to this strip of land. Respondent contends that the deed only conveyed an easement for right of way for road purposes, and that in any event he has acquired the right to maintain his irrigation ditch thereon by adverse user, and by reason of the fact that an easement was created in his favor to maintain such ditch as an incident of the conveyances between himself and his co-owner, Hurlburt. The trial court found in favor of respondent on both propositions. First:

"That the deed of October 31, 1908, grants to the defendant and his predecessors in interest a right of way or easement for a road to the land therein described reserving to plaintiff the title in fee to said land."

Second:

"That irrespective of the deed the plaintiff has a prescriptive right to run water through the said ditch, over, through, and across said right of way."

[1] The finding that the title to this strip of land is in the plaintiff, subject only to an easement in favor of defendant for its use for road purposes, is sufficient alone to support the judgment and injunction in plaintiff's favor, if it correctly interprets the deed, and in the absence of any showing that the maintenance of the irrigation ditch interferes with defendant's easement for a road.

[2] We think the finding of the court as to the effect of this deed is right. There is no dispute under the authorities that a direct grant of a "right of way" for a road carries with it only an easement in the land. Rights of way are classified as easements by section 801 of the Civil Code and section 2631 of the Political Code. Nothing passes by a grant of a right of way "but that which is necessary for its reasonable and proper enjoyment." Smith v. Worn, 93 Cal. 206, 215, 28 Pac. 944, 946; 3 Kent Com. 419, 420; Patchett v. Pac. Coast Ry., 100 Cal. 505, 35 Pac. 73.

[3, 4] It may be conceded that in this instrument the grantor used apt words to convey a fee title if we refer only to the language of the granting clause including and preceding the description of the land affected. But a deed is to be construed as any other contract, from its four corners; and when we find in the granting clause, immediately following the words of grant, bargain, and sale, and the description, the declaration of the grantor that "this grant is for the purpose of granting to party of the second part a right of way from his premises to the county road," there can be no question but that the expressed intention is to limit the interest conveyed to an easement for a right of way. (The word "purpose" does not appear in the deed in the connection given in the above quotation, but in construing the language used both parties seem to concede that such was the purport of the omitted word, and there can be no doubt from the context that such was the fact.)

Under the rules of construction, the whole instrument must be read together to determine the effect of a deed, and the habendum may be resorted to as a limitation upon the estate granted. Section 1105 of the Civil Code declares that "a fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended," and grants are to be interpreted as any other contract. Civ. Code, § 1066.

In Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049, it is said:

"The intention, it is sometimes said, is to be gathered from the four corners of the instrument, and in case of a grant the habendum, as well as any other portion of the instrument, is to be considered. The ordinary use of the habendum is to define or limit the quantity of interest, or the estate which the grantee is to have in the property granted, and, although usually made a separate portion of the instrument, is not necessarily so, but may be wholly omitted, and the interest or estate granted may be defined or limited in the premises or granting part of the conveyance. Montgomery v. Sturdivant, 41 Cal. 290. * * * 'It is in such case to be considered as an addendum or proviso to the conveyancing clause, which by a well-settled rule of construction must control the conveyancing clause or premises, even to

the extent of destroying the effect of the same.'"

Misconception of the effect of the qualifying language used in this deed has doubtless resulted from failing to distinguish between the use of the words "for the purpose of granting a right of way" as a limitation upon the interest conveyed, and the use of the words in cases cited by appellant merely expressing the purpose of making the grant, as indicating the grantor's motive, as in an unlimited grant of described land "for a road to and from said premises." Soukup v. Topka, 54 Minn. 66, 55 N. W. 824; Eldridge v. See Yup Co., 17 Cal. 45; Fitzgerald v. County of Modoc, 164 Cal. 493, 129 Pac. 794, 44 L. R. A. (N. S.) 1229; Cooper v. Selig (Cal. App.) 191 Pac. 983.

There is a vast difference between a grant for purposes of "right of way" for a road and a grant of land "to be used for a road." The latter grant may be entirely consistent with the conveyance of a fee-simple title, as a road may be maintained as readily on land held in fee as under an easement; but the grant of land as a right of way recognizes nothing but an easement.

[5] Of course, under the construction given this deed by the trial court, with which we are in accord, the finding of plaintiff's prescriptive right to maintain his water ditch across this strip of land becomes immaterial; but we may say that we think the evidence in support of such finding is ample. In the first place, the easement to maintain this ditch apparently passed to plaintiff with the division of the land between himself and his cotenant, the evidence disclosing that the ditch was constructed over both tracts for the use of all the land while it was owned in common.

"A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." Civ. Code, § 1104; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69.

[6] Moreover, the evidence shows without contradiction that the plaintiff for upwards of six years prior to bringing this action had been continuously, openly, and adversely, with full knowledge of the defendant, maintaining and operating this ditch, and under circumstances justifying the finding of the court that such use and possession was sufficient to establish a prescriptive right.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; SHAW, J.; OLNEY, J.

186 Cal. 128

DE MOULIN v. MAGNESITE REFRACTORIES CO. et al. (Sac. 2973.)

(Supreme Court of California. June 10, 1921. Rehearing Denied July 7, 1921.)

1. Corporations ⇐482(5)—Finding warranted that assignment of mortgage to wife by company's president was not effective when mortgages were authorized.

In suit to foreclose mortgages given by a corporation to its president's wife to secure a claim of the president against the company, evidence *held* to justify the trial court's finding that the assignment of the indebtedness to the wife by the president had not become effective at the time of the adoption of the resolution of the directors of the company authorizing the mortgages.

2. Corporations ⇐298(5)—Mortgages executed pursuant to resolution of directors, one of whom interested, invalid.

Where the president of a company, one of the two directors present and voting at a meeting which authorized mortgages, was directly interested in the passage of the resolution authorizing such mortgages to secure a claim due to him from the company, which he intended subsequently to convey to his wife, his vote on the resolution was of no avail, the resolution was unauthorized, and the mortgages pursuant thereto were invalid.

3. Corporations ⇐480—Attachment had priority over unauthorized corporate mortgage subsequently ratified.

An attachment levied on a corporation's lands had priority over a mortgage previously executed without proper authority from the board of directors, but subsequently ratified by them after levy of the attachment.

4. Assignments ⇐79—Notes and mortgages given for prior indebtedness transfer indebtedness, though instruments void.

The assignment of notes and mortgages given for a precedent indebtedness has the effect to transfer the prior indebtedness, even if the notes and mortgages are void.

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by U. S. De Moulin against the Magnesite Refractories Company and others and Paul Milanovich, who filed cross-complaint. From the judgment, plaintiff and the cross-complaining defendant appeal. Affirmed.

William H. Fuller, of Los Angeles, and N. F. Bradley, of Visalia, for appellant.

F. J. Schuhl, Middlecoff & Feemster, of Visalia, Max B. Jamison and J. T. Fuller, both of Porterville, and Chas. E. Putnam, of Los Angeles, for respondents.

WILBUR, J. On August 20, 1917, the defendant corporation was indebted to Ed De Moulin, its president, in the sum of $8,890.32. At that time it was indebted to Paul Milan-

ovich, the defendant, in the sum of $3,463.83. On August 20, 1917, Ed De Moulin and W. H. Fuller, two of the three directors of the defendant corporation, purporting to act as such directors at a special meeting of such board, authorized the execution of three mortgages to A. J. De Moulin, wife of Ed De Moulin, to secure said claim of $8,890.32; one mortgage covering the real estate belonging to the corporation in Tulare county, another covering the personal property located in said county, and the third covering the personal property located in Los Angeles county, valued at $1,998.30. The mortgagee assigned the mortgages to plaintiff, U. S. De Moulin, who is a brother of Ed De Moulin, who brought this action to foreclose the three mortgages above mentioned, but subsequently dismissed the third count for the foreclosure of the chattel mortgage upon the property in Los Angeles. The defendant corporation made default, and Paul Milanovich appeared and by way of answer and cross-complaint asserted that the mortgages in question were fraudulent and void as to him, and asked to have his claim established as a superior lien on all the real and personal property of the corporation. The personal property in Los Angeles county was sold after the commencement of this action for $1,998.30, which sum had been paid to plaintiff. Defendant Milanovich sought by his cross-complaint to have such sum applied to his claim. Milanovich brought an attachment suit on the 27th day of August, 1917, and the writ of attachment was levied against all the real and personal property of the defendant corporation in the county of Tulare, but was not levied upon the personal property covered by the chattel mortgage in the county of Los Angeles. Judgment was rendered by the trial court, giving Milanovich a prior lien as to the real and personal property in Tulare county, and denying his prayer that the proceeds derived from the sale of the personal property in Los Angeles county be applied to his claim. The plaintiff appealed from that portion of the judgment giving Milanovich a prior lien, and Milanovich appeals from that portion of the judgment refusing to direct the application of the proceeds of the personal property in Los Angeles to his claim. Both appeals were taken upon the judgment roll, including a bill of exceptions, and are now before us for consideration.

The trial court found as a fact that the corporation was insolvent at the time of the execution of the mortgages in question, and it clearly appears from the pleadings and the evidence that the indebtedness of the corporation was vastly in excess of its assets. At the time in question 40 cars of worthless rock and dirt supposed by the defendant corporation to be magnesite ore were en route to a consignee in New York, who, subsequently discovering the character of the shipment, refused to receive or pay for it. It is clear that at the time in question the corporation was actually insolvent, although the directors may have believed that the shipment in question was worth $30,000, as it would have been, had it consisted of magnesite ore, in which event the corporation would have been solvent.

[1-3] The trial court found that at the time of the adoption of the resolution authorizing the mortgages in question, the corporation was not indebted to A. J. De Moulin. It is conceded that the corporation was indebted on and prior to August 20, 1917 to its president, Ed De Moulin, in the sum of $8,890.32 as above stated. The plaintiff's claim is that Ed De Moulin assigned his claim against the corporation to his wife, A. J. De Moulin, on the 20th day of August, 1917, prior to the time when the purported meeting of the board of directors was held. There is sufficient, however, in his evidence to justify the finding of the trial court that the assignment of said indebtedness had not become effective at the time of the adoption of the resolution authorizing the mortgages. Ed De Moulin testified that the written assignment offered in evidence was made out by him on the evening of August 19th, was brought by him to the office on August 20th, that he believed that his wife was not present in the office at any time during that day, and that after the passage of the resolution and the execution of the notes and mortgages in question he took said notes and mortgages and delivered them to his wife at her residence, receiving in consideration therefor a surrender of his note for $4,500, theretofore executed and delivered by him to his wife by way of gift the preceding April. He does not testify that the assignment was delivered to her prior to the meeting of the board of directors, and the circumstances indicate that it was delivered afterward, although he did testify in general terms that he assigned his claim to his wife previous to the passage of the resolution in question.

This being true, it follows that it is unnecessary to consider the contention of the defendant that the meeting of the board of directors was apparently held without any previous notice of such meeting, because the president, one of the two directors present and voting at the meeting, was directly interested in the passage of the resolution authorizing the execution of the mortgages to secure a claim due to him which he intended subsequently to convey to his wife. His vote upon the resolution was therefore of no avail, the resolution was without authority, and the mortgages executed in pursuance thereof were invalid. Curtin v. Salmon River, etc., Co., 130 Cal. 345, 62 Pac. 552, 80 Am. St. Rep. 132. It is claimed that the same two directors met on the 3d of September, 1917, at a regular meeting, at a time and place fixed in the by-laws and passed a resolution ratifying and confirming the execution of

said mortgages. Assuming for a moment that this meeting was properly constituted, the act of ratification would be unavailing as to the real and personal property in Tulare county, because Milanovich had caused an attachment to be levied thereon, which attachment would have priority notwithstanding the attempted ratification, and for the reasons hereinafter stated it is unnecessary to determine the validity of the chattel mortgage on the property in Los Angeles county. Civ. Code, § 2313.

[4] The District Court of Appeal reversed that portion of the judgment of the trial court which denied the application of Milanovich to have the $1,998.30 received from the sale of the personal property in Los Angeles county applied to his claim, on the ground that the plaintiff had no valid obligation against the corporation, and therefore held that sum for the corporation. It was because of our doubt as to the correctness of this conclusion, particularly in view of the recent decision of this court upon a similar question in Ellison v. Henion, 190 Pac. 793, 11 A. L. R. 444, that the rehearing was granted. Under that decision, and Goldman v. Murray, 164 Cal. 419, 129 Pac. 462, the assignment of the notes and mortgages given for a precedent indebtedness would have the effect of transferring the prior indebtedness even if the notes and mortgages were void. Applying that principle to the case at bar, we find that after the execution of the notes and mortgages in question the prior indebtedness which they were given to secure was transferred to A. J. De Moulin, and her subsequent transfer of the mortgages and notes carried the indebtedness with it, and thus the plaintiff was a creditor of the defendant corporation to the extent of $8,890.32, and the corporation having consented to the sale of the personal property of the corporation in Los Angeles county, and to the application of the proceeds to that indebtedness, the defendant and cross-complainant, Milanovich, is not entitled to complain of that action unless he had a lien thereon prior to the sale.

The trial court found that the chattel mortgage upon the Los Angeles personal property was not recorded. It is contended that there is no evidence to support this conclusion, and it is asserted in the brief that it was in fact recorded. This, however, is immaterial, because the cross-complainant, Milanovich, never secured a lien thereon by attachment; therefore the application of the proceeds of the sale to a valid indebtedness of the corporation then owing to the plaintiff was a proper application of the assets of the corporation.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SLOANE, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

52 Cal. App. 548

WRIGHT v. WRIGHT. (Civ. 3597.)

(District Court of Appeal, Second District, Division 1, California. May 6, 1921.)

1. Divorce ⊂=133(1) — Declarations two months before trial that husband would not return does not establish that separation was desertion.

The husband's declaration two months before trial that he was through with his wife, with whom he had not been living for some time, does not show that the separation amounted to desertion for the statutory period within Civ. Code, § 99.

2. Divorce ⊂=37(6)—Separation beginning by consent does not amount to desertion.

Under Civ. Code, §§ 99–101, relating to desertion, continuation of a separation beginning by consent of both spouses does not amount to desertion on the part of the husband who left the wife, until some withdrawal of the consent or the occurrence of some act, or the making of some declaration indicating a change in the attitude of the parties.

3. Divorce ⊂=37(14)—Wife held not entitled to divorce on ground of desertion, though husband ceased to provide during absence.

Where a wife consented to her husband's leaving her and going to a foreign country, and after some period of time he ceased to make remittances, and the parties ceased correspondence, yet where there was no showing that the wife ever withdrew her consent to the separation, and the only thing indicating desertion was that two months before trial the husband stated he would not return, the wife was not entitled to the divorce on the ground of desertion, particularly as Civ. Code, § 175, declares that a husband is not liable for the support of his wife living separate from him, unless the agreement for separation so provides.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action for divorce by Ida Frances Wright against Stanton MacDonald Wright. From a judgment denying the relief sought, plaintiff appeals. Affirmed.

F. E. Davis, of Los Angeles, for appellant.

JAMES, J. Plaintiff brought this action to secure a divorce upon the claimed ground: First, that she had been deserted by her husband; and, second, that the husband had failed to provide her with the necessaries of life, alleging that the desertion and the failure to provide had continued for more than one year prior to the commencement of the action. Defendant was personally served with the summons and complaint, but made no appearance in the action. Upon his default being entered the court proceeded to hear the testimony of plaintiff and her witnesses, and entered a judgment denying the relief prayed for. Plaintiff has appealed.

The testimony of the plaintiff was to the effect that at a time about five years prior to the commencement of the action her husband left the marital domicile, which was then in the city of New York, and went to Paris; that she knew where he was going at the time of his departure and that there had been no trouble between the two up to that date; that the husband sent money to her for several years amounting to about $60 per month, and that a little more than a year prior to the commencement of her action he ceased to send money or make any provision for her support; that up to about the time that he ceased to send money he had written letters to her and she had responded thereto. In that connection she testified as follows:

"Q. And when did you find out he was going to leave you? A. Well, I commenced to suspect it. His letters, about may be a little over a year after he left, his letters came fewer and fewer between and didn't mention my going to where he was and didn't mention coming to where I was, so I commenced to think that perhaps he wouldn't come back. Q. Did you say anything about that in your letters to him? A. No, sir. Q. How did it come you didn't write to him about it? A. Because I didn't think it was my place. I thought if he wanted to come back he would come. Q. Did he finally cease writing to you altogether? A. Yes; he did. Q. Did you finally cease writing to him also? A. Yes; I didn't answer letters that I didn't receive. Q. You never wrote him except to answer his letters? A. That was all. Q. Have you any of those letters with you? A. I have nothing; no."

The testimony further of the plaintiff was that for more than a year prior to the commencement of the action she had been living with and been supported by her mother. The mother of the plaintiff, as well as the mother of the defendant, gave testimony corroborative of this statement of the plaintiff, and both of the last-mentioned witnesses also corroborated the plaintiff as to the fact that she and the defendant had not lived together for more than one year prior to the commencement of the action. Another witness testified that the defendant was at the time of the trial living with him, and that about two months before the trial the defendant had said that "he was not going back home any more, he was through there."

[1-3] The statement to which the latter testimony referred, being made within the year prior to the commencement of the action, was not sufficient to show that the desertion of the defendant began at a date remote enough to mark the commencement of the statutory period. Section 99, Civ. Code. Appellant in her brief admits that the separation of husband and wife, at the time it occurred, when the husband went to Paris, was by the consent of each party. Under the initial condition then affecting the separation, the continuance of that separation would not give rise to a cause of action for divorce on the ground of desertion until the consent of one or the other of the parties was withdrawn, which withdrawal would necessarily have to be shown by the occurrence of some act or the making of some declaration indicating a change in the attitude of one or the other of the parties. Section 100 of the Civil Code provides as follows:

"Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation."

Civil Code, § 101:

"Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion."

Accepting the admission of appellant, which is borne out fully by her testimony, that there was a separation by consent in the first instance, it must be concluded, we think, that the trial court was altogether justified in holding that no showing was made of the occurrence of anything from which it was proper to infer that the husband intended to desert his wife. The declaration made by the defendant two months before the trial as to his intentions was insufficient for the reasons already given. Counsel's main reliance is placed upon that testimony given by the plaintiff in which she stated that the defendant's letters and remittances to her had ceased for more than a year prior to the commencement of the action. The statute, however (section 175, Civ. Code), provides that a husband is not liable for the support of his wife when she is living separate from him by agreement "unless such support is stipulated in the agreement." There was no attempt to show that at the time the defendant left for Paris he made any promise to support the plaintiff, and the plaintiff made no contention that there existed any such agreement on his part; in fact, the circumstances surrounding the departure of the defendant from the house of the couple in New York were not given to the court, and the plaintiff's testimony touching that matter was such as to suggest that she preferred to leave the court in the dark as to the reasons for the separation. Under the circumstances of the case, and considering the evidence as it was presented to the trial judge, we think that the judgment adverse to the prayer of plaintiff's complaint was the only one proper to be entered.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 280

PEOPLE v. LESSE. (Cr. 515.)

(District Court of Appeal, Third District, California. April 15, 1921.)

1. Indictment and information ⟹110(3)—Information for criminal syndicalism, where following the statute, is sufficient.

An information for criminal syndicalism under St. 1919, p. 281, is sufficient where it follows the statute, and not subject to demurrer, because failing to state the details of the offense with sufficient particularity.

2. Criminal law ⟹133, 134(2)—Defendant's showing for change of venue held insufficient.

In a criminal prosecution, where no sufficient notice of intention to move for change of venue was given the district attorney as required by law, and there was no affidavit showing that there existed any bias or prejudice against the defendant or that he could not get a fair and impartial trial in the county, and the affidavit used refers only to another defendant, the showing is wholly insufficient to justify granting the motion; there being no presumption that bias or prejudice shown to exist against one of two or more persons jointly charged exists against any of the others.

3. Criminal law ⟹1158(2)—Decision of trial court on conflicting affidavits for change of venue is conclusive.

On motion for change of venue, where the affidavits and counter affidavits as to bias or prejudice against the defendant are conflicting, the trial court is vested with authority to determine the conflict, and the appellate court is bound by its ruling.

4. Criminal law ⟹434—Where defendant, prosecuted for criminal syndicalism, admitted membership in I. W. W., a book of such organization held admissible.

In a prosecution for criminal syndicalism under St. 1919, p. 281, where defendant admitted that he was at the time charged in the information a member of the I. W. W., defined by leading dictionaries and encyclopedias as being an organization advocating criminal syndicalism, revolutionary violence, and sabotage, it was not error to read in evidence portions of a book entitled "The New Unionism," admitted to expound the doctrines of such organization; a reference to such book being found among papers in defendant's possession at time of arrest.

5. Jury ⟹105(1)—Jurors stating that they would act fairly notwithstanding adverse opinions of organization to which defendant belonged not subject to challenge.

In a prosecution for criminal syndicalism, where the defendant admitted membership in the I. W. W., which advocates such doctrine, where jurors on voir dire admitted they entertained unfavorable opinions of such organization, but were wholly unacquainted with defendant and knew nothing about him and had no bias or prejudice against him, and knew none of the facts of the case, and stated that their opinions were formed from reading public journals, and that they could and would, if sworn as jurors, act fairly and impartially notwithstanding such opinions, such showing was sufficient for the swearing of such jurors under the express terms of Pen. Code, § 1076.

6. Jury ⟹105(1)—Merely because juror was not favorably inclined toward the I. W. W., of which accused was a member, is no ground for challenge; "criminal syndicalism."

Defendant, prosecuted for the crime of criminal syndicalism, which means, among other things, direct action and sabotage implying willful, malicious, and systematic injury to and destruction of property to injure the employer, was entitled to a jury that would try him fairly and impartially upon the facts of his case, but not to a jury who would excuse or condone unlawful acts of violence because he might make the pretense of believing or might believe that they were right, and where he was charged under St. 1919, p. 281, § 2, subd. 4, with being a member of a syndicalistic organization known as the I. W. W., he could not expect to have jurors excused because they were not favorably inclined toward such well-known organization.

7. Jury ⟹133—Defendant is precluded from reopening matter on juror's voir dire to show the same identical adverse opinion.

In a prosecution for criminal syndicalism, where defendant had questioned a juror as to his opinion of the I. W. W., of which defendant was a member, and made his challenge and invited a ruling thereon, he was precluded from reopening the same matter in order to show the same identical opinion.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Charles Lesse was convicted of the crime of criminal syndicalism under St. 1919, p. 281, and he appeals. Affirmed.

J. G. Lawlor, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PREWETT, Presiding Justice pro tem. The appellant was convicted of the crime of criminal syndicalism, as defined in the act of April 30, 1919 (Stats. of 1919, p. 281). The information against him charges a violation of each of the five sections of the act.

[1] He urges the point on demurrer that the information fails to state the details of the offense with sufficient particularity.

The information follows the statute and this has been held to be sufficient. Every question raised on demurrer has been raised in each of the several cases based upon this statute that have reached the appellate courts of this state, and in each case the points have been decided adversely to the contentions of appellant. This renders unnecessary any extended examination of his claims. We need only to direct attention to the cases of People v. Taylor, 34 Cal. App. Dec. 414,[1] People v. Steelik, 33 Cal. App. Dec. 594,[1] and People v. Malley, 194 Pac. 48, where these points are fully discussed.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Held for hearing by Supreme Court.

[2] 2. The appellant moved for a change of venue. The motion was properly denied. No sufficient notice of intention to make the motion was given to the district attorney as required by law. There was an abortive attempt to give a notice of a similar motion in the case of People v. Golden, another defendant informed against in the same information. The district attorney, without waiving his claim that the notice was insufficient, stipulated that the papers used on the motion in the Golden Case might apply to this case. The showing was wholly insufficient to justify the motion. There was no affidavit, and no pretense of one, showing that there existed any bias or prejudice against this appellant or showing that he could not get a fair and impartial trial in the county of Humboldt. The affidavit actually used refers only to the defendant Golden. There exists no presumption that a bias or prejudice shown to exist against one of two or more persons jointly charged exists against any of the others.

[3] But, even if the affidavits on behalf of Golden could be held to apply to appellant, still the showing was insufficient. Counter affidavits were filed. These affidavits refer to the appellant, and they show that there existed at the time no bias or prejudice against him. At most, the evidence on the point was conflicting, and the trial court was vested with authority to determine the conflict. We approve the conclusions of the trial court, but, if it were otherwise, we would be bound thereby under a well-established rule.

[4] 3. The appellant insists that the court erred in permitting the district attorney to read to the jury certain portions of a book entitled "The New Unionism." This book relates to and expounds the doctrines of a syndicalistic organization commonly called the "I. W. W." Appellant admits that he was at the time charged in the information a member of this organization. The book purports on its face to be a publication made under authority of that organization. A reference to the book as I. W. W. literature was found among the papers in the possession of the appellant at the time of his arrest. It will be seen that the appellant (page 233 of reporter's transcript) admits that it is listed as an I. W. W. book by authority of that organization. On page 240 he admits that it is circulated by the same authority. There was no error in its admission.

But in truth its disclosures as to the purposes of the I. W. W. are a part of the current history of the day—a part of the history of the times. We are informed by the magazines, encyclopedias, and dictionaries of the day that the organization advocates criminal syndicalism, revolutionary violence, and sabotage. The book really informed the jury of nothing that they cannot read as a part of current history. The supplement to the International Encyclopedia issued in the year 1916, at page 330, speaking of the I. W. W., says:

"It favors direct action, including sabotage and the direct strike, favors industrial unionism in opposition to trade unionism, opposes resort to customary political methods, preaches industrial revolution and the immediate confiscation of capital goods."

Merriam's Webster's New International Dictionary—the very recent edition—shows under the word "syndicalism" in the addenda that it—

"aims to abolish the present political and social system * * * by means of the general strike and direct action, which is any kind of action that is directly effective, whether it be a simple strike, a peaceful public demonstration, sabotage, or revolutionary violence."

The New International Encyclopedia is one of the most recent reference works and general histories on the market. Under the title "Industrial Workers of the World," in expounding the principles of the organization, it states:

"It is the duty of the workers to injure the employer wherever possible. In accordance with its underlying philosophy, the tactics of the I. W. W. is that of guerilla warfare. * * * Such methods of injuring the employer are known as sabotage. Sabotage may consist in throwing the progress of production out of order, through tampering with machinery, improper use of materials, or loitering at work."

[5] 4. Several jurors stated on their voir dire that they entertained unfavorable opinions of the I. W. W., and one juror, in answer to a question as to the quantity of evidence that would be required to remove his unfavorable opinion, answered that it would take "enough." The appellant complains that these jurors, thus unfavorably inclined to this organization of which he is a member, could not give him a fair and impartial trial. We are not inclined to coincide in this view. These jurors answered that they were wholly unacquainted with the appellant; that they knew nothing whatever about him; that they entertained no bias or prejudice against him; and that they knew none of the facts of his case. Furthermore, each of them stated that their opinions were formed from reading public journals, and that they could, and if sworn as jurors would, notwithstanding such opinions, act fairly and impartially upon the matters to be submitted to them. This showing, under the express terms of section 1076 of the Penal Code, justified the court in accepting them as jurors.

[6] Moreover, these opinions were not adverse to the lawful rights of the appellant. He was, of course, entitled to a jury that would try him fairly and impartially upon the facts of his case, but he was not entitled to a jury who would excuse or condone un-

lawful acts of violence by him because, forsooth, he might make the pretense of believing or might in fact believe that they were right. Subdivision 4 of section 2 of the act under which he is prosecuted reads as follows:

"Any person who * * * becomes a member of any organization * * * organized or assembled to advocate, teach or aid and abet criminal syndicalism" is guilty of a felony.

Criminal syndicalism means, among other things, direct action and sabotage.

This last word implies willful, malicious, and systematic injury to and destruction of property for the purpose of thereby injuring the employer.

All jurors who read must know in a general way all about the I. W. W. Those who cannot read are not competent jurors anyway.

It is not too much to say that it is to-day impossible to select a thoughtful reading man or woman as a juror who does not know the general purposes of the organization. The situation is quite unlike that of a juror who has formed adverse opinions concerning a mere conspiracy or other cabal local to a given case. In such case both the existence of the conspiracy and its unlawful purposes are facts of the particular case. Here we have to deal with an organization whose existence and purposes are matters of history. We do not excuse jurors because they do not believe in arson, rapine, and sabotage. The fact that these jurors are not favorably inclined to the I. W. W. neither legally nor morally disqualifies them where it fully appears, as it does here, that they can and will give the accused a fair and impartial trial.

5. Objection is made to certain remarks by the district attorney during his argument to the jury. These remarks were not unfair and were quite within the limits of permissible comment. His arguments were legitimate deductions from the facts proved. We find no error therein.

[7] 6. One further point remains to be noticed. One L. D. Graeter was called as a juror. After several questions concerning his opinions of the I. W. W. he was challenged for entertaining an unfavorable opinion of that organization. Like the other jurors, he testified that his opinions were founded upon what he had read in the public journals. He further stated that he could, and if sworn as a juror would, notwithstanding such opinions, act fairly and impartially upon the matters to be submitted to him. The challenge was overruled. Thus far his case is not unlike that of the other jurors.

However, after the court had passed upon his challenge, the appellant sought to reopen the same matter for the purpose of supporting his claim that the juror was biased against the I. W. W. He sought (appellant's brief, page 20) to show "whether or not his opinion was based upon other grounds." The court held that, having once questioned the juror as to his opinion of the I. W. W. and made his challenge and invited a ruling thereon, he was precluded from reopening the same matter in order to show the same identical opinion. In this the court was right.

The court was evidently willing to permit further examination as to other and distinct matters, for it wound up the colloquy on the subject with these words:

"You lay your foundation for the challenge and then make it."

In People v. Stonecifer, 6 Cal. 405, the court says:

"The first error assigned by the appellant is the refusal of the court below to allow him to re-examine the juror Knox, after he had been called and examined, first by the prisoner and afterwards by the state. The appellant contends that by this ruling he was forced to a peremptory challenge, when, if he had been allowed to examine him further, he might have been excluded for cause. * * *"

The court sustained the action of the trial court. A similar ruling was sustained in People v. Collins, 105 Cal. 512, 39 Pac. 16.

But as to all these jurors the court had not been advised by any evidence, statement, or suggestion during the trial and up to that time that the appellant was a member of the I. W. W.; hence there would have been no error in excluding questions touching that organization. The information did not charge appellant with being an I. W. W. There was no reference in the affidavits for a change of venue from which it could be inferred that he was such, even if such reference would have been sufficient to advise the court that this fact would be any part of either the prosecution or defense.

Moreover, the historical matter which we have quoted from standard works should be considered with reference to these questions to the jurors and their privilege of opinion as good citizens concerning the unlawful purposes and activities of the I. W. W. We have carefully examined the evidence and the whole case, and we are satisfied that no alleged error has resulted in any miscarriage of justice.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

52 Cal. App. 496

SCHMIDT v. MILLER et al. (Civ. 3790.)

(District Court of Appeal, First District, Division 1, California. May 4, 1921. Hearing Denied by Supreme Court June 30, 1921.)

1. Corporations ⊂⊃269(3)—Evidence in action to enforce stockholders' liability held to show advancement for certain repayment.

In an action to recover from defendants their proportionate share of their mining corporation's indebtedness on a note to plaintiff, who had advanced money to defendants to develop asbestos mining claims owned by the corporation, in which plaintiff and his brother received about 200,000 of the capital stock of 500,000 shares, evidence *held* not to show that plaintiff was an associate in a joint adventure, showing rather that he had advanced the money to be repaid at all events, and not only out of profits.

2. Corporations ⊂⊃269(3)—Evidence in action to enforce stockholders' liability on note held to show no undue influence, menace, or fraud.

In an action to recover from defendants their proportionate share of their mining corporation's indebtedness on a note to plaintiff, who had advanced money to defendants to develop asbestos mining claims owned by the corporation, in which plaintiff and his brother received about 200,000 of the capital stock of 500,000 shares, finding that there was no undue influence, menace, or fraud exerted on defendants by plaintiff in procuring the note *held* sustained by evidence.

Appeal from Superior Court, Alameda County; J. O. Moncur, Judge.

Action by H. H. Schmidt against Ella M. Miller and others. From judgment for plaintiff, defendants appeal. Affirmed.

Wm. M. Abbott, K. W. Cannon, and Cyril Appel, all of San Francisco, for appellants.

Wm. H. Schooler, of San Francisco, for respondent.

KERRIGAN, J. This action was brought by plaintiff to recover from the defendants their proportionate share of an alleged indebtedness of a corporation in which defendants were stockholders. Plaintiff recovered judgment, imposing upon defendants a stockholder's liability in the sum of $58,170.15, together with costs, and defendants appeal.

Four causes of action are set forth in the amended complaint. The first cause is predicated upon a promissory note by which the corporation promised to pay to plaintiff on demand the sum of $143,679.50. The second and third causes declare in assumpsit for the same amount, and by the fourth plaintiff claims that he laid out and expended for the use and benefit of the Trinity Asbestos Mining Company at the special instance and request of that corporation the sum of $3,017.03. By an amended answer defendants denied the indebtedness of the corporation, and denied that at the time the advances were made by plaintiff they were made pursuant to any promise to repay other than a promise that they should be repaid when the mine was developed and placed upon a paying basis. The execution of the note is admitted, and the amount thereof represents the result of an account stated. A portion of this sum was found by the trial court to be barred by subdivision 1 of section 337 of the Code of Civil Procedure. No contention is here made as to the correctness of the amount of the judgment, assuming a liability to exist.

[1] The main contention urged upon this appeal for reversal is that the evidence shows plaintiff to be an associate in a joint adventure to carry out and effectuate the purposes of which all of the members thereof had organized a close corporation, and that under such circumstances one of such persons cannot obtain the advantage of a stockholder's liability to the prejudice of his coadventurers. We see no merit in this contention. From the evidence it appears that certain of the defendants discovered and located a number of asbestos mining claims in Trinity county, Cal. In order to develop this property defendants entered into negotiations with plaintiff and his brother, Peter Schmidt, which culminated in the formation of a corporation known as the Trinity Asbestos Mining Company, with a capital stock of 500,000 shares, 200,000 of which were allotted to plaintiff and his brother. Thereafter plaintiff advanced about $30,000 to develop the mine, a sum he had been assured would put the property on a paying basis, but, this sum proving inadequate, upon the earnest and repeated solicitations of defendants he continued to advance large sums of money from time to time until the total, with interest, amounted to the sum of $143,679.50. The mine produced nothing; and plaintiff, being dissatisfied with the manner in which his funds were being applied, finally decided not to make any further advances, and thereupon demanded a note from the company to cover the amount mentioned. The note was given, and it is the instrument here sued on. The contention that plaintiff advanced the money with the understanding that it was only to be paid out of the profits of the mine is disposed of by the finding of the trial court that such was not the fact, and this conclusion finds support in the evidence. Aside from the other evidence on this subject the demand note itself negatives any such intention on the part of the parties. Nor is there any merit in the claim that plaintiff agreed or intended to waive his right to a stockholder's liability. The record does not support this contention.

[2] Equally untenable is the argument that the evidence is insufficient to sustain the finding that the note was not procured by undue influence, menace, and fraud. In this behalf it is argued that plaintiff threatened

defendants with vexatious litigation unless the corporation executed the note, and that the note was executed in consideration of plaintiff's making further advances, and to prevent a sale of the corporate property in payment of its debts. It is perhaps true that defendants all indulged the secret hope that plaintiff would continue to supply the corporation with funds, but the record fails to show that he ever obligated himself to do so. The finding that there was no undue influence, menace, or fraud is amply sustained by the evidence.

Other points do not require consideration. The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

52 Cal. App. 574

ROSENBERG et al. v. ROGERS. (Civ. 2250.)

(District Court of Appeal, Third District, California. May 9, 1921. Hearing Denied by Supreme Court July 7, 1921.)

1. Trial ⊜194(11)—Instruction held on the weight of the evidence.

In an action for breach of contract to deliver a fig crop, where defendant contended she was released by plaintiffs' notification that they would not accept certain figs, an instruction that the contract released the defendant of her obligation to deliver any fruit owing to its destruction by frost or other unavoidable casualty was improper, because on the weight of the evidence, and invading the province of the jury, it appearing that the figs were not destroyed, but only damaged.

2. Sales ⊜421—Instruction on interpretation of contract erroneous.

In an action for a seller's failure to deliver a portion of a fig crop, where the only question in issue was whether the buyers had released the seller, an instruction interpreting the contract with respect to the right of the buyers to reject damaged figs was improper.

3. Sales ⊜421—Instruction on interpretation of contract held misleading.

In an action for failure of the seller to deliver a portion of a fig crop, where the seller contended she was relieved by the buyers' notice that they would not accept, an instruction that the contract provided that any fruit tendered which did not conform with the conditions stated might, at the option of the buyer, be rejected or taken without relieving the seller from the obligation to deliver any other portion of the fruit, was improper, because it might mislead the jury into believing that the buyers might take damaged figs without payment, the buyers merely having the option to accept and pay for damaged figs or reject them.

4. Appeal and error ⊜1176(1)—Where the evidence raised an issue of defense, appellate court cannot direct entry of judgment.

In an action for breach of contract for the sale of figs, where the evidence raised a substantial issue of defense, the appellate court cannot, at the instance of plaintiffs, who appealed from an erroneous judgment for defendant caused by error in instructions, direct that judgment be entered in plaintiffs' favor.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Abraham Rosenberg and others against S. M. Rogers. From a judgment for defendant, plaintiffs appeal. Reversed.

Terry W. Ward, of Merced, for appellant.

F. W. Henderson, of Merced, for respondent.

BURNETT, J. The appeal is from the judgment in favor of defendant. The case was here before, and the judgment in favor of defendant was reversed. 186 Pac. 366. The action was to recover damages for the failure of defendant to deliver a portion of her crop of figs to plaintiffs, and was based upon a written contract executed by the parties on January 29, 1918. The terms of that contract, as far as applicable to the controversy herein, are set out and construed in said decision of this court, and the discussion needs no repetition. However, we may quote from that decision the following statement:

"The cause was tried by the court upon the theory that defendant was under no obligation to deliver any figs that did not measure up to the standard fixed by the contract, and specifically was under no obligation to tender any figs that were of poor quality, off color, dark, and defective and not in good merchantable condition."

This court held that such theory was entirely contrary to the express provision of the contract, and for that reason reversed the cause. Upon the second trial respondent relied upon the defense that she was released from any obligation to deliver or to tender the damaged figs by reason of the fact that appellants notified her that they would not accept said figs. There is evidence in the record to support her contention as to said notification, and, although controverted, it presented a question for the determination of the jury. No reason has been suggested why it was not competent for appellants to thus relieve respondent from any obligation to deliver or tender said damaged fruit. In other words, the consideration involves a question of fact, and not of law. It is true that, at the request of plaintiffs, the court gave this instruction to the jury:

"Under the terms of said contract the only condition by which defendant could be released from her obligation to deliver to plaintiffs said figs was the destruction thereof by frost, or other similar unavoidable casualty."

This must be read, however, in connection with the following, given at the request of defendant:

"Defendant admits that she did not deliver all the figs raised on her place in the year 1918, and contends that she offered to deliver to plaintiffs all the figs raised on her place, but plaintiffs refused to accept the ones in question; if, from the evidence you find this to have been the case, you will find for the defendant."

Thus considered, it substantially amounted to a charge that it was the legal duty of defendant to deliver the figs unless she was excused from the delivery by the refusal of plaintiffs to accept them.

[1] But an insuperable difficulty in the way of affirmance of the judgment is injected by this instruction given on request of respondent:

"The contract in this case expressly releases the seller, defendant herein, from her obligation to deliver any portion of the fruit contracted for, owing to its destruction by frost or other unavoidable casualty, to wit, rain."

If the jury followed this instruction, there was nothing to do but to find a verdict for the defendant, regardless of what they believed from the evidence. The instruction would not have been more objectionable if it had been couched in these words:

"The defendant is released by the terms of the contract from her obligation to deliver any portion of the fruit, for the reason that it was destroyed by frost or other unavoidable casualty, to wit, rain."

By said statement the court in effect instructed the jury that the defendant is released from any obligation under the contract in consequence of the destruction of the fruit. If the court had stated that under the terms of the contract the defendant would be released from any obligation to deliver any portion of the fruit that might be destroyed by frost or rain, it would be a proper interpretation of the intention of the parties; but even this might have been misleading, since there was no evidence that the figs were destroyed.

But, as given, the instruction involved an invasion by the court of the exclusive province of the jury to determine the weight of the evidence. It was for them to find whether the conditions were such as to relieve the defendant from any obligation under the contract. This, of course, will not be disputed. If the evidence had shown, without conflict, that the figs were destroyed by frost or rain, it could be held that the instruction was not prejudicial; but the evidence disclosed, on the contrary, that they were not destroyed, but only damaged.

Nor can we say that the instruction was cured by the giving of any other instruction on the subject. Assuming that in another instruction the determination of the question was left to the jury, we would have an irreconcilable conflict without being able to say which instruction the jury followed. It would also be impossible to conclude that the jury based their verdict solely upon the theory that defendant was absolved from liability by reason of the refusal of the plaintiffs to accept the figs. We might so hold, if the evidence as to that had all been in favor of respondent; but, as before indicated, there was a sharp conflict, and it cannot be said that the jury adopted respondent's theory.

[2, 3] Another instruction given by the court at the request of the defendant was as follows:

"The contract in this case provides among other things as follows: 'It is agreed that should any fruit tendered on this contract not conform with the above terms and conditions (the same having already been stated to you) it shall be optional with the buyer to reject same, or take such fruit in, assort and weigh back at seller's expense, and reject any portion of the lot not so conforming without in either case relieving seller from the obligation to deliver any other portion of the fruit herein contracted for.'

"I charge you that the plaintiff in this action was under no obligation to receive or pay for any figs of defendant which did not conform with the terms and conditions of the contract."

Under the evidence introduced, the jury were really not concerned with the proper interpretation of that part of the contract. The obligation of appellants was not in question. The only issue related to the liability of the defendant to deliver the figs, and whether she was relieved by the refusal of appellants to accept them. Besides, as we view it, the instruction was erroneous because it carried the implication that appellants might receive or accept the figs and then refuse to pay for them. In other words, the jury might justly infer from said instruction that appellants could deprive her of the damaged figs, and decline to pay anything for them. So believing, they would readily agree that the contract was unjust, and would not be disposed to hold her to an observance of its requirement as to said delivery. The truth is, however, that plaintiffs simply had the option to accept and pay for the damaged figs or to reject them. They could not keep the figs and the money. In fact, they could not act capriciously in rejecting the figs. The law would exact of them good faith and fair dealing in exercising their option as to the fruit which might not conform to the terms of the contract.

[4] Appellants ask the court "not only to reverse the judgment of the trial court, but to order the trial court to enter judgment for plaintiffs for the whole amount prayed for, together with all costs." We cannot direct such judgment in favor of appellants. We

might do so if there were no legal defense presented by the answer; in other words, if plaintiffs were entitled to judgment upon the pleadings, but such is not the case, as we view it.

We think the judgment should be reversed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

52 Cal. App. 519

STEPHAN v. LAGERQVEST et al.
(Civ. 3315.)

(District Court of Appeal, Second District, Division 2, California. May 5, 1921.)

1. Evidence ⊂=442(1)—Parol evidence admissible to show instructions upon which securities were delivered where receipt merely stated they were received in escrow.

Writings evidencing a sale of a restaurant on terms therein specified, and a receipt signed by the seller's agent for six war savings certificates received from the buyer, "to be held by us in escrow * * * for 10 days," did not show the complete agreement between the parties where they failed to show the terms under which the certificates were to be held, and evidence dehors the writings showing the instructions under which the seller's agent took the certificates might be looked to, especially as receipts are not conclusive, and may be explained or even varied by other proof.

2. Evidence ⊂=442(1)—Whether writings are complete is question of law, and when not complete other evidence admissible.

Whether writings which passed between parties contained the complete contract made by them is a question of law to be determined from the face of the instruments, and when an inspection of them shows that they are incomplete other evidence may be received for the purpose of supplying the missing matter.

3. Pledges ⊂=4—Delivery of war savings certificates as security held "pledge," and not "escrow."

Where a contract for the sale of a restaurant provided for a cash payment and a further payment of $500 within 10 days, the delivery of war savings certificates to the seller's agent as security for the making of the first deferred payment amounted to a "pledge," under Civ. Code, §§ 2924, 2986, and 2987, and not a delivery in "escrow," though the receipt given for the certificates stated that they were to be held in escrow, as the character of a document or transaction does not depend upon misnomer, but must be determined from the facts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Escrow; Pledge.]

4. Pledges ⊂=26—Pledgee's right to possession of securities not affected by agent's delivery to another in violation of duty.

Where, to secure defendant's obligations to plaintiff under a contract of sale, defendant delivered war savings certificates to plaintiff's agent, but the agent, to avoid liability in defendant's suit for rescission, delivered the certificates to a bank, which, however, made no superior claim thereto, and held them as the agent held them, the question of plaintiff's right to recover possession of the certificates was not affected by this violation of duty by the agent.

5. Pledges ⊂=11—Pledgee's agent may act as pledge holder.

Under Civ. Code, § 2993, providing that a pledgor and pledgee may deposit the property pledged with a third person, called the pledge holder, a pledgee's agent may be the pledge holder for the taking and retention of the securities pledged.

6. Pledges ⊂=26—Pledgee not entitled to possession as against third person acting as pledge holder.

Under Civ. Code, §§ 2986–3011, defining the rights of a pledgee on default of the pledgor on the secured obligation, where pledged securities were delivered to the pledgee's agent as pledge holder, and there had been no demand upon or refusal by the agent to enforce the pledgee's rights, the pledgee was not entitled to recover possession of the pledged securities from a bank with which the pledge holder had deposited them.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Elizabeth J. Stephan against P. Lagerqvest and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Hocker & Austin, of Los Angeles, for appellant.

Albert G. Payne, of Los Angeles, for respondents.

WORKS, J. This is an action for the recovery of the possession of certain war savings certificates issued by the United States government. The defendants had judgment, and the plaintiff appeals.

The facts of the case are of a complex character. Appellant was the owner of a restaurant, and, acting through one E. W. Elder, her agent, sold the place to respondent Lagerqvest. Elder conducted his negotiations in the name of Business Investment Company. The sale was evidenced by three certain writings. One of these, in the form of a letter addressed to Business Investment Company and signed by both parties to the sale, was, in part, as follows:

"I hand you herewith check for $250 as part payment on purchase price of restaurant. * * * Full purchase price to be $3,000, balance as follows: $500 on or before ten days from date, and balance of $2,250 to be paid in monthly installments of $200, and interest, purchase lease or chattel mortgage back on restaurant. * * * Possession to be given upon payment of the $500 above mentioned, to be paid on or before ten days."

Another of the instruments was in the form of a receipt, signed by Business Investment Company and Elder, and was in these words:

"Received of P. Lagerqvest $250 as part payment on purchase price of restaurant, * * * full purchase price to be $3,000, balance as follows: $500 on or before ten days from date, and balance of $2,250 to be paid in installments of $200 per mo., and interest. Secured by chattel mortgage or purchase lease back on restaurant and equipment."

This was the form of the third paper, signed by Business Investment Company, per Elder:

"Received of P. Lagerqvest six war saving certificates to be held by us in escrow for Mr. Lagerqvest for ten days."

It is upon a determination of the meaning and effect of this writing that the outcome of the appeal principally depends.

Some time after the passing of these three writings, respondent Lagerqvest wrote a letter to Elder and to one Vandewater, whose interest in the transaction does not clearly appear, a fact, however, which is not material. The letter follows, in part:

"I agree not to sue you or make you a party to any action, in connection with, or growing out of the sale of the Lafayette Cafe, * * * if you will deposit the one hundred and twenty (120) war saving stamps delivered you by [me?] as collateral security, in said transaction and which is now held by you as such collateral security, in the Hellman Commercial Trust & Savings Bank. * * * That said deposit shall state and be accepted by said bank to be held in trust as such collateral security, until the said dispute between the said P. Lagerqvest and Elizabeth J. Stephan is arrived at by written agreement, or determined by a judicial decision of the Courts, and not otherwise. * * * That nothing in this agreement shall be taken to affect the rights of the said P. Lagerqvest, as to the ownership of said stamps or their rights of possession thereof."

Thereafter, a letter was written to the bank, over the signature of Business Investment Company and Elder, containing the following:

"We hand you herewith one hundred twenty United States war saving certificates, of $5.00 denomination, * * * which you are instructed to hold subject to our order, and pending the outcome of that certain action * * * entitled 'P. Lagerqvest v. Elizabeth J. Stevens, No. B67504,' at which time you will receive further orders from us."

In the meanwhile respondent Lagerqvest had served upon appellant a notice of rescission of the contract for the sale of the restaurant. The notice stated certain alleged misrepresentations as a basis for rescission, and contained the following:

"I * * * demand that you pay me back the said $250.00 I paid you * * * and also demand that you deliver to me the six war savings certificates, face value of $500.00. * * * Said above named certificates are known as United States of America war savings certificates."

Thereafter respondent commenced his action for a rescission, it being numbered B 67504, as stated in a letter above set forth. The complaint contained a copy of the notice of rescission, and alleged, after setting up the terms of the contract for the sale of the restaurant:

"That in order to secure the fulfillment of the first payment to be made, to wit: $500 the plaintiff herein deposited with defendants 120 United States of America war savings certificates, * * * and the same is now being holden by said defendants."

The pleading also contained an allegation that defendants had failed, neglected, and refused to return the $250, and "to deliver to the said plaintiff the said 120 United States of America war savings certificates." The prayer demanded, in part, that the defendants be "directed and commanded to deliver to the said plaintiff the aforesaid 120 United States of America war savings certificates now held by them by reason of said contract." The answer, in effect, admitted the allegations of the complaint which we have quoted.

In due time the action for rescission came on for trial, and the plaintiff there, respondent Lagerqvest here, was nonsuited. Appellant thereafter commenced the present action, and at the trial, which resulted in the judgment from which this appeal is prosecuted, there were introduced in evidence all the writings from which quotation is above made, including the complaint in the rescission action. At the trial, also, Elder testified that he was to hold the war savings stamps for respondent Lagerqvest "pending the 10 days necessary to send them to Washington and get the money out of them," however impossible the testimony may appear to be.

[1-3] It is at once obvious that the three writings evidencing the sale of the restaurant do not show the complete agreement between the parties. The paper given in the form of a receipt, to the effect that the war savings certificates were delivered by respondent Lagerqvest to the agent to be held "in escrow" for Lagerqvest, is manifestly incomplete. It fails to show the terms under which the certificates were to be held. What were the instructions under which the agent for appellant took the certificates from the opposite party to the sale? This question must be answered from evidence dehors the three writings, and that such evidence may be looked to is certain. Whether writings

which pass between parties contain the complete contract they have made is a question of law and is to be determined from the face of the instruments (Gardiner v. McDonogh, 147 Cal. 314, 81 Pac. 964); and when an inspection of them shows that they are incomplete other evidence may be received for the purpose of supplying the missing matter (Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571; Daly v. Ruddell, 137 Cal. 671, 70 Pac. 784; Blahnik v. Small Farms Imp. Co., 181 Cal. 379, 184 Pac. 661). Also, the paper concerning the savings certificates, being in the form of a receipt, was peculiarly open to explanation by extrinsic evidence, for writings of that type are not conclusive, and may be explained, or even varied, by other proof. Snodgrass v. Parks, 79 Cal. 55, 21 Pac. 429; San Pedro Lumber Co. v. Schroeter, 156 Cal. 158, 103 Pac. 888; Channel Commercial Co. v. Hourihan, 20 Cal. App. 647, 129 Pac. 947. Applying these rules, and taking into account all the evidence in the record on the subject without again reciting it, it appears to have been established without contradiction or dispute that the savings certificates were taken by Elder as security for the payment of the $500, the first deferred payment mentioned in the writings. The delivery of the obligations to him clearly amounted to a pledge (Civ. Code, §§ 2924, 2986, 2987), and the fact that the receipt termed the delivery a delivery in escrow did not make the certificates an escrow, for the character of a document or of a transaction cannot be made to depend upon misnomer, but it must be determined from facts (McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278; Bledsoe v. Stuckey, 190 Pac. 217).

[4] The true nature of the transaction concerning the savings certificates thus being made manifest, the only remaining question is whether appellant was entitled to judgment for their possession. The fact that Elder, in order to avoid liability in the suit for rescission, shamefully violated his duty as the agent of appellant, or as a pledge holder owing an equal fidelity to appellant and to respondent Lagerqvest, does not affect the question. Respondent bank urges no superior claim to the certificates, and, making no such contention, it holds the obligations as Elder held them. Indeed, the letter from respondent Lagerqvest to Elder, by which the delivery of the certificates to the bank was requested, seems to have contemplated that the status of the certificates should not be changed by the delivery. The sole remaining question is, then, did Elder, holding the certificates as security, so hold them as the agent of appellant, to whose call he must have responded; or did he retain them as a pledge holder, subject to the rights which appellant might enforce against him in that capacity under the law of pledge?

[5] "A pledgor and pledgee may agree upon a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a pledgeholder" (Civ. Code, § 2993); and there is no reason why Elder, agent of appellant though he was in the sale of the restaurant, may not have been made a pledge holder for the taking and retention of the war savings certificates. In fact, the authorities are unanimous to the effect that even an agent or servant of the pledgor may, by agreement between the parties, be made a pledge holder (21 R. C. L., p. 648, par. 13; note to In re Succession of Lanaux, 25 L. R. A. 577; note to First Nat. Bank v. Bradshaw, 39 L. R. A. [N. S.] 892); and, under special circumstances, the pledgor himself may be allowed to retain possession of the pledged property without affecting the validity of the pledge (21 R. C. L., p. 648, par 13; note to First Nat. Bank v. Bradshaw, 39 L. R. A. [N. S.] 892). The very essence of the principle of pledge, without citation of authority upon the subject—and upon a somewhat cursory examination there seems to be none—lends itself to the idea that the agent of the pledgee may be the holder of the pledge.

[6] The rights of a pledgee, on the default of the pledgor upon the obligation secured by the pledge, are defined by the Civil Code (§§ 2986-3011), and there is nothing in the sections covering the subject which confers upon the pledgee the right to insist, as against the pledge holder, upon the possession of the property pledged. In truth, the statute seems to contemplate that the possession shall remain in the pledge holder pending the exercise by the pledgee of the right to subject the pledge to the liquidation or discharge of the main obligation, for "a pledge holder must enforce all the rights of the pledgee, unless authorized by him to waive them" (§ 2996); "* * * a pledge holder for reward, assumes the duties and liabilities of a depositary for reward" (§ 2997); and "a gratuitous pledge holder assumes the duties and liabilities of a gratuitous depositary" (§ 2998). Whether the rights of appellant might be different if it were shown that demand had been made upon Elder, or upon respondent bank, to enforce the rights of appellant (§ 2996), and the demand has been refused, we, of course, need not consider. It is apparent that appellant has mistaken her remedy, and that she was not entitled to judgment for the possession of the pledged property. Because of the conclusion we have reached on that question, it is not necessary to consider other points made by the appellant.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

52 Cal. App. 619

ITALIAN-AMERICAN BANK v. CANEPA et al. (Civ. 3753.)

(District Court of Appeal, First District, Division 2. California. May 13, 1921.)

1. Husband and wife ⊜267(4) — Husband's deed of trust to community property for valuable consideration good against him.

Even under Civ. Code, § 172, giving the husband the management and control of community property, but providing that he cannot convey it without a valuable consideration, unless the wife consents in writing, a deed of trust, executed by the husband without a valuable consideration, is good as against him; the wife only having a right to complain.

2. Ejectment ⊜135—Evidence held to support finding of rental value.

In an action of ejectment, evidence *held* sufficient to support the finding of the court as to the rental value of the property.

3. Ejectment ⊜132—Defendant liable for rental value, though property difficult to rent.

On depriving the owner of real estate of its use and value is liable for its rental value when sued in ejectment, though the owner might have had difficulty in renting it to some one else.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Italian-American Bank against Luigi Canepa and others. From a judgment for plaintiff, defendants appeal. Affirmed.

M. H. Hernan, of San Francisco, for appellants.

D. Freidenrich and H. C. Reyman, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him in an action in ejectment. The defendant denied the allegations of the complaint, and filed a cross-complaint setting up title to the property in himself.

From the findings, it appears that on February 9, 1917, the defendant executed and delivered to A. Sbarboro and A. E. Sbarboro, as trustees for Italian-American Bank, a deed of trust of the property involved here, to secure the payment of $5,000 loaned to defendant by the bank, for which amount he executed his promissory note. It was provided in said deed of trust that, if default should be made in the payment of the note when due, that the trustees, on demand of the bank, should sell the property at public auction. Default was made in the payment of the note; the property was sold in accordance with the terms of the deed of trust. The bank purchased the property at the sale, and received a deed from the trustees therefor. At the time of the execution of the deed of trust, the defendant was a married man, and the property was community property.

It is argued by appellant that the defendant could not pass title to the property by the deed of trust, because the property was community property, and the consent of the wife was not secured. Section 172, Civil Code, is the one applicable to the case, as the property was conveyed by defendant before section 172a became operative. Section 172, Civil Code, provides that the husband has the management and control of the community property, with the absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such property, or convey the same without a valuable consideration, unless the wife consent in writing thereto.

[1] Appellants urge that the proof is not sufficient to show that the defendant received a valuable consideration for the execution of this deed of trust. The deed of trust was in evidence, and recites a consideration of $5,000, evidenced by a promissory note. The defendant admitted the execution of the deed of trust, and did not contradict its recital as to consideration. Apart from this fact, even if the conveyance had been made without consideration, the transfer is good as against the husband, even under the provisions of section 172, Civil Code. The only person, in any case, who has a right to complain is the wife. Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Dargie v. Patterson, 176 Cal. 714, 169 Pac. 360. The wife is not a party to this action and, according to the testimony, she died before its commencement.

[2, 3] The appellant contends also that the finding of the court that the rental value of the property was $70 a month is not sustained by the evidence. There is no merit in this contention. The only evidence on this subject was that of two real estate agents, produced by plaintiff, who testified that they were familiar with the property involved in the action, and were familiar with rental values in that district; that the property consisted of two stores and two flats, and had a rental value of from $70 to $75 a month. The defendant himself testified that one store and flat were rented by him at $35 a month; that he lived in the other flat, and considered its rental value $10 a month, and that he had placed some of his property in the remaining store; that when that store, so occupied by him, was rented, it had been rented for $25 a month. It is true he testified that it was difficult to rent the store he was occupying, because there was not a great demand for stores in the neighborhood; but that fact is immaterial. If he deprived the plaintiff of the use and value of its property, he is liable for its rental value, and cannot argue that the plaintiff might have had diffi-

culty in renting the store to some one else. The court found that the rental value of the property was $70 a month, which is in accordance with all of the testimony on the subject, including the testimony of the defendant himself.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

52 Cal. App. 609

PEOPLE v. WILLIAMS. (Cr. 955.)

(District Court of Appeal, First District, Division 2, California. May 12, 1921.)

1. Rape ⟸52(2)—Description of act held sufficient.

On a trial for rape on a girl under 16, testimony describing the act of sexual intercourse with sufficient definiteness to leave no doubt in the minds of the jury was sufficient.

2. Criminal law ⟸785(8)—Witnesses ⟸340(3)—Instruction that delinquency of prosecutrix cannot be considered as affecting credibility held proper.

On a trial for rape of a girl under 16, an instruction that her moral delinquency is not to be considered as affecting her credibility was proper.

3. Rape ⟸59(1)—Instruction held not to preclude consideration of question of malice in making charge.

Where defendant, charged with the rape of a girl under 16, claimed that he had caused her arrest when found in bed with another man, and that the charge against him was due to animosity, and the court specifically charged that, in passing on the credibility of witnesses, it was the duty of the jury to consider any motive which might impel a witness to testify, etc., a further instruction that the girl's moral delinquency was not to be considered as affecting her credibility did not preclude the jury from considering whether she was actuated by malice in making the charge.

4. Criminal law ⟸1171(1)—Argument that acquittal would send prosecutrix into street held not to require reversal.

On a trial for rape of a girl under 16, where the district attorney called the jury's attention to the fact that her misconduct with another man occurred after the crime of which defendant was accused, and argued that her conduct in her future relations with men was influenced by her early experience with defendant, his remark that an acquittal would send "that little girl practically upon the street" did not require a reversal, where the jury was bound to convict if they believed the girl's testimony, and could not have reached their verdict unless they believed such testimony.

5. Criminal law ⟸1171(1)—Remark in argument concerning irrelevant matter held not ground for reversal.

On a trial for rape of a girl under 16, the remark of the district attorney in his argument concerning a matter of routine of army life *held* not ground for reversal under the evidence.

6. Criminal law ⟸1055, 1129(1)—Remarks of counsel, not assigned as error, need not be reviewed.

Remarks of the district attorney are not reversible error, where no assignment of error is made thereto, and no request is made for an instruction to disregard the remarks.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Allan E. Williams was convicted of an offense, and he appeals. Affirmed.

Austin Lewis and William F. Cleary, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. Defendant was convicted of a violation of subdivision 1 of section 261, Penal Code. The prosecuting witness was a girl of the age of about 14 years at the time of the commission of the offense. The defendant was her stepfather.

[1] Appellant objects that the evidence is insufficient, because the language used by the prosecuting witness in giving her testimony is not sufficiently definite and specific in describing the act of sexual intercourse. In cases of this character it is rare, indeed, that children use scientific or precise anatomical terms. The argument made by appellant is that the prosecuting witness is not an ordinary child, but that her experience in sexual matters at the time of the trial, as disclosed by the record, made it possible for her to have described the occurrence with absolute exactness. Her experiences, as disclosed by the record, would have no effect upon the precision of her language. It is unnecessary to set forth her testimony here. It is sufficient to say that it is unambiguous and much more definite than usual in cases of this character. It assuredly left no doubt in the minds of the jury.

[2, 3] Appellant objects to an instruction given by the trial court:

"You are further instructed that the moral delinquency of the girl complainant is not to be considered as affecting her credibility."

This instruction states the law. People v. Wilmot, 139 Cal. 103, 72 Pac. 838; People v. Cruse, 24 Cal. App. 497, 502, 141 Pac. 936; People v. Johnson, 106 Cal. 289, 39 Pac. 622. But appellant points out that the testimony in this case shows that some time after the commission of the act charged against the defendant, but before the arrest of the defendant, the prosecuting witness had been found

in bed with a young man at the home of her mother and the defendant; that the defendant, upon so discovering her, had called the police and had the mother, the girl, and the young man taken to the city jail. Appellant argues that this action of defendant caused a hatred of him by the girl, and that this animosity later caused her to make this accusation against him. It is contended that the instruction complained of prevented the jury from taking into consideration any animosity engendered in the prosecuting witness by this experience. The instruction complained of does not preclude the jury from considering whether or not the prosecuting witness was actuated by malice in making the charge against the defendant. The court specifically instructed the jury that in passing upon the credibility of the witnesses it was their duty—

"to consider any motive which may impel a witness to testify, to consider the interest which a witness may have in the result of this trial, and whether or not such witness may be moved in so testifying by any hopes or fears, by any friendship or animosity."

[4] Appellant assigns as error the remark of the district attorney in his closing argument to the jury, wherein he states that if a verdict of acquittal is given, the jury is "sending that little girl practically upon the street." The district attorney called the attention of the jury to the fact that, according to the testimony, the misconduct of the girl with one other than the defendant occurred after the crime of which the defendant is accused. It was argued that the conduct of the girl in her future relations with men was influenced by this early experience with the defendant. While it is, of course, true that the defendant is responsible only for his own offense, and not for the offenses of others, we do not consider this remark such as to warrant a reversal of this judgment, where there is such positive testimony in the record against the defendant. The jury could not have reached its verdict unless it believed the testimony of the girl. If it did believe that testimony, it was bound to convict the defendant, regardless of whether or not the girl's future life had been influenced by his act. The verdict of the jury puts the stamp of truth upon the testimony of the prosecuting witness, and that is all that is necessary for a conviction in a case like this. The extent of the consequences of the crime is immaterial here.

[5, 6] The same may be said of the objection of the appellant to the remark of the district attorney recalling to the jury a matter of routine with respect to the soldiers at the Presidio—that after roll call they were free. Also, as to this remark, there was no assignment of the same as misconduct, and no request of the court to instruct the jury to disregard it.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

52 Cal. App. 503

BOLAN et al. v. GALLAGHER et al.

(Civ. 3515.)

(District Court of Appeal, Second District, Division 1, California. May 4, 1921.)

1. Action ⟹45(1)—For partition of real and personal property not bad for misjoinder of causes.

In view of Code Civ. Proc. § 752, and section 752a, added by St. 1919, p. 73, under which real and personal property may be partitioned in the same action, a demurrer to a complaint for such partition on the ground of misjoinder of causes of action was properly overruled.

2. Pleading ⟹193(6)—Demurrer to complaint for partition of real and personal property on ground of misjoinder of causes of action insufficient, on allegation same not separately stated.

Under Code Civ. Proc. § 430, subd. 5, permitting a demurrer on the ground that "several causes of action had been improperly united or not separately stated," and section 431, requiring that it distinctly specify the ground of objection, a demurrer to a complaint for the partition of real and personal property on the ground of "misjoinder of causes of action" was insufficient.

3. Appeal and error ⟹707(2)—Omission from judgment of promissory note described in complaint not prejudicial variance, in absence of record showing evidence on which based.

Though a promissory note, described in the complaint as being a part of property to be partitioned, was not included in the decree, there was no such inconsistency as amounted to prejudicial error; the record not showing the evidence on which the judgment was based.

4. Appeal and error ⟹931(1) — Presumption in favor of judgment.

The presumptions are in favor of the judgment, in the absence of an affirmative showing in the record that the decision is erroneous.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Lilly Bolan and others against William Davis Gallagher and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Nathan Newby, of Los Angeles, for appellants.

D. Z. Gardner, of Los Angeles, for respondents.

JAMES, J. Appeal from a judgment entered in favor of the plaintiff. The defend-

ants who are the appellants here demurred to the complaint of the plaintiffs and, their demurrer being overruled, no answer was filed and the judgment followed as a matter of course.

[1,2] It is claimed here that the court erred in overruling the demurrer. The action was brought to secure a decree for the partition of real and personal property. Sections 752 and 752a (added by St. 1919, p. 73) Code of Civil Procedure, provide for such relief and the latter section provides that "real and personal property may be partitioned in the same action." Appellants particularly insist that their demurrer should have been sustained because the alleged causes of action were not separately stated. It is true that the property sought to be partitioned, both real and personal, was described in the single cause of action alleged in the complaint. However, appellants' demurrer did not include the ground which is sought to be given effect here. Subdivision 5 of section 430, Code of Civil Procedure, which section enumerates the various grounds for demurrer, provides that objection may be taken:

"5. That several causes of action have been improperly united, or not separately stated."

Ground 2, as stated in appellants' demurrer is:

"That there is a misjoinder of causes of action, to wit: A cause of action for the partition of real property and a cause of action for the partition of personal property."

Section 431, Code of Civil Procedure, declares, in part, as follows:

"The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it does so, it may be disregarded. * * *"

[3] The demurrer as presented to the court was properly overruled. We find no merit in the contention that, because a certain promissory note described in the complaint as being a part of the property to be partitioned was not included within the terms of the decree, there is an inconsistency between the allegations of the complaint and the judgment, which amounts to a prejudical error entitling the appellants to complain. The record on appeal does not show what evidence was heard which furnished to the court the data upon which to base the judgment. It may well have been, as respondent states, that such evidence showed that the promissory note referred to had been sold prior to the making of the decree, in which case it was properly excluded from the terms of the latter.

[4] The presumptions are in favor of the judgment in the absence of an affirmative showing in the record that the decision is erroneous.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 508

PEOPLE v. BARRIOS. (Cr. 555.)

(District Court of Appeal, Third District, California. May 6, 1921.)

1. Criminal law ⟸1172(8)—Charging larceny in burglary information not prejudicial, where jury convicted of burglary.

The fact that an information for burglary contained a charge of larceny did not prejudice accused, so as to entitle him to reversal of the conviction, where the jury expressly found him guilty of burglary, though it might have rendered the offense uncertain if the verdict had been merely guilty as charged.

2. Burglary ⟸41(5)—Evidence held sufficient to show entry was in nighttime.

Evidence that a store was locked at 6 o'clock in the evening, which was a few minutes before sunset, and was thereafter entered before the next morning, is sufficient to show an entry in the nighttime, though it does not demonstrate that the entry was not made before sunset.

3. Criminal law ⟸517(4)—Evidence introduced before defendant's confession held to establish corpus delicti.

Evidence introduced before defendant's confession, which showed that a store was broken and entered after 6 in the evening and before next morning, and that, when he was arrested before daybreak next morning, defendant was wearing a coat taken from the store, and other stolen property was found in a room designated by him, is sufficient to establish the corpus delicti and render his confession admissible.

4. Criminal law ⟸519(5)—Confession, when testifying on behalf of codefendant, held voluntary.

Where defendant appeared as a witness on behalf of those jointly charged with the offense, and was examined by the attorney for the codefendants, who was also his attorney at that time and at his subsequent trial, his testimony was voluntary and might be used against him at his trial as a confession.

5. Witnesses ⟸255(2)—Official reporter can refresh memory from shorthand notes.

The official court reporter in testifying to the testimony given by defendant at another trial can refresh his memory by referring to his shorthand notes.

6. Burglary ⟸47—Form of verdict convicting of second degree held properly refused.

Where the information charged that the burglary was committed in the nighttime, so that a verdict of burglary in the second degree would have been void, it was not error to refuse to give the jury a form of verdict of burglary in the second degree.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

7. Criminal law ⊂=854(1) — Women jurors need not be separated from men during deliberations.

Pen. Code, § 1135, as amended by St. 1919, p. 1033, requiring a separate room for the female members of the jury from that provided for the male members, must be read in connection with the amendment of Pen. Code, § 1128 (St. 1919, p. 304), made at the same session, providing for separate rooms for men and women jurors when it becomes necessary for them to retire for the night, and does not change the law that the jurors must be kept together during their deliberations.

8. Criminal law ⊂=730(16)—Answer by prosecuting attorney to attacks on himself held not prejudicial, in view of charge.

Where defendant's counsel had argued that the statement of the prosecuting attorney to defendant, before he testified on behalf of codefendants, that he would send defendant to the penitentiary for perjury, made defendant's confession at the former trial involuntary, the prosecuting attorney's statement that the evidence showed his statement to defendant referred merely to the portion of defendant's testimony exonerating his codefendants, and that he then believed and still believed that such portion of the testimony was false, was not prejudicial to defendant's rights, where the court on defendant's request instructed the jury to disregard all statements made by counsel on either side which were not related to the case.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Arthur Barrios was convicted of burglary in the first degree, and he appeals from the judgment, and from the orders denying his motions in arrest of judgment and for new trial. Affirmed.

Terry W. Ward, of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant and M. Jiminez, Ignacio Blanco, and Jacinto Tappio were jointly charged with the burglary "in the nighttime" of the merchandise store of L. A. Reid at Atwater, in Merced county. The information charges, in appropriate language, that the alleged entry by the defendants was made with intent to commit grand larceny, and then, in the same count, it is averred that the defendants "did then and there take, steal, and carry away from said store goods, wares, and merchandise belonging to said L. A. Reid of the value of $1,100." Jiminez entered a plea of guilty. The defendant and Blanco and Tappio demurred to the information on the ground, among others, that it charges more than one offense in a single count. The demurrer was overruled. Blanco and Tappio were tried jointly and acquitted. Thereafter the defendant Barrios was tried and convicted of "burglary in the first degree." The defendant duly moved in arrest of judgment and for a new trial, both of which motions were denied. On his appeal the defendant assigns many alleged errors.

[1] 1. The information charged larceny in the same count with the charge of burglary. No confusion of issues at the trial resulted from the double charge. The defendant was tried on the charge of burglary. The jury returned a verdict of "guilty of burglary in the first degree." Had the jury found the defendant guilty "as charged," without designating the crime, the duplicity complained of would present a more serious question. Under a charge of burglary with intent to commit larceny, it is always permissible to show a consummated larceny in proof of such intent. Therefore the averment of larceny could in no wise prejudice the rights of the defendant, because proof of such larceny would properly have been made in the absence of such allegation. Judgments are not to be set aside for mere technical errors not resulting in a miscarriage of justice.

[2, 3] 2. Independent of the defendant's confession, the evidence shows the following facts: The building entered was closed and the doors locked at 6 o'clock on the evening of September 10; at 7:30 the next morning the screen of a window, intact the evening before, was found cut and the window open, the rear door open, and large quantities of merchandise, in place at the time the store was closed as stated, were missing; the defendant was arrested in the city of Fresno at 3 o'clock in the morning of September 11, and then had on his person a mackinaw which had been taken from the building, and he remained silent when asked where he obtained the mackinaw; at the time of his arrest the defendant was in the company of Jiminez, who also had on one of the stolen mackinaws; the defendant and Jiminez told the arresting officer that they were going to a certain room to sleep, and about half an hour later the officer found three more of the stolen mackinaws in the room designated; the greater part of the stolen goods were found in a ditch eight miles north of Fresno. This evidence abundantly shows that a burglary was committed and tends strongly to connect the defendant with the crime. It does not demonstrate that the entry was not made during the few minutes between 6 o'clock in the evening and sunset of September 10. Demonstration, however, is not required. Proof of the time of entry in this case is more certain than that in the case of People v. Schafer, 161 Cal. 579, 119 Pac. 920, where it is stated that the claim of insufficiency of the evidence to show entry in the nighttime was without foundation. The foregoing testimony was all produced before the admission of the defendant's alleged confession, and hence disposes of the contention that it was error to admit the confession before proof of the corpus delicti.

3. Counsel for defendant in this case con-

ducted the defense of Blanco and Tappio on their trial on the same charge. During the progress of that trial, on the order of the court, and at the request of counsel for Blanco and Tappio, the defendant Barrios was brought into court from the county jail, where he was confined, for the purpose of testifying. The defendant Barrios thereupon, in response to questions propounded by his present counsel, testified in detail to the commission of the burglary and his own part in it. The testimony so given was taken down in shorthand by the official reporter, who at the trial of Barrios, and over the objection of his counsel, was permitted to relate such testimony to the jury. It is objected that this was in effect compelling the defendant to be a witness against himself, and that, treating the testimony as a confession of guilt, it was not shown to have been voluntary. If the testimony was voluntarily given, it was a waiver of the constitutional privilege, so that the two objections are in effect the same.

As stated, at the trial of his codefendants, Barrios was called and examined by his then and present attorney. During his examination the following occurred:

"Mr. Ward: Q. Since you have been in the county jail, have you had any inducements or threats made to you, if you gave testimony in this case? A. No, sir. Q. Nobody told you you would get probation if you testified? A. No, sir; I was told by the district attorney here Tuesday morning, the 12th, he called me up to the office, and he told me if I was going to testify here in court. I told him I was; then I told him what I was going to testify to. I told him I was going to testify to the truth and he told me, What was that? Then I began telling him what was the truth; he told me, if I would say that, he was going to have me charged with perjury and send me up on two different counts, one to fourteen for burglary and one to fourteen for perjury. Q. He told you, if you testified that Blanco and Tappio were not with you, that he would have you prosecuted for perjury; is that it? A. Yes, sir. Q. What did you say to him about that? A. I told him I did not care; I was going to tell the truth, if they sent me up for life; I did not care."

He was cross-examined as follows:

"Q. (by Mr. Landram). I believe, Mr. Barrios, as you have testified in response to Mr. Ward, that no promises have been made to you by me, in order to get you to testify in this case, promises of reward or anything of that kind? A. No, sir; I have not been promised any reward. The sheriff had me out there one day, and he said to me; of course, he asked me what I was going to do; of course, it seems like he wanted me to say that Tappio and Blanco were with us when we committed this burglary. I told him they were not; so he told me, why was I protecting them and be sent to the penitentiary? that I had not good health, me and Jiminez were in poor health and why I would want to go to the penitentiary, just in order to protect somebody else."

[4] The testimony seems to have been given voluntarily and with the knowledge that it would probably result in his own conviction and sentence to the penitentiary. Since his testimony was given in response to questions by his own attorney, it must be assumed that he had been fully advised as to his constitutional privilege.

[5] 4. There was no error in permitting the official reporter to refresh his memory from his shorthand notes. People v. Sexton, 132 Cal. 39, 64 Pac. 107.

[6] 5. The failure of the court to give the jury a form of verdict of burglary of the second degree was not error. The information charged the commission of the burglary in the nighttime and, hence, a verdict of burglary of the second degree would have been void. People v. Smith, 136 Cal. 207, 68 Pac. 702.

[7] 6. Failure to provide separate rooms for the male and female jurors, if there was such failure, cannot be held to have prejudiced the rights of the defendant, in the absence of a showing to that effect. The law requires that the jurors be kept together during their deliberations. People v. Adams, 143 Cal. 208, 76 Pac. 954, 66 L. R. A. 247, 101 Am. St. Rep. 92. Since the Adams Case was decided, section 1135 of the Penal Code has been amended (St. 1919, p. 1033), by adding the provision that the "board of supervisors shall provide a room for the female members of the jury which shall be separate and apart from the room provided for the male members." This amendment, however, must be read in connection with the amendment made at the same session of the Legislature (St. 1919, p. 304) to section 1128 of the Penal Code which provides:

"That when the jury is composed of both men and women, in the event that it shall become necessary to retire for the night, the women must be kept in a room or rooms separate and apart from the men."

There is no conflict between these amendments, and, read together, they are in harmony with what has always been the law, that jurors must be kept together during their deliberations. The record further shows that separate rooms were provided for the men and women on the jury in the event of their retirement for the night.

[8] 7. Exception is taken to the statements made by the district attorney in his closing argument to the jury. The record discloses the following:

"Mr. Landram: I want to mention briefly a few of the circumstances of the case, and before I go further I want to make some reference to a statement by Mr. Ward, with reference to a conversation had by myself and Mr. Barrios in the county jail; Mr. Ward's statement was, that I said to Mr. Barrios, 'If you tell the truth, I will send you up for

perjury.' You remember, though, in the reading of that testimony Mr. Ward himself by his question limited the matter with reference to the perjury to the statement made 'If you testify that Tappio and Blanco were not there, he would send you up for perjury.' And that, ladies and gentlemen, is a fact; Tappio and Blanco, I believe the evidence in that case showed conclusively, were there, and I believe, when this defendant testified in that case they were not there, he was deliberately perjuring himself—

"Mr. Ward (interrupting): I assign that statement as misconduct and ask the court to instruct the jury to disregard the statement.

"The Court: The jury have already been instructed; they are not bound by any statement made by counsel on either side. Of course, this is a mere conclusion of the district attorney. If he attempts to state anything outside of the record, it is merely a conclusion and it is not binding. The jury are to make their own conclusions, received from the evidence, and they are not bound by any conclusions of any one else.

"Mr. Landram (continuing): I am not trying to enforce my opinion in that regard upon any of you jurors. This is a matter for you; thinking as I do it would have been my duty, if that jury convicted these men, to have charged this man with perjury—

"Mr. Ward (interrupting): I assign that as misconduct, and ask the court to instruct the jury to disregard it.

"The Court: Well, the jury will disregard all statements, made by counsel on either side, that have nothing to do with this case."

The district attorney seems to have made such statements in defending himself against charges by counsel for the defendant, who had said that the district attorney had told the defendant that—

"If he testified upon the trial of that case, he would send him up for 14 years for burglary and 14 years for perjury; now, in what sense was the testimony of the witness voluntary, or made without any threats or intimidation?"

The district attorney was apparently trying to show that counsel's charge was not supported by the evidence. The question whether the defendant's testimony had been voluntarily given was a legitimate subject of argument before the jury. In view of the evident purpose of the district attorney, which the jurors must have understood, and the admonition of the court, it does not appear that the defendant's rights were prejudiced by the statements.

The other assignments of error are incidental to those discussed, and are sufficiently disposed of without further consideration.

The judgment and orders appealed from are affirmed.

We concur: BURNETT, J.; HART, J.

52 Cal. App. 644

SEXSON v. SEXSON. (Civ. 3606, 3607.)

(District Court of Appeal, Second District, Division 1. California. May 17, 1921.)

1. Appeal and error ⊂⊃1011(1)—Findings final when evidence presented conflict.

In a wife's action to establish her ownership of real estate conveyed to her husband on the theory that it was conveyed to give him a credit, and on his agreement to reconvey it after such purpose had been served, where the husband's testimony that the deeds were given for a valuable consideration merely presented a conflict with the wife's evidence, which was sufficient to support the findings, the conclusions of the trial judge on the facts must be treated as final.

2. Limitation of actions ⊂⊃66(7), 103(2) — Does not run against right to reconveyance until demand made or trust repudiated.

Where a wife conveyed land owned by her to her husband to give him a credit, on his agreement to reconvey after any credit so obtained had been satisfied, she parted only with the naked legal title, and the husband received it as trustee, subject to the wife's right to a reconveyance, and limitations did not commence to run against such right until a demand was made on the husband that he reconvey, or until his repudiation of the trust.

3. Trusts ⊂⊃365(2)—Defense of laches without merit when trustee not prejudiced by delay in suing to establish title.

In a wife's suits to establish her ownership of real property conveyed by her to her husband to give him a credit, on his agreement to reconvey after any credit so obtained had been satisfied, the defense of laches was without merit where no circumstances appeared showing that the husband was prejudiced by the mere lapse of time occurring between the time of the conveyance and the dates of the commencement of the actions.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Two actions by Elizabeth M. Nagle Sexson against Oliver V. Sexson were tried together. Judgment for plaintiff in each action, and defendant brings separate appeals. Affirmed.

Adam Thompson and Renwick Thompson, both of San Diego, for appellant.

Titus & Macomber, of San Diego, for respondent.

JAMES, J. Two actions were brought in the superior court by the above-named plaintiff against the above-named defendant, in each of which judgment was rendered in favor of the plaintiff. Separate appeals were taken by the defendant from the judgments. The cases were tried together in the superior court, and by stipulation the appeals are presented in the same way.

The actions of the plaintiff were brought for the purpose of having it determined that

she was owner of certain real property situated in the city of San Diego. The general allegations of the two complaints were similar, except that the property involved was of different descriptions. For the sake of brevity we will designate the property described in action 3606 as the Horton's Addition lot, and that described in action 3607 as the Hillcrest lot. The plaintiff first alleged that she was, and for a long time prior to the occurrence of the matters stated in her complaint had been, the wife of the defendant; that she was the owner of both of the lots mentioned in her sole and separate right; that in November, 1913, she deeded to the defendant an undivided one-third interest in the Horton's Addition lot, and in April, 1918, transferred the legal title to the Hillcrest lot to the defendant. She alleged that these transfers were made without consideration of any kind, and were made—

"for the purpose of establishing an immediate and temporary credit for said defendant, and under the agreement and promise of the defendant to use said property for such purpose, and no other, and with the specific understanding and agreement between plaintiff and defendant that defendant would deed said property to plaintiff upon her request after any credit obtained by the defendant by virtue of holding said property had been satisfied."

Demand was alleged to have been made upon the defendant on or about the 1st day of November, 1919, that he deed the property back to the plaintiff, and that such demand had not been complied with. In a second cause of action alleged in each of the complaints it was set out that the deeds of the plaintiff to both parcels of realty had been obtained by fraud and undue influence; that defendant had great influence over the plaintiff on account of the relationship existing between the two, and that the plaintiff had great confidence in the defendant, and great reliance upon statements made by him; and by reason thereof, upon his representing and agreeing that he would deed back the property to her at her request, she made the transfers hereinbefore referred to. She alleged further that defendant, at the time of the making of said representations, did not intend to deed the property back to her in accordance with his agreement, but intended to defraud plaintiff out of her real property. Allegation was also made that plaintiff did not discover the "said fraud of said defendant until she demanded that defendant deed said property to her, to wit, on or about the 1st day of November, 1919."

[1] The parties to the actions were married in 1909. The defendant was then employed as driver for a transfer company, and earned an amount which, according to his testimony, varied from $125 to $140 per month. He continued steadily at this employment up to about April, 1916, when he ceased to work for a period of about one year, and then secured employment in the sheriff's office in San Diego county, in which position he was employed at the time of the trial of the action. In the fall of 1919 he ceased to live with plaintiff, and in 1920 the two actions here concerned were brought, one on February 27th and one on April 7th.

It is shown by the evidence that at the time of her marriage plaintiff owned the Horton's Addition lot, which was a lot about 50 by 100 feet in dimensions, located in the downtown district of the city of San Diego. According to some testimony offered at the trial, this lot in 1913 was worth, exclusive of improvements, about $25,000. In 1910 it was decided by the plaintiff and defendant that a garage building should be erected on this lot. Plaintiff did not possess the necessary funds to pay the construction cost. The defendant owned in his separate right a lot in another part of the city and besides had in cash about $1,000. (His wife testified the amount was $600.) He arranged to deed to the contractor who was to construct the garage building the lot owned by him at an agreed valuation of $2,100, and added to that the amount of money which he had. Mrs. Sexson had several hundred dollars in cash, and enough more money was borrowed to make up the contract price of the garage building, which was $7,500. Upon its completion the building was immediately rented, and continued thereafter to be steadily occupied by a tenant. The rents were collected by the defendant and placed in an account at the bank, which was first kept in the name of the defendant only, but later was in the joint names of the plaintiff and defendant. Out of this money the several indebtednesses incurred on account of the construction of the garage were satisfied in installment payments, except that it was the contention of the defendant that he never was reimbursed out of that money for his contribution toward the building of the garage, which contribution, taking the admission of the plaintiff as to the amount, was the sum of $2,700.

The earnings of the defendant in his employment were used to satisfy the living expenses of the family. From the time the garage was built in 1910, up to November, 1913, defendant had not received from the plaintiff any written evidence showing the amount of money from his separate estate that he had contributed toward the building of the garage. It was on November 20, 1913, that the wife deeded to defendant an undivided one-third interest in the garage property. The circumstances attending the whole matter of the building of the garage and the use of the defendant's separate funds in that enterprise are persuasive, as the story is read from the printed page, as affirming the truth of defendant's claim, and as indicating that when the deed of the one-third interest was made it was executed for the purpose of adjusting

the separate interests of the husband and wife in the garage property.

In suggesting this conclusion, however, we are here met with the condition that the plaintiff made a sworn declaration as to a totally different understanding and agreement. She testified that for the money advanced by the husband it was agreed that he would reimburse himself from the rents afterward collected. A statement of the amounts of rent which were collected by the defendant and deposited in the account referred to in the bank was received in evidence, and it does appear that the income was of such a sum as, deducting taxes and allowing for payment of the outside indebtedness, would leave enough money to have satisfied defendant's claim for the amount contributed by him toward the construction of the building.

Admitting a sharp conflict to have existed between the sworn testimony of the plaintiff and defendant, it must, nevertheless, be said that the findings, upon all of the issues as to the facts set out in the first alleged cause of action as asserted by the plaintiff, find support in the evidence. The court was not assisted by having presented in complete detail a schedule of the various expenditures made on behalf of both of the parties during the time that they lived together as husband and wife. Such tangible evidence as bank accounts and canceled checks was not produced, nor books of account, to show how and for what purpose the joint or separate incomes were expended. The Hillcrest property was purchased after the marriage of the parties. Mrs. Sexson testified that her husband asked her to deed it to him—

"for the same purpose, to establish a credit, and I gave it to him for the same purpose. He wanted to go on a cattle ranch and he said he had to have a credit and a prestige."

One other witness testified to having heard the defendant express a desire to go into the ranching business. The defendant testified that the deeds to him were for a valuable consideration. He denied all of the assertions made by the plaintiff as to alleged conditions affecting the transactions. As we have noted, however, such testimony presented a conflict in the evidence. Under such a state of the record the conclusions made by the trial judge as to the facts must be treated as final.

[2, 3] In what has been stated as to the sufficiency of the evidence we refer more particularly to that affecting the cause of action first alleged in plaintiff's complaint. The court in its findings determined that all of the allegations of the complaint as amended were true. The cause of action first alleged was one presenting a case where the defendant received the title to the real property involved in the two actions in trust, to be held subject to the conditions stated. Under the circumstances alleged and shown, plaintiff parted with the naked legal title only to her property, and the defendant received the same as trustee, subject to the right of the plaintiff to have that title revested in her by conveyance from the defendant after it had served the agreed purpose. The statute of limitations would not commence to run against the plaintiff's right until demand was made of defendant that he reconvey, or until the repudiation of the trust by the trustee. Taylor v. Morris, 163 Cal. 717, 127 Pac. 66. This statement we make in answer to the contention of appellant that his demurrer urging the bar of the statute of limitations should have been sustained. There was no evidence tending to show any repudiation of the trust at such a time prior to the commencement of the action as would make applicable either of the particular statutes pleaded. Plaintiff's demand for reconveyance was made within less than a year before the date of the commencement of the actions. The defense of laches, which was further interposed by the defendant in his answer, was without merit under the facts as they were asserted by the plaintiff to be. No circumstances were disclosed such as to show that the defendant was prejudiced by the mere lapse of time occurring between the date of the conveyance and the dates upon which the two actions were commenced. See Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467; Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516.

We have referred particularly to the contentions made in the brief of appellant as against the cause of action first asserted in plaintiff's complaint. This because, as we have already noted, that cause of action was sufficiently sustained by the evidence. The relief sought, as depending upon the two causes of action, was the same; hence, if the evidence sustained the first cause, it becomes immaterial as to whether the evidence was sufficient to support the findings upon the second alleged cause of action. Under the condition suggested, the judgment would necessarily have to be sustained; hence a discussion of appellant's points as urged against the cause of action for alleged fraud could serve no useful purpose.

The judgments appealed from are affirmed.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 508

PEOPLE v. KEPFORD et al. (Cr. 554.)

(District Court of Appeal, Third District, California. May 5, 1921.)

1. Criminal law ⊂⊃342—Absence of motive favorable to accused.

A motive for the commission of a crime may be shown as a circumstance tending to show guilt, and the absence of motive may be considered as a circumstance favorable to the accused.

2. Trespass ⊂⊃88—Evidence defendants had permission to use another car admissible to show absence of motive.

In a prosecution for taking an automobile without the consent of the owner, in violation of the motor vehicle act, Stats. and Amdts. 1905, p. 185, P. C. § 499b, where defendants claimed they rode in the car as guests of another, whom they thought the owner, evidence that they had permission from their brother to use his machine was admissible to rebut the state's theory as to the willfulness of their use of the car.

3. Criminal law ⊂⊃1170(2)—Exclusion of merely cumulative evidence not prejudicial error.

In a prosecution for taking an automobile without the owner's permission, in violation of the Motor Vehicle Act, P. C. § 499b, it was not prejudicial error to exclude defendant's testimony that he had permission to use his brother's car, where the latter and a codefendant testified, without objection, that he had such permission, the evidence being merely cumulative.

4. Criminal law ⊂⊃1166½(12)—Court's remark implying taking automobile without consent sufficient to convict not reversible error, in view of instructions taking must be willful.

In a prosecution for taking an automobile without the owner's permission, in violation of the Motor Vehicle Act, where defendant sought to show absence of motive by testimony that he had permission to use his brother's car, the court's remark, "that is wholly immaterial and taking time" was not reversible error, any implication that the taking of the machine without consent was sufficient to justify conviction, though not willful, being removed by subsequent instructions that the taking must have been willful and felonious, that if defendants rode in the machine with another, whom they believed had a right to use it, they were not guilty, and fully instructing as to burden of proof, reasonable doubt, and presumption of innocence.

5. Trespass ⊂⊃88—Evidence held to justify disbelief of defendants' claim to have ridden in car with one they believed was owner.

In a prosecution for driving an automobile without the consent of the owner, evidence *held* sufficient to justify the jury in believing that a person with whom defendants claimed to have ridden in the car, believing him the owner, was mythical.

6. Witnesses ⊂⊃359—Unnecessary to show judgment of conviction to impeach witness where latter testified he pleaded guilty.

Under Code Civ. Proc. § 2051, providing that a witness may be impeached by showing by his examination or by the record of the judgment that he had been convicted of a felony, where a witness, in answer to a question as to whether he had been convicted of a felony, stated that he plead guilty, it was unnecessary to produce the record of conviction, his plea of guilty being equivalent to the verdict of a jury, which constitutes a conviction under Pen. Code, § 1151.

7. Criminal law ⊂⊃730(8)—Remark of state's attorney to consider accused's criminal tendency held harmless in view of instruction to consider same for purpose only of weighing testimony.

In a prosecution for driving an automobile without the consent of the owner, a remark of the district attorney, in his argument, that "we might consider the tendency of" defendant "from his past history" was not prejudicial error, in the absence of bad faith or an attempt to take an unfair advantage, he having corrected it when his attention was called to it, and the court having instructed the jury to consider such tendency only for the purpose of weighing testimony.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Clyde Kepford and another were convicted of driving an automobile without the consent of the owner, in violation of the Motor Vehicle Act, and they appeal. Affirmed.

E. P. Foltz, of Stockton, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendants were convicted of violating the provisions of the Motor Vehicle Act (St. 1905, p. 185), in that they—

"did on or about the 14th day of May, 1920, in the county of San Joaquin, willfully, unlawfully, and feloniously drive and operate and cause to be driven and operated a motor vehicle, to wit, an automobile, not their own nor the property of either of them, on the public highway, to wit, the Lockeford-Lodi road, and at the time of so driving and operating and causing to be driven and operated said automobile as aforesaid, the owner thereof, one Allen M. Sherfey, was not then and there present, and did not consent to having said automobile above mentioned driven and operated and caused to be driven and operated as aforesaid by said defendants, Clyde Kepford and Edward Kepford, or either of them."

No objection is made to the sufficiency of the information, nor is it claimed that the evidence did not warrant the verdict of the jury. The instructions are unassailed, and the regularity of the proceedings is not questioned except in three particulars, which we proceed to notice.

In their brief appellants declare:

"Both defendants at all times admitted being in the Sherfey machine. They claimed from the first and at the trial that a fellow who gave his name as Ryan was bootlegging at the picnic (a picnic near Lockeford where Sherfey had parked his machine), and took them in the Sherfey machine, which they believed to be Ryan's, several times to Lockeford and back of the Lockeford hotel in a field where he had some booze hid, and sold some to the boys and others until it was gone. * * * The defendants claim that Ryan was going to another place where he claimed to have liquor hid when the accident (referring to the breaking of the car) happened."

In view of this defense on the part of appellants, they claim that error was committed by the trial court in its—

"refusal to allow evidence of want of motive for the crime by showing that the defendant, Ed Kepford (Clyde could not operate a machine) had permission from his brother, Sydney, to use his machine that night."

In reference to this ruling the record shows the following:

"Q. Did you have any conversation with him (referring to his brother Syd.) that night about running it that night?

"The Court: The court will limit further inquiry along that line. That is wholly immaterial and taking time.

"Mr. Foltz: That is an important matter, the motive for running the machine. If a man has a machine of his own it is not reasonable he would go and steal somebody else's machine.

"The Court: The question is whether he took this machine. It is not a question of motive at all."

[1, 2] In this connection attention is called by the Attorney General to the fact that there was no claim of accident, nor was it contended by appellants that they believed they were taking their brother's machine; but their whole defense was that they had the right to ride in this particular machine and, hence, it is asserted, that the proposed evidence was immaterial. Manifestly, it would have no tendency to excuse or justify their conduct in riding with Ryan. In fact, they needed no justification further than their own explanation, but, unfortunately for them, the jury rejected it. But the real purpose of the evidence was to support the probability of their story, and to weaken the contention of the people that they had willfully taken Mr. Sherfey's machine.

It is a familiar rule that a motive for the commission of a crime may be shown as a circumstance tending to show guilt, and the absence of motive or reason for the commission of the alleged offense may be considered as a circumstance favorable to the accused. People v. Brown, 130 Cal. 591, 62 Pac. 1072; People v. Bauweraerts, 164 Cal. 696, 130 Pac. 717. Having, therefore, the permission of their brother to use his machine, they claim it would be less probable that they would willfully take some other machine without permission. Being able, in other words, to accomplish their purpose lawfully, it is argued that they would be less likely to resort to unlawful means. If they had contended that they did not use Sherfey's machine at all, or that they supposed they were taking their brother's machine, the materiality of the proposed evidence would be quite apparent. However, in aid of their plea of not guilty, and to rebut the theory of the prosecution, they had the right to introduce any evidence that might logically relate to the question of guilty knowledge. The force of the claim as to the willfulness of the use of Sherfey's machine might be impaired if the jury believed that appellants had permission to use their brother's machine. This upon the theory, of course, that men do not ordinarily commit crime when they can just as easily accomplish their purpose in a lawful manner. We think, therefore, the evidence was admissible for what it was worth.

[3] However, the evidence would have been cumulative, merely, as the other two brothers testified, without objection, that defendants had permission to use said machine—presumably for a proper purpose. There was no dispute as to that, and the refusal to allow additional evidence of the same kind, if erroneous, was without prejudice.

[4] If it may be said that the court's said remark might be considered as implying that the taking of Sherfey's machine by defendants without consent was sufficient to justify conviction in the absence of willfulness, it is sufficient to answer that the effect of such implication was entirely removed by the subsequent instructions of the court. For instance, the jury was directed substantially that the taking must have been willful and felonious to warrant a conviction. The theory of appellants was specifically covered by this instruction:

"If you have a reasonable doubt from the evidence whether the defendants operated the machine as charged or rode with one Ryan, believing Ryan had a right to use the machine, you must find the defendants not guilty."

The jury was also fully instructed as to the burden of proof, the doctrine of reasonable doubt, and the presumption of innocence. In fact, every principle of law germane to the situation was properly presented, and the jury must have had a comprehension of the legal aspect of the case.

[5] As far as the facts are concerned, it may be added that the jurors were entirely justified in believing that Ryan was a mythical person originating in the exigent need of appellants to fabricate a defense.

[6] The second and third objections of appellants are based upon the following showing: Defendant Ed Kepford was cross-examined by the district attorney as follows:

"Q. You were previously convicted in this county of a felony on August 2, 1915? A. Yes sir—not that I know of, a felony, no sir.

"Q. You plead guilty to a charge of burglary which was for the taking of an automobile? A. I plead guilty, yes. They told me I could get out of it; that is the way, only way, I could get out of it.

"Q. For the taking of a Japanese automobile? A. Yes, sir; from about 30 feet from my place, standing up against a locust tree."

Then, in the argument to the jury by the district attorney, this appears:

"We might consider the tendency of Ed Kepford from his past history.

"Mr. Foltz: We assign that as error, 'the tendency of Mr. Kepford.'

"The Court: I think, Mr. Van Vranken, you can only consider that for the purpose of weighing testimony.

"Mr. Van Vranken: That is the purpose. I was in error, your honor.

"The Court: Only for that purpose. I will have to instruct to that effect."

It is claimed that it was incumbent upon the people to show a judgment of conviction either by a production of the record or by an interrogation of the witness to that effect. In some instances the term conviction is used as including not only a verdict but also the judgment which follows. But that a verdict of guilty constitutes a conviction within the contemplation of section 2051 of the Code of Civil Procedure, providing that "a witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony," is positively determined by the Supreme Court of this state in People v. Ward, 134 Cal. 301, 66 Pac. 372. Therein it is said:

"It is contended that at the time the witness testified he had not been 'convicted of a felony;' that, to sustain the ruling of the court, it must be assumed, as a matter of law, that the verdict of guilty constituted a 'conviction.' That such verdict does constitute a conviction, within the ordinary as well as the technical meaning of the word, seems to be well settled."

See, also, section 1151 of the Penal Code. The district attorney elected to take the usual course and ask the witness, first, if he had been convicted of a felony, adopting the language of the statute. This was an entirely proper question. The answer was somewhat equivocal, and it was followed by the question as to his pleading guilty to a charge of felony. The answer of the witness to the question showed that he had been convicted of a felony—his plea of guilty being equivalent to the verdict of a jury. In view of his answer, it was, of course, unnecessary to produce the record of conviction.

[7] As to the objectionable remark of the district attorney, it is to be observed that when his attention was called to it he immediately corrected it, and the court properly instructed the jury as to the purpose for which said conviction might be considered. There is no claim that the district attorney acted in bad faith, or that he sought to take an unfair advantage of the defendants. Under such circumstances, the inadvertent statement must be regarded as harmless.

Appellants seem to have been fairly tried and justly convicted, and the judgment and order are therefore affirmed.

We concur: FINCH, P. J.; HART, J.

52 Cal. App. 477

ESPINOSA v. STUART et al. (Civ. 3711.)

(District Court of Appeal, First District, Division 2, California. May 3, 1921. Hearing Denied by Supreme Court June 30, 1921.)

1. Pleading ⟹204(2)—Demurrer to complaint containing three counts properly overruled, where one count was good.

Overruling of demurrer to complaint containing three counts was not error, where one of the three was good.

2. Action ⟹48(1)—Counts held not improperly joined.

Under Code Civ. Proc. § 427, subd. 8, a complaint containing a count in ordinary form to quiet title, and a count showing cause of action for actual undue influence under Civ. Code, § 1575, and a cause of action for implied undue influence by an attorney over his client, under section 2235, and a third count involving in the same manner as the other two counts transfers from plaintiff to defendant, *held* not bad for misjoinder of causes of action.

3. Trial ⟹397(2)—Failure to find on material allegation of one count not error, where court based judgment on other count.

Court's failure to find on a material allegation of one count was not error, where it based its judgment on the allegations of another count.

4. Trial ⟹397(1)—Failure to find on material allegation not error, where allegation not denied.

Failure to find on a material allegation was not error, where the allegation was not denied and there was no issue thereon.

5. Appeal and error ⟹1033(7) — Appellant cannot complain of insufficiency of evidence to sustain finding in own favor.

Appellant cannot complain of the insufficiency of the evidence to sustain a finding in his own favor.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Salvador Espinosa against Z. B. Stuart and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

J. W. Hocker, C. W. Byrer, and Z. B. Stuart, all of Los Angeles, for appellant.

C. F. Lacey, of Salinas, and R. C. McComish, of San Jose, for respondent.

STURTEVANT, J. The plaintiff brought an action against the defendant to quiet his title to lands in Monterey county. The plaintiff had judgment, and the defendant has appealed under section 953a of the Code of Civil Procedure. The controversy arose out of a transaction which took place between the plaintiff, as client, and the defendant, as his attorney and legal advisor.

Carlos Espinosa was the owner of large tracts of land, including the lands in suit. In January, 1865, he died, leaving him surviving a widow, Josefa Boronda de Espinosa, and eight children, including the plaintiff. The father left a will, written in the Spanish language, which was admitted to probate. While the probate proceedings were still pending, one of the daughters, Narcisa Duarta, induced the plaintiff, in consideration of certain moneys which had already been paid to him, and of certain other moneys which were thereafter to be paid to him, to convey to her his interest in the estate. Later, in 1879, the estate was distributed by a decree which found that the mother was the sole legatee. In 1916 the widow was negotiating a lease of a large tract to the Spreckels Sugar Company, but before the lease was executed some of the children, appearing through the defendant as their attorney, commenced an action attacking her title, on the 23d day of September, 1916. Later, September 25, 1916, the widow commenced a counteraction to quiet her title against all of the children, including this plaintiff. The defendant appeared in that action as attorney for several of the children. Later, but as early as October, 1916, negotiations were commenced looking toward a settlement of both of the cases just mentioned. Early in those negotiations Mr. Lacey, attorney for the widow, advised Mr. Stuart, attorney for several of the children, that the mother had made her will (which he held in his safe), and, litigation or no litigation, all of the property would, at her death go to the children, share and share alike. A written agreement of compromise was not signed until March 29, 1917; but the record contains testimony to the effect that that paper contains in writing the proffered compromise discussed between Mr. Lacey and Mr. Stuart, the defendant, in the month of October, 1916.

For many years the plaintiff had been absent from Monterey county. In the fall and winter of 1916–17 the defendant was busy trying to locate the plaintiff. Finally, on February 16th or 17th, Mr. Stuart succeeded in calling on the plaintiff at Davis, Yolo county, California. While at Davis defendant asked this plaintiff to employ him as an attorney. While there the defendant told the plaintiff that the court had directed him to get together all of the heirs of plaintiff's father. Together they went to Salinas on February 17, 1917. The next day the plaintiff orally consented to employ defendant as his attorney. An agreement compensating defendant for services was signed, defendant says, "along the latter part of February, 1917." This agreement, although often called for during the protracted trial, was never produced, notwithstanding the defendant often said he thought he had it. The defendant actually commenced to act as the plaintiff's attorney, as early as March 29, 1917. On April 12, 1917, the plaintiff signed a grant, bargain, and sale deed to defendant conveying one-third of his interest absolutely. By a subsequent deed he conveyed the remaining two-thirds of his interest in the lands in dispute. This later instrument refers to another paper "of even date herewith." It was not produced at the trial. All of these papers were dictated to Miss Castro. She was not produced at the trial, nor were her notes.

The agreement of employment, it was claimed, took place before the plaintiff's two sisters. One sister was not produced, and the other was not questioned on the subject. The absence of the witnesses not called was not accounted for. The absence of the writings claimed to have been executed, but not produced, was never accounted for. There is evidence that the defendant never informed his client, this plaintiff, that the plaintiff's deed to Mrs Duarta conveyed no title; nor that there was a standing offer of compromise which afforded this plaintiff all the rights he could acquire by any litigation; nor that, as this plaintiff had already been made a party defendant to the pending suits, the parties litigant necessarily must protect his rights in their attempt to protect their own rights; nor that this defendant must do all the work which he subsequently did do, whether the plaintiff employed him or not. In addition to numerous acts of weak-mindedness shown in the record in numerous small matters, it appears that as early as March 29, 1917, this plaintiff was adjudged incompetent, and thereafter appeared through the duly appointed guardian of his person and estate.

On March 29, 1917, the plaintiff deeded to the defendant properties of the value of $15,000; on the 12th day of April he deeded to him properties of the value of $25,000, and on the same dates he signed contracts assigning to the defendant rents amounting to several thousand dollars. The trial court found that the value of the services rendered for the plaintiff by the defendant was $500. There was evidence in the record supporting each of said valuations. There is testimony to the effect that before the plaintiff signed any of said papers he talked to two or more

laymen as to the advisability of so doing. There is no evidence that any of such persons knew of the aforesaid facts which the defendant had failed to state to his client. Yet such independent advice is the sole showing which the defendant made tending to relieve him of the charge of undue influence.

Before taking up the points made by the appellant, it will work in the interest of clearness for us to notice two different rules of law. The first rule to be noticed is stated in section 951 of Pomeroy's Equity Jurisprudence, as follows:

"Where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law."

Still referring to that same rule, the learned author, in section 955, says:

"In the various instances described in the preceding paragraphs there has been an actual undue influence consciously and designedly exerted upon a party who was peculiarly susceptible to external pressure on account of his mental weakness, old age, ignorance, necessitous condition, and the like. The existence of any fiduciary relation was unnecessary and immaterial. The undue influence being established as a fact, any contract obtained or other transaction accomplished by its means is voidable, and is set aside without the necessary aid of any presumption."

The second rule to be noticed is stated by the same author in section 955, in words as follows:

"The single circumstance now to be considered is the existence of some fiduciary relation, some relation of confidence, subsisting between two parties. No mental weakness, old age, ignorance, pecuniary distress, and the like, is assumed as an element of the transaction; if any such fact be present it is incidental, not necessary—immaterial, not essential."

Our Civil Code, §§ 1575 and 2235, states the same rules. That the relation of attorney and client is specially subject to these rules has been directly passed on. Metropolis, etc., Sav. Bank v. Monnier, 169 Cal. 592, 147 Pac. 265. In that case, at page 598, of 169 Cal., on page 268 of 147 Pac., the court said:

"Assuming that, upon another trial, the defense of undue influence will be within the issues, it is proper to point out that a prima facie case in support of this defense would be made out by proof that Mr. Patton, prior to and at the time he took the note and mortgage, was acting as attorney for Mrs. Monnier. The relation of attorney and client is of a fiduciary character, and the Civil Code (section 2235) clearly provides that all transactions between a trustee and his beneficiary during the existence of the trust, by which he obtains any advantage from his beneficiary, 'are presumed to be entered into by the latter without sufficient consideration and under undue influence.' This does not mean that a trustee may not deal with his beneficiary. But if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair. Certainly, the obtaining of a note for $20,000, secured by mortgage, is an advantage, and the attorney, or those claiming under him, cannot safely rest, as they did in this case, without affirmative proof of the facts surrounding the transaction. On the question of the applicability of the presumption declared by section 2235, it is sufficient to refer to Cooley v. Miller & Lux, 156 Cal. 510, 523, 105 Pac. 981, and authorities there cited. See, also, Cooley v. Miller, 168 Cal. 120, 142 Pac. 83, 88.

[1] The appellant makes 11 points. The first point he makes is that the trial court erred in overruling his demurrer to the plaintiff's complaint. The plaintiff set forth his grievance in three counts: (1) A count, in the ordinary form, to quiet title; (2) and (3) counts as for a breach of trust. The defendant Stuart demurred "to the complaint" on the ground that the complaint did not state facts sufficient, and on the ground that several causes of action had been improperly joined. Clearly, the first count was entirely sufficient, and therefore the demurrer was not good as to that count. This being true, the trial court was justified in overruling the demurrer "to the complaint" in so far as it was an attack on the ground that the complaint did not state facts sufficient. Pfister v. Wade, 69 Cal. 133, 136, 10 Pac. 369.

The second count commingled and combined allegations showing (1) a cause of action for actual undue influence (sections 951 and 955, Pomeroy's Equity Jurisprudence), and (2) a cause of action for implied undue influence as for an advantage gained by an attorney over his client after such relation had been created (section 955, Pomeroy's Equity Jurisprudence). The second count is not a model of good pleading, but we cannot say that it is subject to the attack that it did not state facts sufficient. De Pedrorena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787.

[2] The third count was dismissed, and we need not dwell on it. As all three counts involved the transfers from plaintiff to defendant, the second ground of attack, an improper joinder of causes, is without merit. Such combinations are permissible since the addition of subdivision 8 to section 427 of the Code of Civil Procedure. Morris v. Judkins, 36 Cal. App. 413, 414, 415, 172 Pac. 163; Lathrop v. Francis, 180 Cal. 182, 180 Pac. 1 and 2.

[3, 4] The defendant complains that the trial court failed to find on a material allegation of the count to quiet title. As the trial court based its judgment on the alle-

gations of the second count in the complaint, the attack is not sound if the court fully found on the issues presented by the second count. Furthermore, the allegation in question was not denied, and there was no issue thereon.

Again, the defendant contends that "the judgment is not supported by the findings, and is contrary to law." In this behalf the defendant argues that the trial court failed to make a finding on a material issue. This point we have just discussed, and it does not require further consideration.

[5] Another point is that—

"The judgment is not supported by the findings in that: It is not true that the plaintiff is now or ever was the owner of the undivided one twenty-fourth of said real property hereinabove referred to."

The answer is that the finding is in the defendant's favor. Also, it is a finding on an issue presented by the first count and the trial court did not rest its judgment in whole or in part on such count.

All of the remaining attacks are to the effect that the findings are not supported by the evidence. No one of these attacks is supported by the record. Taking up first the findings made responsive to issues tendered by the complaint, assignments of insufficiency 2, 3, 4, 5, 6, and 7 are not well founded. As to some minor matters, the evidence was conflicting; but as to no single one of those findings can it be truly said there was no evidence. As to issues tendered by the defendant's answer, he complains in points 8 and 9 as to the findings made thereon. It suffices to say that the evidence abundantly supports the findings.

As stated above, the plaintiff pleaded in his second count a combined charge of (1) actual undue influence and (2) a violation of fiduciary relations. There is evidence in the record supporting that count when weighed by the calls of either rule.

We find no error in the record, and the judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

52 Cal. App. 487

BONIFACIO v. STUART. (Civ. 3713.)

(District Court of Appeal, First District, Division 2, California. May 3, 1921. Hearing Denied by Supreme Court June 30, 1921.)

1. Action ⊜45(4)—Causes of action held not improperly united.

A cause of action to set aside a conveyance and a cause of action to recover money had and received by defendant *held* not improperly united, the action being in equity, in which the court takes jurisdiction for all purposes.

2. Equity ⊜38—When equity takes jurisdiction, it does so for all purposes.

When equity takes jurisdiction, it does so for all purposes.

3. Attorney and client ⊜123(2) — Attorney has burden of showing client's conveyance to him to be fair.

In client's action to set aside conveyance to attorney on ground of improper advantage taken of client by attorney, the attorney had the burden of showing that transfers to him by the client were fair and adequate, and that the client was fully advised as to his rights and as to his liabilities at the time he executed such papers.

4. Attorney and client ⊜123(2)—Client, suing to set aside conveyance to attorney for services, not required to prove value of services.

In client's action to set aside conveyance to attorney made in payment for services, the client was not required to produce opinion testimony as to the value of the attorney's services, nor was the trial judge bound to ask for such testimony, the attorney in such case having the burden of showing that the transaction was fair, a fiduciary relationship existing between them.

5. Appeal and error ⊜1011(1)—Conflict in testimony was for trial court.

A conflict in the evidence was for the trial court.

6. Appeal and error ⊜1071(2)—Error in misstating fact cured by decree following finding.

Error of court in misstating in conclusions of law fact stated by findings of fact was corrected by the decree following the finding.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Suit by John J. Bonifacio against Z. B. Stuart. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Hocker, C. W. Byrer, and Z. B. Stuart, all of Los Angeles, for appellant.

C. F. Lacey, of Salinas, and R. C. McComish, of San Jose, for respondent.

STURTEVANT, J. The defendant in the trial court has appealed from an adverse judgment as to his title to a fractional interest in certain lands in Monterey county. The defendant acted as attorney for the plaintiff in the case of Espinosa v. Bonifacio et al., No. 6436, records superior court, state of California, in and for the county of Monterey, that being the same litigation referred to in Espinosa v. Stuart (No. 3711) 199 Pac. 66, this day filed, and which is hereby referred to for additional facts. In his complaint the plaintiff alleged that he was the owner of an undivided one thirty-second interest in certain lands, describing them; that the defendant claimed some interest, which was without right; that the defend-

ant acted as attorney for this plaintiff for a long period in a suit entitled Espinosa v. Bonifacio et al., and in other matters; that during all that time plaintiff had full confidence in defendant; that during said time said attorney asked said client to sign two papers, saying they were papers to clear the title to the lands in dispute in Espinosa v. Bonifacio et al.; that, in truth, one of said papers was a deed by which plaintiff conveyed to defendant three-tenths of his one thirty-second interest; that the other paper was an assignment of three-tenths of plaintiff's rentals, aggregating $500 per annum; that the aforesaid statement of said attorney to said client was false; that plaintiff believed and acted on it; that plaintiff did not receive any consideration for said interests; that the defendant had collected $200 of the rentals so assigned; and that the plaintiff had no plain, speedy, and adequate remedy at law.

[1, 2] The defendant demurred to the complaint on the ground that several causes of action had been improperly united, and not separately stated, viz.: A cause of action to set aside a certain conveyance, and an action to recover the sum of $200 money had and received by the defendant. The demurrer was overruled. The ruling was not erroneous. The plaintiff alleged a cause in equity. When equity takes jurisdiction it does so for all purposes. Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820. The defendant argues the point as though the plaintiff had combined an ordinary action to quiet title and an action for money had and received. An examination of the allegations quoted above will show that plaintiff's basic action was something more than an action to quiet title.

[3, 4] The complaint pleaded more fully than necessary a cause of action for an advantage taken by an attorney of his client. The plaintiff showed by the evidence that the relation of attorney and client arose through a written contract, executed September 12, 1916; that said writing called for a fee measured at two-tenths of the plaintiff's share; and that, on March 30, 1917, the defendant took from the plaintiff transfers measured at three-tenths. The burden of proof shifted to the defendant to show that such excessive transfers were fair and adequate, and that the plaintiff was fully advised both as to his rights and as to his liabilities at the time he executed said papers. Metropolis, etc., Sav. Bank v. Monnier, 169 Cal. 592, 598, 147 Pac. 265. The defendant did not so take up the burden of proof, but now complains because the plaintiff did.

In this behalf he complains that the trial court erred in making a finding "that said one thirty-second interest was and is of the value of $25,000," whereas the pleadings did not expressly allege any value thereof. If it was a finding without the issues, it was nugatory, and cannot hurt the defendant. Again, he contends that there was no evidence of the value of his services or of the services of his associates. The trial court awarded the defendant $150, apparently to pay defendant's associates, whom he had employed. No burden rested on the plaintiff to produce opinion testimony on the value of an attorney's services, nor was the trial judge bound to ask for such testimony. Zimmer v. Kilborn, 165 Cal. 521, 522, 132 Pac. 1025. The defendant, in effect, contends that the findings are not supported by the evidence. In this behalf the defendant says, "Can a written instrument be contradicted by a man, who simply says that he did not know what he was signing—that he did not read it?" The answer is, "Most certainly, when a fiduciary relation has been shown to exist." Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 576, 126 Pac. 351, 42 L. R. A. (N. S.) 125. As to the sufficiency of the evidence, it is enough to state that the plaintiff took the stand as a witness in his own behalf, and that, by the documents he produced, or by his oath, he substantiated all the allegations contained in his complaint as hereinabove set forth.

[5] In point 4 of his brief the defendant argues that the plaintiff took independent advice, and he quotes witnesses to that effect. The plaintiff testified that he did not do so. The conflict was for the trial court.

In point 7 the defendant asserts that the plaintiff did not prove any overt acts of, or constituting, undue influence. In making this attack the defendant is clearly confusing a case of actual undue influence with a case for violation of the duties arising out of a fiduciary relation. Goodwin v. Goodwin, 59 Cal. 560, and Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807, are cases of the first class; Simpson v. Dalziel, 135 Cal. 599, 67 Pac. 1080, was of the latter class, but it involved the duty of a client after the relations between himself and his attorney had been terminated.

[6] The last attack which appellant makes is based on the fact that in the conclusions of law the court uses the fraction seven-tenths instead of eight-tenths. The findings of fact uses eight-tenths, and the judgment uses eight-tenths. The error, if any, was corrected by the decree. Spencer v. Duncan, 107 Cal. 423, 40 Pac. 549.

The written contract between the parties, dated September 12, 1916, contained a clause which would have warranted a claim by the attorney for reimbursement for cash expended; but he introduced no accounts or vouchers showing that he had any claim under that clause. Again, he claimed a subsequent alteration had been made in the contract of employment, but he did not show a new consideration which would support such a claim (Main St., etc., Co. v. Los Angeles Traction Co., 129 Cal. 301, 305, 61 Pac. 937), nor did he show, nor did the court find, that there

was a subsequent written agreement nor an executed oral agreement (Civ. Code, § 1698).

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

52 Cal. App. 484

BOUTON v. STUART. (Civ. 3712.)

(District Court of Appeal, First District, Division 2, California. May 3, 1921. Hearing Denied by Supreme Court June 30, 1921.)

1. Pleading ⟸193(6) — Complaint held not subject to demurrer on ground that actions had been improperly united without being separately stated.

In client's action against attorney, complaint alleging that the attorney obtained certain transfers from client while acting as her attorney in certain litigation, that some of the property so transferred had been transferred by the attorney to third persons named as codefendants, and that the attorney had collected under such transfers rentals amounting to specified sum claimed by the client to be her property, *held* not subject to demurrer on the ground that plaintiff had improperly united, and had not separately stated the causes of action, one to set aside the deed, and one to recover money had and received.

2. Action ⟸50(4) — Complaint held not demurrable for misjoinder of parties and causes.

In client's action against attorney, complaint alleging that the attorney obtained certain transfers from client while acting as her attorney in certain litigation, that some of the property so transferred had been transferred by the attorney to third persons named as codefendants, and that the attorney had collected under such transfers rentals amounting to specified sum claimed by the client to be her property, *held* not subject to demurrer on ground that there was a misjoinder of parties defendant on the theory that the action to set aside the deed was addressed to all the defendants, and a cause of action for money had and received was addressed to the defendant attorney only.

3. Attorney and client ⟸123(2)—Testimony as to value of tract, a portion of which had been conveyed by client to attorney in payment for services, held admissible in action to set aside conveyances.

In client's action against attorney to set aside conveyances of portions of a tract of land to attorney in payment for services, testimony as to the value of the tract *held* admissible.

4. Attorney and client ⟸123(2) — Attorney required to prove client's conveyances to him to be fair.

In client's action to set aside conveyances to attorney, the attorney was required to prove that the transfers were fair, and that the consideration was adequate.

5. Attorney and client ⟸123(2) — Attorney, having failed to prove transaction with client fair, could not complain that client did not rest case on statutory presumption.

In action to set aside conveyances to attorney, the attorney, having failed to meet the burden of proving the transactions fair and the consideration adequate, could not complain because the client did not rest her case on the presumption in her favor under Civ. Code, § 2235.

6. Appeal and error ⟸1011(1)—Conflict in testimony for determination of trial court.

A conflict in the testimony was for the determination of the trial court.

7. Appeal and error ⟸1036(2) — Joining of defendants as to whom action was subsequently dismissed held immaterial.

It was immaterial on appeal that certain persons had been originally named as defendants, where the action had been dismissed as to them.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Gudelia E. Bouton against Z. B. Stuart. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Hocker, C. W. Byrer, and Z. B. Stuart, all of Los Angeles, for appellant.

C. F. Lacey, of Salinas, and R. C. McComish, of San Jose, for respondent.

STURTEVANT, J. The defendant in the trial court has appealed from an adverse judgment as to his title to a fractional interest in certain lands in Monterey county. The case is closely allied in its facts to the cases entitled Bonifacio v. Stuart (No. 3713) 199 Pac. 69, and Espinosa v. Stuart (No. 3711) 199 Pac. 66, this day filed; therefore we state only those facts necessary to a determination of this case.

[1, 2] In her amended complaint the plaintiff sets forth allegations showing that certain transfers were obtained by the defendant Stuart while acting as her attorney in certain litigation; that some of the property so transferred had been by the defendant Stuart transferred to the other defendants, Frank Shurtz and David Wallace; and that the defendant Stuart had collected under said transfers certain rentals amounting to $550 claimed by the plaintiff to be her property. The defendants interposed a demurrer alleging that the plaintiff had improperly united and had not separately stated two causes of action, a cause of action to set aside a deed and a cause of action to recover $500 (sic $500) moneys had and received. The demurrer also alleged that there was a misjoinder of parties defendant because the action to set aside the deed was addressed to all of the defendants and the cause of action for money had and received was addressed to the

defendant Stuart only. The trial court overruled the demurrer. There was no error in the ruling.

[3-5] The plaintiff showed by the evidence that the relation of attorney and client arose through a written contract executed September 12, 1916; that said writing called for a fee measured at two-tenths of the plaintiff's share; and that on March 30, 1917, the defendant took from the plaintiff transfers measured at three-tenths. The plaintiff also introduced testimony tending to prove each of her allegations; thereupon the defendant introduced some testimony to the effect that the plaintiff had been advised as to the contents of the papers which she signed; thereupon, and in rebuttal, the plaintiff called the county assessor, and, over the objection and exception of the defendant, the assessor testified that the whole tract, of which the property in dispute was a part, had a value of $800,000. There was no error in receiving the testimony. The burden of showing that the transfers were fair and that the consideration was adequate rested on the defendant. True, he had not introduced any evidence showing that the consideration was adequate, but if he had wanted to cover the omission in his proof he could have made the request. By failing to meet the burden of proof he may not complain because the plaintiff did not rest her case on the presumption in her favor as expressed in the statute (Civ. Code, § 2235).

[6] Points 3, 4, 5, and 6 attack certain findings as not being supported by the evidence and the complete answer is that the plaintiff introduced evidence tending to support each and all of her allegations. The defendant introduced some evidence to the contrary. The conflict was for the determination of the trial court. The plaintiff testified that three papers were together in the form of a book; that the lease from Mrs. Espinosa and all of her children to the Spreckels Sugar Company was read to her; however, that paper is not here involved. She also testified that the other two papers were not read to her; that all of the papers were in English, and that she could not read English. While on the stand as a witness the defendant testified that all of the papers were attached together. Two other witnesses who were present at the execution of the papers testified that they saw two separate papers—a lease and something else. But, as stated by both the plaintiff and the defendant, there were no two separate papers but all three were attached together. The only question for the trial court to determine was as to whether the plaintiff was advised as to the assignment measured at three-tenths of her interest instead of being measured at two-tenths, according to the terms of her written contract. The defendant says she was so advised. The plaintiff says she was not. The conflict in this testimony has been decided by the trial court in favor of the plaintiff.

[7] It does not appear from the record that the defendant Z. B. Stuart had transferred to the defendant Frank Shurtz or to the defendant David Wallace any specific parcels of the lands involved in this case. It is immaterial, therefore, that those two persons were originally named as defendants and that the action was later dismissed as to them.

We find no error in the record, and the judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

52 Cal. App. 637

BANDUCCI v. SRESOVICH. (Civ. 3273.)

(District Court of Appeal, Second District, Division 1, California. May 14, 1921.)

1. Pleading ⊂=214(3) — Plaintiff assumed on demurrer to have complied with provision of contract.

Though a contract by defendant to construct a building for plaintiff required plaintiff to exercise all reasonable diligence in the discovery and report to the contractor as the work progressed unsatisfactory materials and labor, where the complaint in plaintiff's action for breach of the contract alleged that he had performed all the covenants contained in the contract on his part, it must be assumed on demurrer that he complied with such provision.

2. Contracts ⊂=305(1) — Under building contract failure to express dissatisfaction during work held not waiver of defects.

Under a building contract providing that the payment of the progress payments should not be construed as an absolute acceptance of the work done up to the time of the payment, but that the entire work was to be subject to inspection and approval when claimed to be completed, and that the architect, superintendent, or owner should exercise all reasonable diligence in the discovery, and report to the contractor as the work progressed unsatisfactory materials and labor, the mere failure of the owner during the progress of the work to express dissatisfaction therewith, or direct the contractor's attention to omissions, could not be deemed a waiver of his right to a structure of the dimensions, and constructed of the materials, called for by the contract.

3. Contracts ⊂=332(2)—Complaint in action for breach of building contract not demurrable.

In an action against a building contractor for breach of the contract, a complaint, which, though awkwardly drawn, showed the making of the contract, the performance by plaintiff of all the conditions thereby imposed on him, defendant's breach of the contract and the resulting damages, for which, upon proof of such facts and the absence of any sufficient defense, plaintiff would be entitled to judgment, was not subject to general demurrer.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by Louis J. Banducci against Joseph Sresovich as administrator, substituted for D. Ashbury Evans, deceased. From a judgment for defendant on demurrer, plaintiff appeals. Reversed.

E. A. Klein, of Bakersfield, for appellant.

Wetherhorn, Hoyt & Jones, of Bakersfield, for respondent.

SHAW, J. By this action plaintiff sought recovery of damages for defendant's alleged breach of a contract to construct a building in accordance with his agreement so to do. A general demurrer interposed to the complaint was sustained and, plaintiff declining to amend, judgment was entered for defendant, from which plaintiff appeals.

It appears that defendant, pursuant to a contract, set out in the complaint, erected a building for plaintiff; that by the terms of this contract the building was to be constructed in accordance with plans and specifications referred to therein, and under the supervision of the architect named or superintendent agreed upon by the parties, and payment therefor made, subject to approval of the architect, as the work progressed. The contract contained a provision as follows:

"Ninth: The payment of the progress-payments by the owner shall not be construed as an absolute acceptance of the work done up to the time of such payments; but the entire work is to be subject to inspection and approval of the architect, superintendent or owner at the time when it shall be claimed by the contractor that the contract and works are completed; but the architect, superintendent or owner shall exercise all reasonable diligence in the discovery, and report to the contractor, as the work progresses, materials and labor which are not satisfactory to the architect, superintendent or owner, so as to avoid unnecessary trouble and cost to the contractor in making good defective parts."

While inartificially drawn, the substance of the complaint is that plaintiff on his part performed all of the terms and conditions of the contract but that defendant on his part, in completing the house, failed and neglected so to do; that on or about October 1, 1918, plaintiff, in writing directed to defendant, specified various defects, omissions and substitutions in the construction of the building, and, in writing, requested that he comply with the contract; but, notwithstanding such notice and request, defendant has failed, neglected, and refused to comply with the provisions of his agreement, by reason of which fact the building as completed does not comply with the plans and specifications pursuant to which defendant agreed to construct it. In addition to the above, the complainant specifies the particulars wherein the building as completed fails to comply with the terms of the agreement, together with the damage alleged to have been sustained by reason of such noncompliance.

[1, 2] It was, as claimed by respondent, the duty of plaintiff, during the progress of construction, to "exercise all reasonable diligence in the discovery, and report to the contractor" as to materials and labor which were not satisfactory. Since, however, it is alleged in the complaint that plaintiff performed all the covenants contained in the contract on his part, we must, upon the demurrer, assume that he did comply with this provision. However, the question of whether plaintiff complied with this provision is unimportant, since by the terms of the contract the entire work, upon the claim of completion made by the contractor, was to be subject to the approval of the architect, superintendent, or owner, regardless of whether or not the owner or architect, during the progress of the work, had expressed dissatisfaction therewith. In other words, the mere failure of plaintiff, during the progress of the work, to express dissatisfaction therewith, or direct the attention of the contractor to omissions, could not upon the facts shown be deemed a waiver by plaintiff of his right to a structure of the dimensions, and constructed of the materials, called for by the contract, and for which he paid the price. Perry v. Quackenbush, 105 Cal. 310, 38 Pac. 740. This being true, and since, as alleged in the complaint, defendant failed to construct the building in accordance with the plans and specifications therefor, but in doing the work used materials other than those called for by the contract, and omitted the doing of work specified therein, it follows that it is sufficient to state a cause of action.

[3] However awkwardly drawn the complaint may be, it is not obnoxious to the general demurrer interposed. It shows the making of the contract, the performance on the part of plaintiff of all the conditions thereby imposed upon him, the breach of the contract by defendant, and the resulting damages, for which, upon proof of such facts and the absence of any sufficient defense, plaintiff would be entitled to judgment.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

52 Cal. App. 597

VOINICH et al. v. POE, County Clerk.

(Civ. 2235.)

(District Court of Appeal, Third District, California. May 11, 1921. Hearing Denied by Supreme Court July 7, 1921.)

1. New trial ⊂155—Stipulation of parties cannot keep alive motion for new trial.

As Code Civ. Proc. § 660, declares that the power of the court to pass on a motion for new trial shall expire within three months after the verdict of the jury, and that if such motion is not determined within three months, it shall be deemed denied, and section 939 allows 30 days for an appeal after entry of the order determining a motion for a new trial or other termination, the time within which the trial court may determine the motion for new trial is restricted to the three-month period, and cannot be extended by a stipulation of the parties.

2. Appeal and error ⊂349—Death of counsel held not to extend time for appeal.

Where on the day defendants' counsel died, the 30-day period allowed for an appeal by Code Civ. Proc. § 939, after termination of motion for a new trial had expired, the fact of counsel's death will not extend defendants' time for appealing under section 286, providing that when an attorney dies, the party to the action for whom he was acting must be required by the adverse party to appoint another attorney before further proceedings can be had, for there was nothing further for plaintiff who had recovered judgment to do; the appeal being a proceeding by defendants; hence a notice of appeal thereafter filed was ineffectual.

3. Mandamus ⊂57(1)—Clerk will not be compelled to make transcript where appellate court would have no jurisdiction of appeal.

Where the time for an appeal had expired, so that the appellate court would be without jurisdiction, and an attempted notice was wholly ineffectual, the clerk cannot, by mandamus, be required to make a transcript.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Petition by Martin Voinich and others for a writ of mandate against A. W. Poe, County Clerk, to compel preparation of a transcript. From a judgment for respondent after an order sustaining a demurrer to the petition, petitioners appeal. Affirmed.

Joe Huberty, of San Andreas, for appellants.

Snyder & Snyder, of San Andreas, for respondent.

BURNETT, J. On February 1, 1917, a complaint was filed in the superior court of Calaveras county, wherein Rose Rolleri was plaintiff and Martin Voinich, Nick Voinich, Mitchell Voinich and Pave Voinich were defendants. The cause came on regularly for trial on June 28, 1918, Messrs. Snyder and Snyder appearing as attorneys for the plaintiff and Will A. Dower as attorney for said defendants. Judgment was entered in said action on the 1st day of October, 1919, in favor of the plaintiff therein, and notice thereof was served upon the defendants and filed with the clerk on October 10, 1919. On the 20th day of said month the said defendants caused to be served and filed their "notice of intention to move for a new trial." On account of the illness of Mr. Dower, said attorney for the defendants, the parties entered into certain stipulations for the continuance from time to time of the hearing of said motion, the last stipulation being as follows:

"It is stipulated and agreed by and between the respective parties to the above-entitled action that the hearing of defendants' motion for new trial may be continued to and including the 25th day of February, A. D. 1920, at the hour of 10 o'clock a. m. or as soon thereafter as counsel can be heard. Dated this 9th day of February, 1920. Snyder & Snyder, Attorneys for Plaintiff."

The day this stipulation was signed and filed the said Will A. Dower died, and on June 8th following said defendants, petitioners herein, without any written notice or request by the adverse party, appointed Joe Huberty, Esq., as their attorney, for the purpose of seeking relief from said judgment in favor of said Rose Rolleri. On said June 8 said Huberty, as attorney for said defendants, caused to be filed with A. W. Poe, clerk of said superior court, substitution of attorney for said defendants, notice of appeal and the necessary undertaking to perfect the appeal in said cause. The following day, June 9, notice to the clerk was filed, requesting and directing him, as county clerk, to make up and prepare, for the purposes of appeal, a full and complete transcript of all the records and proceedings in said action. Said clerk refused, and ever since has refused, to comply with said notice. Thereupon, said defendants, as petitioners herein, began an action in said superior court for a writ of mandate to compel said Poe, as clerk of said court, to prepare said transcript. A demurrer to said petition, or complaint, was interposed by said Poe and sustained by the court, and from the judgment following said order this appeal has been taken.

[1] The first question is whether the stipulation of the parties was operative to keep alive the motion for a new trial. Section 660 of the Code of Civil Procedure provides:

"The power of the court to pass on motion for new trial shall expire within three months after the verdict of the jury or service on the moving party of notice of the decision of the court. If such motion is not determined within said three months, the effect shall be a denial of the motion without further order of the court."

It cannot be doubted that this provision is mandatory and jurisdictional. The trial court has no legal power to grant a motion for a new trial after the expiration of the time limited by said statute. It is equally plain that, if the court fails to act upon the motion within said period, by operation of law said failure is equivalent to a denial of the motion on the last day of said three months. If there were any doubt about the meaning of that statute it would be set at rest by the decision of the Supreme Court in Lancel v. Postlethwaite, 172 Cal. 326, 156 Pac. 486. Therein it is said:

"In other words, a trial court is empowered to grant a new trial, upon a motion duly made to that end, at any time within three months after the verdict of the jury or service on the moving party of notice of the decision of the court, but not thereafter; and its failure to determine within such time any such motion regularly made is a denial of such motion and a 'termination in the trial court' within the meaning of section 939 of the proceedings in such motion."

Said section 939 of the Code of Civil Procedure provides:

"An appeal may be taken from any judgment or order of a superior court from which an appeal lies under any provision of this Code, or of any other Code, or under any other statute, within sixty days from the entry of said judgment or order. * * * If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."

In Bidwell v. Sonoma County Transportation Co., 39 Cal. App. 330, 178 Pac. 722, the question arose whether said section 660 was affected by section 12, providing for the exclusion of the last day in which an act may be done if that falls on a holiday. In holding that said section 12 does not qualify said section 660 the court said:

"The latter section [section 12] is general in its terms as applied to the time within which an act may be performed; but section 660 is specific as to the time within which the court may pass upon a motion for a new trial, and in the most positive terms confines the power of the court to perform that particular act to the period named, and, going even further, provides that, failing action by the court within said time, the motion is automatically deemed denied."

The trial court's authority being thus limited, it manifestly cannot be extended by any stipulation of the parties. Land v. Johnston, 156 Cal. 253, 104 Pac. 449; Marin M. W. District v. North Coast Water Co., 178 Cal. 324, 173 Pac. 473. The foregoing decisions reassert the familiar principle that jurisdiction cannot be conferred by consent. In the former it is said:

"Statutes limiting the time of appeal are jurisdictional and mandatory, and as the time within which a notice of appeal may be filed is fixed by law it cannot be enlarged by stipulation of the parties or order of court."

[2] The motion for a new trial in the case of Rolleri v. Voinich et al. having been automatically denied on January 10, 1920, an appeal from the judgment therein in order to be effective had to be taken on or before February 9, 1920, unless the time was extended by reason of the death of the attorney for the defendants; and that brings us to the second question in the case.

It is the claim of appellants that the time was thus extended by virtue of section 286 of the Code of Civil Procedure, providing:

"When an attorney dies, * * * a party to an action, for whom he was acting as attorney, must before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another party, or to appear in person."

Under a fair construction of this section, since Mr. Dower was the attorney for the defendants in said action, and since he died on the last day in which an appeal could be taken if he were living, the plaintiff would have been required to serve said notice before taking any further proceedings in the case against said defendants. But the section has no application here, for the simple reason that said plaintiff took no further proceedings against said defendants. Plaintiff had already secured her judgment, and had the benefit of the denial of the motion for a new trial made by the defendants. The proposed appeal was not, of course, a proceeding against the defendants, but a proceeding by the defendants against the plaintiff.

If any authority were needed for a proposition that seems so plain, we may find it in the decision of the Supreme Court in Larkin v. Superior Court, 171 Cal. 719, 154 Pac. 841, Ann. Cas. 1917D. 670. The question arose over a motion to dismiss an action because not brought to trial within five years, as provided by section 583 of the Code of Civil Procedure. Plaintiff claimed that the five-year period was extended by reason of the death of said plaintiff's attorney, but the Supreme Court, in commenting upon said section 286, said:

"Clearly this section has no application here. It means no more than it plainly says, viz. that no proceedings may be had against him, no judgment or order or other step in the action taken, until he appoints an attorney, unless the prescribed notice be first given. The mere running of this five-year period, which had commenced to run prior to the death of Mr. Isaacs, was not a 'proceeding' had against the plaintiff, even under the very liberal definition given that term as used in section 473 of the Code of Civil Procedure, in Stonesifer v. Kilburn, 94 Cal. 43."

With equal propriety it may be said herein that the running of this 30-day period in which an application could be taken by Mr. Dower's clients was not and could not be extended by his death.

It is further to be observed that in the Larkin Case the Supreme Court expressed disapproval of the construction placed upon said section by the District Court of Appeal of the Second District in Troy Laundry Co. v. Drivers' Co., 13 Cal. App. 115, 109 Pac. 36.

[3] It necessarily follows that the notice of appeal filed by petitioners herein on June 8, 1920, was entirely ineffectual, and the appellate court would be without jurisdiction to review the cause upon its merits. The transcript, therefore, would be of no benefit to petitioners, and the court would not compel the clerk to perform the wholly idle and useless act of preparing a transcript that could not be available. In Spotton v. Superior Court, 177 Cal. 719, 171 Pac. 801, it is said:

"This is an application for a writ of mandate to compel the settlement of a bill of exceptions to be used on appeal from final judgment. Unless there is an appeal on which the bill of exceptions can be used, mandate will not issue, for such a writ will not issue where it would be of no benefit to the applicant, or to enforce a mere abstract right, unattended by any substantial benefit to the petitioner. Gay v. Torrance, 145 Cal. 147."

We think there is no doubt that the lower court was right in sustaining a demurrer to the petition, and the judgment is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

186 Cal. 301

NORTHERN CALIFORNIA POWER CO., CONSOLIDATED, v. FLOOD.

(Sac. 2942.)

(Supreme Court of California. June 20, 1921.)

1. Waters and water courses ⊂=152(8)—Evidence of prescription sufficient.

In an action to quiet title to a water ditch and the right to divert water, evidence *held* sufficient to show that defendant acquired a prescriptive right against plaintiff to use water from such ditch and the right to the use of the ditch.

2. Waters and water courses ⊂=143—Prescription limited to quantity of water beneficially used.

The right to the use of water of a stream may be acquired as against others entitled thereto, by taking and beneficially using the same adversely and continuously, under a claim of right for five years, but such right extends only to the quantity put to beneficial use, and the fact that one has a ditch running through his land, which he keeps full of water diverted from a stream, gives him no right to such water, against others having rights therein, and the use of all the water in the ditch, or a specific portion thereof, for only part of the time, is insufficient to give title to that quantity continuously.

3. Frauds, statute of ⊂=129(8)—Parol sale of water right valid.

A parol sale of a quantity of water flowing in a ditch accompanied by payment and possession is valid.

4. Waters and water courses ⊂=154(1)—Water in ditch appurtenance to land.

Water running in a ditch from a natural stream to a parcel of land to be used for beneficial purposes thereon is a species of real property, and the right to take and so use it is an appurtenance to the land.

5. Waters and water courses ⊂=151—Prescriptive title not lost by nonuse for less than statutory period.

A prescriptive title to water in a ditch acquired by continuous use for five years is not lost by subsequent interruption for less than five years, in view of Civ. Code, §§ 811, 1007.

6. Waters and water courses ⊂=137—Continuity of use essential to prescription.

A right to the use of water for irrigation may be acquired by prescription without showing that it is actually running on the land all the time, but its use by claimant when necessary and under a claim of right, without molestation, and with the knowledge, actual or implied, of others interested, is sufficient with respect to continuity of use, though there may be days or weeks during which he does not use it at all; and if he has used it continuously for a certain period each day long enough to acquire a prescriptive right to such use, he has the right only for that period, and cannot object to the use of the flow by others during the intervening time.

In Bank.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by the Northern California Power Company, Consolidated, against Mollie Flood. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Carr & Kennedy, of Redding, for appellant.

Jesse W. Carter, of Redding, John H. Tolan, of Oakland, and Albert C. Agnew, of San Francisco, for respondent.

SHAW, J. The plaintiff appeals from the judgment.

The complaint states a cause of action to quiet title of the plaintiff in and to a certain water ditch known as the "Asbury ditch," and in and to the right to divert into said ditch from Mill Seat creek sufficient water to fill the ditch, and the right to use said water for beneficial purposes and carry the water in said ditch and its connecting waterways to the place of use.

The defendant in answer alleged that she was the owner of 160 acres of land and the owner of a right by prescription to use for beneficial purposes thereon one-fourth of the water diverted into and flowing in said ditch, and the right to maintain and use said ditch for the purpose of conducting that portion of the waters thereof from said creek to her said land.

The findings are that the plaintiff and defendant, as tenants in common, are the owners of said ditch and of the right to divert into the ditch the waters of Mill Seat creek to the extent of a flow of 1,400 inches measured under a 4-inch pressure; that defendant is the owner of the right to use one-fourth thereof, which is found by the court to be the equivalent of 350 inches measured under a 4-inch pressure, during the irrigating season of each year for beneficial purposes on her said land. It is further found that for 20 years next before the beginning of the action defendant and her predecessors in interest, under claim of right, and continuously during the irrigating season of each year, had used all of said 350 inches of water on said 160 acres of land now belonging to her, and that the use thereof was and is necessary for the proper cultivation of said land and for the raising of crops thereon. It further appears that the plaintiff is the owner of a tract of land known as the Myers place, situated on said ditch below the land of defendant, and that after the defendant had used so much of said 350 inches as she desired on her said land the surplus was allowed to run down the ditch for use on said Myers place. The evidence shows that the Myers place contains 200 acres of land.

The judgment declared that plaintiff and defendant were owners in common of the Asbury ditch, that plaintiff had the right to take all the waters therein, at all times, except that during the irrigating season of each year the defendant had the right to have flow down in said ditch through her land water from said creek amounting to 350 inches, as aforesaid, and to use said 350 inches on her land, but that she should allow whatever remained after such use to flow down the ditch to the said Myers place for the use of the plaintiff.

The plaintiff claims that the evidence is insufficient to support the finding that the defendant is the owner of or entitled to use the 350 inches of water as aforesaid.

[1] The evidence shows that the Asbury ditch, and its connecting waterways extended from a headgate on Mill Seat creek down to and through the land belonging to the defendant and from thence on down to, through, and beyond the said Myers place. Without detailing the evidence at length, it is sufficient to say that it shows that the defendant has acquired a prescriptive right against the plaintiff and its predecessors in interest to use water of said creek from said ditch on her land, and the right to the use of the ditch as a means of conveying said water from the headgate of the ditch in the creek to said land. The only important question on the point of her water right is as to the quantity of water to which she is entitled.

With respect to the quantity of water used by the defendant the evidence is altogether indefinite and uncertain. Indeed, there was no attempt to prove the use of any specific quantity of water for any particular time. The evidence was sufficient to show that the ditch running through the defendant's land was kept running full of water during the irrigating season, but how much thereof, or how many miner's inches thereof, was taken out by her and applied to her land was neither shown nor attempted to be shown. The evidence shows that the total amount of land irrigated for crops was 20 acres, including about 18 acres of alfalfa and an acre and a half of orchard. There was no use of the water other than for irrigation, watering stock, and domestic purposes. There is some evidence that when water was not used on the alfalfa or orchard it was allowed to run over some 8 or 10 acres of pasture land for the purpose of making the grass grow for pasture. There is nothing to the effect that these uses required that the 350 inches of water should flow out of the ditch and upon the fields during the whole season. The defendant seems to have assumed that a perfect right to the water could be established by proof that the ditch was kept running full during that period. There was no testimoney directed to the purpose of establishing the quantity of water taken and actually used on the land.

[2] The right to the use of waters of a stream may be acquired, as against others

entitled thereto, by taking and beneficially using the same adversely and continuously under a claim of right for a period of five years. But in such a case the right, with respect to the quantity of water therein, extends only to the quantity actually put to a beneficial use. The fact that one has a ditch running through his land which he keeps full of water diverted from a stream does not give him any right to such water against others who have rights therein. In order to gain a right to the water the diverter must actually use it, and the quantity used measures the extent of his right. The use of all the water in the ditch, or a specific portion thereof, for only a part of the time, is not a sufficient use to give title to that quantity of water continuously. For example, if 20 acres of land requires irrigation once a month during the irrigating season and the entire flow of the ditch for two days is necessary to accomplish one irrigation, the fact that the claimant has used the water in that manner once a month during every irrigating season does not give him the right to the entire flow during the intervals of nonuse. If others are using the water during such intervals of nonuse by him, his right would include only one-fifteenth of the full flow of the ditch. We emphasize this point because we have found that in recent cases the question of the duty of water seems to have received very little attention. From comparison with many other cases on the subject, we are disposed to doubt whether a continuous flow of 17½ miner's inches of water for each acre irrigated can ever be necessary, or can ever be otherwise than excessive and wasteful.

There are some other questions which deserve notice.

[3, 4] The evidence tended to show that the water right of the defendant was acquired originally by one King from Asbury, the original appropriator, by a verbal agreement for the sale of 30 inches of the water flowing in the ditch, and that thereafter King and his successors in ownership of the Flood tract, claiming under said purchase, used upon the land such part of the waters flowing in the ditch as they deemed necessary from time to time, and that this use was made with the knowledge of Asbury and his successors. Such a use by King and his successors claiming under the verbal agreement would be adverse to Asbury and to others holding under him, and if continued uninterruptedly for five years it would create a prescriptive title to the quantity actually used, even if the sale of water by parol agreement were invalid. The evidence in this case indicates that a prescriptive title had been acquired in that manner. Such parol sale, however, is not invalid. Water running in a ditch from a natural stream to a parcel of land, to be used for beneficial purposes thereon, is a species of real property, and the right to take it and so use it is an appurtenance to the land. The purchase money for the thirty inches was paid in full, and King at once took possession of the right by taking and using the water in pursuance of the sale, and he and his grantees have ever since continued to do so, except as interrupted after the year 1909, by the wrongful acts of the plaintiff and its predecessors in interest. Consequently the defendant has a complete equitable title as against the plaintiff to the 30 inches so purchased by King from Asbury.

[5] With respect to the claim to a greater quantity it may be further stated that there was evidence of use for a period of five years, continued in such a manner as to create a prescriptive title. Such title would not be lost by subsequent interruption for less than five years. Such a right constituted a servitude upon the original title of Asbury, and the nonuse thereof would not extinguish it unless the nonuse continued for the period of five years. Civ. Code, § 811, subd. 4; Id. § 1007.

[6] A right to the use of water for irrigation of land may be acquired by prescription without showing that the water is actually kept running upon the land all the time. Irrigation, as usually practiced, is required only at intervals during the season. If the claimant takes the water and uses it at the time when it is necessary to do so and does this under claim of right, without molestation by others interested in the stream or ditch, and with their knowledge, actual or implied, it will be sufficient with respect to the continuity of use, although there may be many days or weeks during which he does not use it at all. The evidence leaves the question of the use of the water during the nighttime uncertain, not showing clearly whether the continuous use spoken of was during the day only or both day and night for the entire irrigating season. The value of water for irrigation is too great in this state to allow a landowner to gain a right thereto for the entire 24 hours of each day by using the same for only a half or any other portion of the time less than the whole. If he has used it continuously for a certain period each day long enough to gain a prescriptive right to such use, he would have the right only for that period, and he could not lawfully object to the use by others of the flow during the intervening time of each day.

The point is raised that the plaintiff is and has been applying the water to public use, and that the defendant has allowed that public use to be established and continued without objection for so long a time that she is now estopped to assert her own right to a part thereof and is limited to an action for damages, under the doctrine stated in Miller & Lux v. Enterprise, etc., Co., 169 Cal. 424, 147 Pac. 567, and cases there cited. The answer to this objection is that the evidence

shows that she did object to the plaintiff's conduct in taking all of the water and has continued to object ever since it began, and has interrupted the plaintiff's use many times and appropriated to her own use the share of the water which she claims the right to use. While there is no express finding on the point, it is included in the general findings of ownership, and the complaint that the court did not find on this subject is without foundation.

We are satisfied with the conclusions of the court on all the points except as to the quantity of water to which the defendant is entitled. There is no necessity for a new trial of any other issue. Upon the going down of the remittitur the lower court is directed to proceed to try the issue as to the quantity of water to which the defendant has gained the right by prescription, or under the parol sale to King, or both, and when it shall have found the quantity to which she is so entitled to render judgment accordingly securing to her the right thus determined.

The judgment is reversed, and the cause is remanded to the court below, with directions to try the single issue above stated, and thereupon to render a new judgment upon that and the other findings in the cause.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

186 Cal. 335

WHITE et al. v. RED MOUNTAIN FRUIT CO. (L. A. 6346.)

(Supreme Court of California. June 23, 1921.)

1. Carriers ⟸348(4)—Trial ⟸194(18)—Instruction on contributory negligence in suit for injuries in entering elevator held not confusing, and not on the weight of the evidence.

In an action for injuries on entering an elevator, an instruction that if plaintiff exercised the care of an ordinarily prudent person she was not guilty of contributory negligence, unless she were also guilty of some fault or negligence which contributed to the injury, was not erroneous, as being on the weight of the evidence, nor as charging that plaintiff's contributory negligence must be an act outside of stepping into the elevator.

2. Damages ⟸216(1)—Instruction not to consider, in fixing amount of verdict, whether defendant would appeal not erroneous.

In a personal injury suit, an instruction not to consider, in fixing the amount of the verdict, if for plaintiff, whether defendant would appeal did not amount to telling the jury not to hesitate to render a large verdict if they thought defendant would appeal, nor did it indicate the court believed the plaintiff entitled to such a verdict, the import of the instruction being that the jury should not return a smaller verdict than plaintiff was entitled to because defendant might appeal if it thought the sum too large.

3. Damages ⟸216(8)—Instruction not requiring finding plaintiff would have kept on working if not injured not error where no evidence to contrary.

In an action for injuries to a wife, where there was no evidence that she would not have continued working and earning wages if not injured, an instruction to allow the husband damages for wages lost and to be lost was not erroneous in not requiring a finding there was a reasonable certainty she would have kept on working, the reasonable inference from the fact that she was working at the time of the injury being that she would continue to do so.

4. Trial ⟸296(3)—Instruction responsibility of elevator operator is of highest character not inconsistent with one he is not insurer of safety, but bound to utmost care.

An instruction that the responsibility of passenger elevator operators is of the highest character was not inconsistent with one that they are not insurers of the absolute safety of passengers, in view of the rest of such instruction that they are bound to the utmost care and diligence of very cautious persons, and are responsible for injury caused by the slightest neglect against which human care and foresight might have guarded.

5. Carriers ⟸321(21)—Instruction that plaintiff need not prove exactly the cause of accident if shown due to defective or negligently operated elevator not error as removing burden of proof.

An instruction that if plaintiff proved that while she was riding in defendant's elevator there was an accident, by reason of a defect therein, or in the operation thereof, she need not prove exactly the cause of the accident, was not erroneous, as removing the burden of proving negligence, it meaning simply that if plaintiff showed she was hurt by reason of such defect she need not show the exact cause of the accident.

6. Carriers ⟸321(21)—Instruction if plaintiff proved accident due to defect in or defective operation of elevator, burden on defendant to disprove negligence, correct.

An instruction that if plaintiff proved there was an accident to the elevator in which she was riding when injured, by reason of a defect therein, or in 'ts operation, the burden shifted to defendant to disprove negligence, by proof that the accident could not have been prevented by the exercise of the highest degree of care, was correct.

7. Trial ⟸296(11)—Instruction plaintiff need not present direct evidence of damages not reversible error, in view of other instructions to allow special damages.

An instruction that plaintiffs need not present direct evidence of their damages, but need only show the extent of their injuries, and that they were proximately caused by the accident, it being for the jury to determine the damages, was not erroneous as charging no evidence of the amount of special damages was required,

in view of other instructions to allow sums incurred in employing physicians, nurses, etc.

8. Damages ⊂⊃216(1)—Instruction to allow damages for injuries if they hastened development of disease held correct.

An instruction that, if plaintiff's injuries hastened the development or increased the activity of a disease from which she was suffering, she was entitled to recover damages sustained from the injuries received, was not erroneous as charging that she could recover damages for the disease, the instruction meaning that she could recover for the damages done in hastening the development or increasing the activity of the disease.

9. Trial ⊂⊃133(2)—Effect of misconduct of counsel in asking question removed by admonition of court to disregard answer.

In a personal injury suit, the effect of misconduct of plaintiff's counsel, if any, in asking plaintiff on redirect examination if he had said that it was on behalf of a company that a doctor came to see him, to which he answered in the affirmative, was removed by the court's admonition to the jury to disregard the answer.

10. Carriers ⊂⊃346(1)—Evidence held insufficient to establish contributory negligence in stepping into elevator.

Evidence *held* insufficient to show that plaintiff, injured by an elevator starting up as she stepped into it, was guilty of contributory negligence.

11. Carriers ⊂⊃347(4)—Question of negligence in not observing whether elevator platform even with floor held for jury.

It is not negligence, as a matter of law, for one invited to enter an elevator by the opening of the door to step down a foot, nor to step into it without observing whether the platform is exactly even with the floor, the care required being for the jury.

Department 1.

Appeal from Superior Court, Los Angeles County; Louis W. Meyers, Judge.

Action by Evelyn C. White and husband against the Red Mountain Fruit Company, a corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

Duke Stone and Daniel Hunsaker, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

LAWLOR, J. The plaintiffs are husband and wife, and recovered a judgment against the defendant for personal injuries suffered by the wife as she was entering an elevator operated by the defendant in a building owned by it, the gravamen of the asserted cause of action being the negligence of the defendant in the maintenance and operation of the elevator. The defendant appeals, and urges three grounds for reversal, namely: That the trial court erred in certain instructions to the jury; that plaintiffs' counsel was guilty of misconduct in the course of the trial; and that the evidence shows that the plaintiff injured had been guilty of contributory negligence.

[1] As to the instructions complained of, we might say preliminarily that, so far from their being open to criticism, they seem to us models of concise and lucid statement to the jury of the issues which they were to determine and the rules of law applicable thereto. The first instruction complained of is as follows:

"The plaintiff Evelyn C. White was only required to exercise ordinary care at the time and place in controversy—that is, she was required to only use the care that an ordinarily prudent person would have exercised under the same or similar circumstances, and if she exercised such care then she was not guilty of contributory negligence, and you will so find; for it is no defense to this action that the said plaintiff by her own act in attempting to get into the elevator has contributed to the injury, but it must also appear that she was guilty of some fault or negligence, and that such fault or negligence, if any, has contributed to the happening of the accident."

The criticism made of this instruction is that it is one upon the weight of the evidence, and that it is confusing, contradictory, and misleading in that it directs the jury that the only fault or negligence on the part of the plaintiff which would be contributory negligence would be some act on her part outside that of stepping into the elevator. We think it apparent, from a reading of the instruction, that it is not in fact one upon the weight of the evidence. We think it also plain, from a reading, that it was not an instruction that the contributory negligence which would bar a recovery on the part of the plaintiff had to be some act on her part outside of her act in stepping into the elevator. The point of the instruction was that the mere act of stepping into the elevator would not, in and of itself, bar a recovery, but there had to be some negligence on the plaintiff's part, either in the doing of this act or in some other way. This, of course, is the law. It is also claimed that the instruction is inconsistent with other instructions given on the subject of contributory negligence, but the contention likewise proceeds upon the assumption that the instruction was one to the effect that the only fault or negligence on the plaintiff's part which would bar a recovery would be some act outside of her act in stepping into the elevator. This assumption is without foundation, and the inconsistency asserted does not in fact exist.

[2] The second instruction complained of is as follows:

"If you find for the plaintiffs, then, in fixing the amount of your verdict in this case, you

should not consider whether the same is large or small, so far as the number of dollars is concerned, and neither should you consider whether or not if you fixed a certain amount the defendant would appeal or would not appeal, because that is not a matter of any concern to you, and is not one of the questions submitted to you, it being your duty alone to apply the law as given to you by the court to the facts proven in the case, and then, if you shall find for the plaintiffs, bring in a verdict in such an amount as will reasonably and fairly compensate the plaintiffs for the damage done to them, and each of them, and when you have done that you have performed all the duty that is required of you in this case."

It is said of this instruction that it amounted to telling the jury that they should not hesitate to render a large verdict if they thought the defendant might appeal. We do not so read it. What it did tell the jury was that they should not return a smaller verdict than the plaintiff was properly entitled to as compensation, because of the fact that the defendant might apeal if the sum the jury thought the plaintiffs were entitled to as compensation were large, and they should bring in a verdict for that amount. It is also said of the instruction that it might indicate to the jury that the court believed the plaintiff entitled to recover a large verdict. We can find no such indication in it. Just what the occasion was which called for the giving of this instruction is not brought to our attention, and ordinarily, of course, there would be no occasion for it; but it is not asserted that there was no occasion, and that the instruction was correct does not admit of serious question.

[3] The third instruction criticized reads as follows:

"If you shall conclude that plaintiffs should recover herein, and if you further find that Evelyn C. White before the accident in controversy was earning wages, and shall further believe that she was unable for any length of time after said accident to earn said wages, and will be unable in the future for any length of time to earn the same wages by reason of any injuries received in the accident in controversy here, then I instruct you that you may find for the plaintiff Carl A. White such sum in damages as will reasonably and fairly compensate for such loss of wages, and in addition thereto you will allow him such sum as the evidence shows he has necessarily and reasonably expended or incurred in employing physicians and surgeons to treat the injuries of his said wife, together with any reasonable and necessary amount of money paid to any nurse or nurses for caring for her said injuries, in all not exceeding the amount alleged in the complaint, to wit, $965."

It is not questioned that the plaintiff's husband was entitled to recover, if entitled to recover at all, for the wages which his wife had lost, and for the wages which it reasonably appeared she would lose in the future, but the instruction is criticized because it does not instruct the jury that before they could allow compensation for loss of wages they should find that there was a reasonable certainty that the wife would have kept on working if she had not been hurt, and would have continued to earn wages. The fact of the matter was that the wife was actually working and earning wages at the time she was hurt, and every reasonable inference is that she would have kept on doing so except for the injury. No evidence justifying a contrary inference is brought to our notice, and, this being the situation, the injection into the instruction of the element which the defendant claims was erroneously omitted would have been the injection of an element for which there was no support in the evidence.

[4] The fourth instruction complained of reads:

"Although not insurers of the absolute safety of the passengers, they [persons operating passenger elevators] are bound to the utmost care and diligence of very cautious persons, as far as human care and foresight can go, and are responsible for injury occasioned by the slightest neglect against which human care and foresight might have guarded. The responsibility is proportioned to the danger, and is of the highest character in the case of those who operate elevators for lifting persons from one level to another."

It is said of this instruction that the portion to the effect that the responsibility of one operating an elevator for the carriage of passengers is "of the highest character" is inconsistent with the first portion of the instruction to the effect that such persons are not insurers of the absolute safety of the passengers, the argument being that the highest character of responsibility is that of an absolute insurer. This criticism is hypercritical in the extreme. The responsibility which was referred to in the latter portion of the instruction is very plainly that responsibility for the exercise of the care which is referred to in the first portion.

[5] The fifth instruction complained of reads:

"You are instructed that it is not necessary for the plaintiff to prove *exactly* the cause of the accident to the plaintiff, Evelyn C. White, while being carried by the defendant in its elevator at the time and on the occasion in controversy here, but it is only necessary, in law, for them to prove the allegations of their complaint that she was thus being carried, and while thus being carried there was an accident to the elevator in which she was riding by reason of some defect in the elevator or its machinery, or appliances, or in the operation thereof, and when this accident is thus proved, the burden shifts upon the defendant to show that it was not guilty of negligence by proof

that the accident could not have been prevented by the exercise of the highest degree of care and prudence on its part, or that said accident was caused by inevitable casualty, accident, or misfortune, or some other cause which human care, judgment, and foresight could not prevent."

The first criticism of this instruction is in its use of the word "exactly" italicized above. The ground of the criticism is not plainly expressed, but apparently it is that the effect of the use of this word was to remove from the plaintiff the burden of proving negligence. But this was plainly not the effect of the instruction. The instruction was simply that, if the plaintiff showed that she was hurt through an accident to the elevator by reason of some defect in it or the appliances connected with it, or by reason of its defective operation, she did not have to show the exact cause of the accident. It needs no authority to support the proposition that this is a correct statement of the law.

[6] The second criticism of the instruction is of that portion to the effect that, upon plaintiff's showing that she was hurt by reason of some defect in the elevator or its appliances, or by its defective operation, the burden is shifted to the defendant to show that it was not guilty of negligence by proof that the accident could not have been prevented by the exercise of the highest degree of care on its part. In support of his criticism, counsel cites the opinion of this court reported in 40 Cal. App. 689, 181 Pac. 669, denying a rehearing of Bourguignon v. Peninsular Ry. Co., 40 Cal. App. 689, 181 Pac. 669. An examination, however, of the opinion referred to shows that it lays down the exact rule contained in the instruction under discussion. We would say, also, that this rule is so familiar and has been so repeatedly laid down that it is no longer open to reasonable question.

[7] The sixth instruction complained of reads:

"The law does not require that the plaintiffs present any direct evidence to show the amount of damages which they have sustained in this behalf, or the amount of money which would compensate for the injuries the said Evelyn C. White has received; all that is necessary in this behalf is to show to the jury the extent of her injuries, if any, and that they were proximately caused by the accident; then it is for the jury to determine, under all the evidence and in the manner I have indicated, the amount of damages which ought to be awarded to plaintiffs therefor."

It is not contended that this instruction is not correct so far as general damages caused by the injury to the plaintiff wife are concerned. The complaint is that it in effect charged the jury that no evidence of the amount of special damages, such as doctor's bills, medicines, nurses' hire, and the like, was necessary. Suffice it to say that when the instruction is taken in connection with the other instructions given (see, for example, the third instruction discussed herein) it is not open to any such interpretation.

[8] The seventh, and last, instruction complained of reads:

"If you find from the evidence that the plaintiff, Evelyn C. White, received any of the injuries alleged in the complaint solely by reason of the defendant's negligence, and you further find that at the time of the reception of said injuries said plaintiff was suffering from some disease or ailment or malady, to wit, hyperthyroidism, and you further find that said injury hastened the development of such disease or increased the activity thereof, and that thereby said plaintiff's present condition, whatever you find that to be, has resulted from such injury, then I charge you that the plaintiffs are entitled to recover such damages as you may determine she has sustained from the injuries, or any of them, received in the accident."

The criticism made of this instruction is that it in effect told the jury that if the plaintiff at the time of the accident was suffering from a disease, the plaintiff, as a part of her damages, if she was entitled to any, was entitled to recover damages for the disease. The instruction cannot be so read. It simply charges the jury that, if the plaintiff was suffering from a disease at the time of the accident, and the accident hastened the development or increased the activity of the disease, the plaintiff, if entitled to recover, was entitled to recover for the damages done by the accident in thus hastening the development or increasing the activity of the disease. This was a correct statement of the law. Campbell v. Los Angeles Traction Co., 137 Cal. 567, 70 Pac. 624.

[9] The alleged misconduct of plaintiffs' counsel consists in his having asked this question upon the redirect examination of the plaintiff husband: "Is it not a fact that Dr. Ryder came up there on behalf of a company—you said company?" to which the witness answered, "That is it exactly." The question and answer were immediately objected to, the asking of the question assigned as misconduct, and the court instructed the jury to disregard the statement of the witness. It is not necessary to determine whether there was, in fact, any misconduct on the part of plaintiffs' counsel, although perhaps, in justice to him, we should say that the circumstances under which the question was asked tend strongly to negative any such conclusion; but, assuming that the asking of the question was misconduct, it is yet evident that it was by no means of such a serious nature that it may be taken that its effect was not removed by the admonition of the court. Williamson v. Hardy, 190 Pac. 646.

[10] The point that the evidence showed

that the plaintiff was guilty of contributory negligence was based upon the testimony of the plaintiff wife. The contention is that this testimony shows that she was warned to wait before stepping into the elevator, that she knew that the floor of the elevator was not even with the landing, and that it was negligence on her part to step into the elevator under these conditions. The testimony, however, does not necessitate any such conclusion as counsel contends for. What happened, as related by the plaintiff wife, was that, as she was waiting for the elevator, the elevator stopped at the floor, the door opened, and she started to step in; the operator said, "Wait," the elevator started up, and she was hurt. She also testified that, at the time she stepped in, the elevator platform was a foot or a little more below the floor, and that she did not observe this until she was in the act of stepping in. The opening of the door was, of course, an invitation for her to enter, and it is apparent that the jury were at liberty to find that the warning from the operator was not given in time for her to obey it.

[11] Neither are we prepared to say that it is negligence as a matter of law for a person invited to enter an elevator by the opening of the door either to step down a foot or so for that purpose or to step into the elevator without observing whether the platform is exactly even with the floor. What reasonable care required of the plaintiff under the circumstances was, at best, a question for the jury to determine.

Judgment affirmed.

We concur: SHAW, J.; OLNEY, J.

In re BRIGGS' ESTATE.

BRIGGS et al. v. BRIGGS.

(L. A. 6614.)

186 Cal. 351

(Supreme Court of California. June 25, 1921. Rehearing Denied July 25, 1921.)

1. Wills ⟹470—Intention gathered from construction of entire will.

At common law, and under Civ. Code, § 1321, requiring that all the parts of a will be construed in relation to each other so as to form, if possible, one consistent whole, the testator's intention must be gathered from a construction of the entire will.

2. Wills ⟹602, 603(3)—Bequest to two sons, portion of one dying childless to pass to survivor, held to create limited fee.

Testatrix had two married sons, one childless, the other having children and grandchildren. To them she bequeathed her residuary estate in equal parts, but in another clause of the same paragraph expressed her desire that if the childless son died without issue, one-half his portion should revert to the other, and the rest to her great-grandchildren. *Held*, it being her apparent intention to keep the residuum among her lineal descendants, the intent of the entire paragraph was that the childless son should take his share subject to the condition that if he died childless, it should go to his brother and the other residuary legatees; neither clause being complete in itself, but together creating a limited fee.

3. Wills ⟹104—Words "desire," "revert," and "his portion" construed.

Where a testatrix bequeathed the balance of her estate to her two sons in equal parts and in another clause of the same paragraph stipulated that in the event one should die without issue, "I desire one-half his portion to revert to" the other, such second clause was sufficiently clear and distinct, the word "desire" in connection with the words used in the first clause equally well expressing her testamentary disposition, and being as clear as "bequeath," the word "revert," though technically incorrect, being merely an expression of her intention that the property should "go" to the survivor, and the expression "his portion" referring to the property to be given over to the other legatees in case the son should die childless, or the property be received under the will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Desire; Portion; Revert.]

4. Wills ⟹467—"Desire" of testatrix held mandatory, being addressed to law, not to legatee.

Where a testatrix expressed her "desire" that if one of two sons to whom she bequeathed her residuary estate died without issue his share should go to the other son and her great-grandchildren, such expression was mandatory, words in a will expressing a mere desire being precatory only if addressed to the legatee, but mandatory if addressed to the law or decedent's personal representative, or standing alone as an expression of testatrix's desire.

5. Wills ⟹545(3)—Will, providing that if devisee died without issue his share should pass to others, held to mean death at any time before or after testatrix's death, thus creating limited fee only.

Where a testatrix in one clause bequeathed her residuary estate to her two sons in equal parts, and in another provided that if one of the sons, who was childless, died without issue, one-half his portion should revert to his brother and the other to testatrix's great-grandchildren, the latter clause was not intended to be substitutive, in the event the precedent gift lapsed on the donee's death without issue during testatrix's lifetime, the reference being to death at any time, the happening or nonhappening of the contingency determining the result; Civ. Code, § 1336, declaring that words in a will referring to death or survivorship "simply" shall relate to the time of the testator's death, being inapplicable to death on a contingency.

Angellotti, C. J., and Olney, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Petition by Charles T. Briggs for partial distribution of the estate of Hortense E. Briggs, deceased. From an order granting the petition, Fordyce W. Briggs and other legatees appeal. Reversed.

Rehearing denied in bank; ANGELLOTTI, C. J., and SHURTLEFF, J., dissenting.

Harold M. Sawyer and Alfred T. Cluff, both of San Francisco, for appellants.

George R. Freeman, of Corona, for respondent.

LAWLOR, J. This is an appeal by certain legatees of Hortense E. Briggs, deceased, from an order granting a petition of Charles T. Briggs, another legatee, for partial distribution.

Decedent died, leaving a will, in which she made certain bequests. The balance of her estate was left to her two adult sons, the said Charles T. Briggs and Fordyce W. Briggs, under the following clause, which constituted the fourth paragraph of the will:

"The balance of my estate I bequeath to my two sons Charles T. Briggs of Corona and Fordyce W. Briggs of Santa Ana, to be equally divided between them— In the event my son Charles dies without issue I desire one-half his portion to revert to my son Fordyce W. Briggs and one-half to be equally divided between my great-grandchildren."

The will was admitted to probate. In due course the said Charles T. Briggs petitioned the court for partial distribution to him absolutely of certain property of the estate under the said fourth paragraph of the will. The petition was granted, and this appeal is taken from the order. The sole question presented on appeal is the proper construction of the said fourth paragraph of the will.

The contention of appellants is thus stated:

"The fourth paragraph gives respondent a fee in half of the residuum of the property, but the gift over creates a conditional limitation on that fee, making the same a base or limited fee, subject to be terminated upon respondent's death without issue, and upon such termination the property vests in appellant Fordyce W. Briggs, and in the great-grandchildren of the testatrix living at the date of such termination."

Respondent contends in effect that this is a misinterpretation of the fourth paragraph, which, he insists, is to be read as two separate clauses. He claims that by this paragraph he is given an equal portion and an equal interest in the estate with Fordyce W. Briggs, and that on the death of the testatrix he took an undivided one-half of the estate in fee simple absolute. In support of this position he argues: First, that it was the intention of the testatrix that he should have an equal undivided one-half interest in the fee simple with Fordyce, and that she clearly states this intention in the first clause of the paragraph; second, that the second clause of the paragraph is contradictory, inconsistent, and repugnant to the first, and cannot be given effect because it is in opposition to the fee plainly given in the first clause; third, that the first clause of the paragraph is a clear devise and bequest, that the second clause is not equally clear and distinct, and that the first clause cannot be affected by inference or argument from other parts of the will, or by parts not equally clear and distinct—the second clause is indistinct because of the uncertainty of the meaning of the words "desire" and "revert," and the uncertainty of what would be meant by "his portion" which would have to be paid over to the other legatees in case Charles should die childless; fourth, that the second clause is precatory and not mandatory; and, fifth, that the second clause is substitutive—that the gift over was intended as a substitutionary scheme in case the precedent gift to Charles lapsed; in other words, the expression "dies without issue" refers only to his death in the lifetime of the testatrix.

For the purposes of his brief respondent divides the paragraph into two clauses which he designates as "clause 1" and "clause 2," respectively. It is upon this segregation of the paragraph that respondent bases his interpretation of the will. He claims that it was the intention of the testatrix he should have an equal estate in fee simple with Fordyce under the first clause, and that the second would not cut down the estate given by the first.

[1, 2] In our opinion, when the entire paragraph is considered together, it becomes plain that the intention of the testatrix was that Charles should take his share subject to the condition that if he died childless it should go to Fordyce and the other appellants. Respondent's contention that the first clause shows the intention of the testatrix to be to give him a fee simple absolute ignores the rule that the intention must be gathered from a construction of the entire will. Adams v. Prather, 176 Cal. 33, 167 Pac. 534; Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138. In interpreting a will all the parts are to be construed in relation to each other and so as, if possible, to form one consistent whole. Section 1321, Civ. Code. It is unquestioned that, considered by itself, the first clause would show an intention to vest the fee to one-half of the residuum in Charles absolutely, but it is equally plain that the addition of the second clause shows the testatrix intended to limit the estate. This view finds support in the surrounding circumstances. Charles was 55 years of age, and Fordyce was 3 years younger. Both were married. Fordyce had living children and grandchildren. Charles had been married about 16 years and was childless. Considering these circumstances, it might natu-

rally follow that by the language used the testatrix intended to keep the residuum among her lineal descendants. Respondent argues that because she entertained feelings of equal affection for her two sons and always treated them alike in property matters, she intended to treat them alike in all respects at her death. She did provide that they should equally enjoy her bounty during their lives. The only difference was that she denied Charles the right to testamentary disposition, but only if he died childless. It seems to us that the apparent intention to keep the residuum among her lineal descendants can account, as no other fact or circumstance does, for this distinction. Proceeding upon this theory, the intention we have deduced from the will naturally follows. In our opinion the testatrix intended that the half of the residuum given to Charles was conditional upon his leaving children.

In support of his contention that the second clause is repugnant to the first, in that it is contradictory and inconsistent, respondent argues that the testatrix by the first clause created an absolute estate; that the second clause in cutting down the estate becomes repugnant to the first clause which creates it absolutely. We think the effect of the second clause is not to cut down an absolute estate which may have been created by the first, but merely expresses one phrase of her testamentary intention. Neither clause is complete within itself, but together they create a limited fee. The language employed clearly expresses the intention of the testatrix that Charles should take a fee in the property subject to a limitation or condition, and is not open to any other construction.

[3] Nor is the expression of the testatrix's intention contained in the second clause open to the objection that it is not "clear and distinct." In Estate of Tooley, 170 Cal. 164, 149 Pac. 574, Ann. Cas. 1917B, 516, a similar question was presented. The will in that case read:

"I give all my property at my death to my daughter Logan Mattie Tooley.

"If at her death she has neither husband or children, I desire any property that may be left divided equally among my sisters and brother."

Of the contention that the words of the second paragraph were not as clear and distinct as those of the first, and consequently could not cut down the distinct devise contained in the first, the court said:

"In view of these authorities it cannot be said that the words of the second paragraph of the will are not equally clear and distinct as those of the first paragraph. We think no case can be found in which a will indicating a disposition of property by the word 'desire' or 'wish' had been held not to be sufficient to constitute a will. The meaning of the word, when used in such connection in a will, is as clear as that of any other word in the language."

In the case here, although the testatrix used the technical word "bequeath" in the first clause, the word "desire," used in the second, in connection with the words she has used in the first, equally well expresses her testamentary intention, and is equally as clear as the word "bequeath."

While the estate could not technically "revert" to a third person, nevertheless the use of that word does not render the meaning of the second clause any less plain. In a similar case, where the word "revert" was employed, it was said:

"The legacy had never been the property of the children thus designated, and, consequently, could not technically revert to them, and his use of this word was merely an expression of his intention that it should 'go' to them." Estate of Bennett, 134 Cal. 320, 66 Pac. 370.

The expression "his portion," referring to the property to be given over to the other legatees in case Charles should die childless, means the property he receives under the will, when such estate is determined by a consideration of the entire instrument. The fact that it is referred to as his portion does not destroy the condition, for the portion may be his and still be subject to the limitation imposed by the will.

[4] It is true that words in a will expressing a mere desire are to be considered as precatory if addressed to the legatee. On the other hand, if the wish is addressed to the law, or to the personal representative of the decedent, or stands alone as an expression of the testator's desires, the word is mandatory. Estate of Tooley, supra; Board, etc., v. Culp, 151 Pa. 467, 25 Atl. 117. In this case the testatrix does not request the legatee to do anything. She wants the estate to go to Fordyce and her great-grandchildren if Charles dies without issue, and she merely states that desire. The expression of intention must therefore be regarded as mandatory.

[5] The contention that the second clause is substitutive is based on section 1336 of the Civil Code, which declares:

"Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession."

In Estate of Carothers, 161 Cal. 588, 119 Pac. 926, it was held:

"It is important to notice that the rule as stated in the Civil Code applies only where there are words 'referring to death or survivorship, simply.' The will of Carothers does not refer to the death of William 'simply.' It refers to his death 'without issue,' a contingency which may never happen. We have no provision of our Code declaring what the rule should be where the words refer to death upon a contingency. * * * If there is nothing in the context or in the surrounding circumstances to indicate either, then the ordinary meaning of

the words is that the reference is to death at any time it may occur, and that the happening or not happening of the contingency is to determine the result."

The death of Charles, to effect the limitation of the estate, must be upon a contingency—he must die without issue. The same contingency was declared in Estate of Carothers, supra, not to be death, simply, within the meaning of the Civil Code. There is nothing in the context or the circumstances here to indicate a contrary intention on the part of the testatrix, so the words must be taken to refer to death at any time.

Respondent has founded an argument upon a comparison of the will at bar with those in other cases, but in view of the interpretation we have given the paragraph herein, it will serve no purpose to further consider the point.

The order is reversed.

We concur: SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.

ANGELLOTTI, C. J. I dissent. I am confident that if the testatrix could meet her olographic will clad in the construction given to it by the majority opinion, she would not recognize it. In any event she would feel that she had been extremely inadequate in attempting to express her intention as to the disposition of her estate in such a manner that it would be carried into effect by the courts.

To me it seems perfectly clear, from the words of the will and the circumstances under which it was made, that it was her intention, expressed therein, that each of her two sons, who were her only children and heirs at law, should take as his own, absolutely and unconditionally, one-half of the residue of her estate (which was of the value of over $125,000, and consisted almost entirely of personal property), after the payment of a $2,000 legacy to her "old home church," and that the expressed desire contingent on the death of Charles without issue was nothing more than the expression of a mere wish or desire on the part of the testatrix, intended to be and in effect addressed to Charles himself, to be complied with or not as he might determine. The effect of the decision is practically to give to Charles only a life estate in so far as any enjoyment or control by him of the property during his lifetime is concerned, for until the very moment of his death it cannot be determined with certainty that his interest amounts to anything more. If he does die without issue, the estate bequeathed to him is ended. And all this in the face of the obvious desire on the part of the mother to divide her valuable estate (except for the $2,000 legacy) equally between her two sons, and the apparently clear and distinct bequest to them of "the balance of my estate * * * to be equally divided between them."

I am constrained to admit that in material respects the will here is the same as the will involved in Estate of Tooley, 170 Cal. 164, 149 Pac. 574, Ann. Cas. 1917B, 516. I endeavored in my opinion filed therein, in dissenting from the order denying a rehearing after decision in department, to briefly state what I considered the basic fault in the department opinion, and what I said there is equally applicable here, and sufficiently shows for all the purposes of a dissenting opinion my reasons for dissent herein.

I concur: OLNEY, J.

186 Cal. 231

HOLMES et al. v. NAY et al. (S. F. 9330.)

(Supreme Court of California. June 16, 1921. Rehearing Denied July 14, 1921.)

1. Waters and water courses ⊂127—No prescription by diversion below riparian land.

By diversion below riparian land, no rights superior to the riparian rights incident to the land are acquired by prescription.

2. Waters and water courses ⊂7—Federal act validates diversions invading government's rights.

Under the Act Cong. July 26, 1866, § 9 (U. S. Comp. St. § 4647), the government did not release its rights as riparian owner in favor of one diverting water below the government's land, the act being intended simply to validate such diversions as invaded the government's rights as riparian owner.

3. Waters and water courses ⊂47—Nonriparian use.

The diversion of water from a stream on one tract of land to a lower tract for use there is not permitted as an incident of the ownership of the former tract.

4. Waters and water courses ⊂42—Riparian use reasonable amount.

Though the owner of a tract of land to which he diverted water from another tract, below which point of diversion another party had theretofore diverted water, had no right to use the water on such tract, a judgment enjoining him from making any diversion whatever above the point of the other party's diversion was too broad; he having the right as owner of the tract from which the water was diverted to divert a reasonable amount thereof for use on that tract.

5. Easements ⊂16—Purchaser of part of estate takes with benefits and burdens as between it and part vendor retains.

Where the owner of two tenements sells one, or the owner of an estate sells a portion of it, the purchaser takes with all the benefits and burdens appearing at the time of the sale

to belong to such portion as between it and the property the vendor retains.

6. Easements ⟸14(1) — Rights reserved in grantor by implication only where grantee knew or should have known such was intention.

Where the owner of land conveys it fully and without reservations, rights are reserved in the grantor by implication only where the circumstances clearly indicate that the grantee knew or should have known that such was the real intention of the grantor.

7. Waters and water courses ⟸156(5)—Riparian rights conveyed by deed.

A deed conveying a part of a tract of land without reserving any riparian rights conveys all such rights, though grantor was openly and visibly diverting water at a point below such land, the rule that, where an owner sells a portion of a tract of land, the purchaser takes it with all the burdens appearing to belong to it as between it and the property the vendor retains, being inapplicable where the diversion was at a point below such land.

8. Waters and water courses ⟸156(5) — Rights of riparian owners under various deeds determined.

A grantor conveyed land to F., granting him the right to one-half the water from a stream flowing by it, but reserving to himself the right to take from the water diverted by F. one inch for use on a tract which he subsequently deeded to B. without granting the incidental riparian rights, and two inches for use on other lands subsequently acquired by H. Thereafter N. acquired title to land across the stream from F.'s land and above B.'s land, and, from the stream at a point on a tract above such land he diverted water for use on his newly acquired land, thus interfering with diversions theretofore made below such point of diversion on F.'s, B.'s and H.'s land. *Held* B. and H. could complain of any diversion by M. whereby the diversion under F.'s grant of one-half of the natural flow of the stream was prevented so as to deprive them of their one and two inches, and that, as to the other one-half B., H., and N. were riparian owners, entitled to have the use of the water for stock, domestic, and irrigation purposes on their riparian lands reasonably apportioned between them.

9. Waters and water courses ⟸78—Riparian owner may divert water above his land.

The owner of riparian land is not required, so far as a lower riparian owner is concerned, to make a diversion of water on his land, but can make it above, provided no unreasonable loss of water is caused thereby.

10. Waters and water courses ⟸78—Riparian owner may divert water from main stream to land in watershed of branch.

A riparian owner may divert water from a main stream at a point on his land and use it on land in the watershed of a branch stream which flows into the main stream before the latter reaches the land of lower riparian owners, the rule that the riparian owner may not convey and use water outside the watershed of the stream being inapplicable, when not used outside the watershed of the stream as it passes the lower riparian lands.

11. Waters and water courses ⟸64—Upper riparian owner may not pollute water.

A lower riparian owner may complain of the muddying and pollution of water by an upper riparian owner, except in so far as it is a reasonably necessary incident of the latter's use of the water, under the maxim, "sic utere tuo, ut alienum non lædas," but a manner of use which would not be unreasonable as between strangers might be so as between riparian owners on the same stream.

12. Waters and water courses ⟸79—Diversion limited to beneficial use.

No one may divert water otherwise than for a beneficial use even under a grant of such right.

13. Waters and water courses ⟸78—Upper riparian owner may not complain of wastage by lower riparian owner.

Since no one may complain of an unlawful diversion unless he is injured thereby, and a riparian owner is not injured by a diversion below his land and his own point of diversion, a lower riparian owner may complain of any wastage of water by an upper riparian owner, but the latter may not complain of wastage by the former.

14. Waters and water courses ⟸79—Riparian rights not affected by diversion for other than beneficial purposes.

In apportioning the use of water between riparian owners, it is the reasonable use or the possibility thereof for beneficial purposes that alone should be considered, so that a share to which one is entitled cannot be affected by the diversion by another of water not used for beneficial purposes.

In Bank.

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Suit by William F. Holmes and another against H. L. Nay and another. Judgment for plaintiffs, and defendants appeal. Reversed.

W. F. Cowan, of Santa Rosa, for appellants.

Lyman Harford, of Orland, and J. T. Campbell and Geary & Geary, all of Santa Rosa, for respondents.

OLNEY, J. This is an appeal by the defendants from a judgment enjoining them from diverting any of the water from a stream known as Yellow Jacket creek, except such as is diverted for stock and domestic use, and also from muddying and polluting the stream. Of the two defendants, one was but an employee or tenant of the other, Nay, and had no rights in the water except in that capacity. We may, then, treat the case as one involving only the respective rights of the two plaintiffs, Holmes and Bernard, on

the one side, and the defendant Nay on the other.

The stream rises in a considerable spring on a 101-acre tract belonging to Nay, and which was public land when he acquired it, and flows southwesterly across this land to the boundary line of what was formerly a single large tract constituting what is commonly known as a Spanish or Mexican grant; that is, a tract granted to private owners by the government of California before California was separated from Mexico. The stream, on reaching the grant line, continues southwesterly across the grant, flowing between and constituting the boundary line between a subdivision of the tract on the northwest side of the stream owned by one Folker, and two subdivisions on the southeast side, owned by the defendant Nay and the plaintiff Bernard, respectively; that owned by Nay being the one higher up on the stream. The land of the plaintiff Holmes is also a part of the grant and riparian to the stream, but some distance further down. Nay, in other words, is the owner of two tracts, first, one on which the stream rises and which was formerly public land, and another below it, which is riparian to the stream and was formerly a part of a larger tract, of which the lands of the two plaintiffs were also a part. At a point on the upper tract Nay diverted water from the stream and conveyed it to the lower tract for use there. It is this diversion which brought on the present litigation. The respective rights of Nay as the owner of these two tracts are quite distinct and should be treated separately. As we have already stated sufficient of the facts to determine his rights as the owner of the tract which was formerly government land, we may as well take up their discussion at this point.

[1] This tract is, of course, riparian to the stream. As a result of this fact, Nay has the rights of riparian owner, unless in some way they have been lost. The claim of the plaintiffs is that those rights were lost by reason of the fact that long before Nay acquired it and it ceased to be public land, the predecessor in interest of the plaintiffs had diverted all the stream at a point below and put it to beneficial use, and that such diversion and use have been continuously maintained ever since. It is, however, settled law in this state that by a diversion below riparian lands no rights superior to the riparian rights incident to the land are acquired by prescription. Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; Cave v. Tyler, 133 Cal. 566, 65 Pac. 1089; Walker v. Lillington, 137 Cal. 401, 70 Pac. 282. The reason for this rule is that a riparian owner is not concerned with what is done with the water after it passes his land, and he cannot complain of any diversion made below, and, since he cannot complain, no rights can be acquired by prescription because he does not complain.

[2] But it is claimed by the plaintiffs that, because the defendant's land was public land at the time the diversion was made, those making the diversion below acquired, by virtue of section 9 of the act of Congress of July 26, 1866 (14 Stat. 253 [U. S. Comp. St. § 4647]), a right superior to the riparian rights incident to the land; in other words, that by this statute the government released or ceded its rights as riparian owner in favor of any one taking water from the stream, even one taking it entirely below the land of the government. But the question so presented as to the effect of the act of Congress was also presented in Cave v. Tyler, 133 Cal. 566, 65 Pac. 1089, and there decided directly contrary to the contention of the plaintiffs. It is unnecessary to repeat the discussion found in the opinion in that case. Suffice it to say that the reasoning of the opinion is, in brief, that the act of Congress was intended simply to validate such appropriations or diversions as constituted an invasion of the government's rights as a riparian owner, and that, since a diversion below its lands did not constitute an invasion of its rights and was something of which the government could not complain, there was no release or cession of its rights under the statute mentioned. This decision is conclusive as to the point that the defendant in the present case has still the riparian rights incident to the ownership of the 101-acre tract he acquired from the government. Such rights, of course, include the right to a reasonable use of the water of the stream on any portion of the tract which is riparian to it, but not elsewhere, for stock, domestic, and irrigation purposes.

[3, 4] It should be said, however, that the use to which Nay was putting the water, a use not on the 101-acre tract, but on the tract below it, was not a use permitted as an incident of the ownership of the 101-acre tract, and that his right to such use must depend upon whatever rights he may have as the owner of the tract to which the water is conveyed and where it is used. But, assuming for the moment that, as the owner of the latter tract, the defendant had no right to use the water upon it, so that the plaintiffs had the right to enjoin such use, the judgment against the defendant is yet too broad. It does not enjoin such use, but, with a minor exception not here material, it enjoins the defendant from making any diversion whatever above the point of the plaintiffs' diversion. The defendant, however, as the owner of the 101-acre tract, had the right to divert a reasonable amount of the water for use on that tract, if at any time in the future he should desire to do so, and the judgment should not, as it does, foreclose him from the exercise of this right.

[5-7] Coming now to the question of the defendant's rights as owner of the tract which was formerly a part of the Mexican grant, it is evident that, since the land is riparian to the stream, the defendant has the right to a reasonable use thereon of the water of the stream unless in some way the riparian rights, which are an incident of the ownership of the land, have been lost. It is also evident that these rights have not been lost by prescription. This is evident because the plaintiffs' point of diversion is below even this part of the defendant's land, so that the case comes within the rule already stated that a diversion below riparian lands gives no right by prescription against the riparian rights incident to the land, for the simple reason that such taking is not an invasion of those rights.

Since the riparian rights incident to the defendant's land could not have been lost by prescription, the only other method upon the facts of this case by which they could have been lost is a voluntary transfer or cession of them by one who was at the time the owner of the land. It is not claimed that there was any such transfer or cession after the severance of this particular tract from the larger tract of which both it and the lands of the plaintiffs were originally a part. The question then reduces itself to whether or not there was such transfer or cession either at the time of that severance or prior thereto. It is claimed in effect that it did occur at the time of the severance. The deed by which the owner of the larger tract severed from it and conveyed to another ownership the land now owned by the defendant did not reserve from its operation any riparian rights incident to the land. On the face of the deed, therefore, those rights were conveyed as a part of the land, and there was no withholding or cession of them. But it is claimed that in view of the fact that the stream, and the whole stream, was at that time being diverted for use on other lands, including those of the plaintiffs, and such diversion was open and visible and must have been known to the grantee, the case comes within the familiar rule stated in Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025, that—

"'Where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains.' * * * Where the owner of one heritage consisting of several parts has so adapted them that one derives a benefit from the other, when he sells one of them without making mention of the incidental burdens of one in respect to the other, an implied understanding arises that the burdens and correlative advantages shall continue as before the separation of the title."

There would be no doubt about the application of this rule if it were the fact that the diversion in question, an open and plainly apparent one, had amounted to an imposition of a burden by the owner of the whole tract upon the portion severed from it for the benefit of other land retained by him. It would also seem that it might well be that, if the diversion had been above the portion severed by conveyance, so that the stream when it came to that portion was diminished, and if also the extent of the diversion was such as to make it apparent that it exceeded what might be diverted under any riparian right, a burden would have been imposed upon the portion conveyed for the benefit of lands retained. But where, as here, the diversion was below the land conveyed so that the stream as it flowed by it was wholly unaffected, we do not see how it can be fairly said that any burden was imposed upon that portion of the land for the benefit of other portions. So far as that land is concerned, it is wholly unaffected by the diversion. Upon this point the case, as it seems to us, is wholly analogous to those cases where a right by prescription was claimed against a riparian owner because of a diversion below his land, and that the same reasoning by which such right was denied leads to the conclusion here that the grantee of the land would not take it with its riparian rights subordinated to a diversion below which did not affect his land. It should be said also that, where the owner of land conveys it by deed purporting to convey it fully and without reservations, rights should be held to be reserved in the grantor by implication only where the circumstances very clearly indicate that the grantee knew or should have known that such was the real intention of the grantor. It would be going very far, indeed, to hold that, where riparian land is conveyed without any reservation whatever, the riparian rights incident to it yet do not pass for the reason that the grantor was openly and visibly diverting the water at a point below. Presumably in such a case it was the intention that full effect be given to the deed and that the diversion below be subject to the riparian rights ostensibly conveyed rather than the contrary. Our conclusion, then, is that the present case does not come within the rule of Cheda v. Bodkin, and that the deed by the owner of the whole tract conveying the portion now owned by the defendant operated to convey all the riparian rights incident to the portion conveyed which the grantor had at the time of conveyance. He, of course, had all of such rights unless they had been previously ceded or transferred, and the question of whether they had been or not is the next question in the case.

[8] The conveyance to the defendant's immediate predecessor in interest was subse-

quent to the conveyances of the parcel now owned by the plaintiff Bernard and of the parcel now owned by one Folker, on the opposite side of the stream, from both the Bernard and the Nay [the defendant] parcels. As between the Folker and Bernard parcels, the former was conveyed first. The deed to the Bernard parcel does not purport to grant more than the land itself, so that by it no transfer or cession of riparian rights incident to the land retained by the grantor was worked. In other words, the riparian rights incident to the Nay parcel, which was retained by the grantor, were unaffected by the deed to the Bernard parcel, and were retained in full by the grantor as an incident of his continuing ownership.

The same, however, is not true of the deed to the Folker place. It not merely conveyed the land, but granted the right to one-half the water in the creek. There was here a definite cession of riparian rights. The grantor could not thereafter insist upon the right to divert water for use on the riparian lands retained by him, of which the Nay place was a part, to the impairment of the right which he had granted to the grantee of the Folker place. Duckworth v. Watsonville, etc., Co., 150 Cal. 520, 89 Pac. 338. He could, of course, take the one-half of the water not so granted, and he could take it from the stream where he pleased, either above or below the Folker point of diversion, but, if he took it above, the owner of the Folker place would, to the extent to which such diversion above diminished the flow past his point of diversion, have the right to take proportionately more than one-half of the flow at that point. As the result of these conveyances, then, and there is nothing else which can be claimed to be a transfer or cession of the riparian rights incident to the defendant's land, the situation is that, as between Nay and Bernard, each has the full riparian rights incident to his land, and, as a part of these, has the right to have the use of the water apportioned between him and the other upon that basis, but that as between them and Folker their riparian rights have been limited to an interest in one-half of the flow of the stream. The result is that, if the owner of the Folker place insists upon his right, the use of the water between Nay and Bernard must be apportioned as if the flow of the stream were just half of what it actually is.

The plaintiff Holmes is in exactly the same situation as the plaintiff Bernard. He acquired his land from the original owner of the whole tract subsequent to the conveyances of the other parcels. Except as limited by the Folker grant, he acquired his parcel with the full riparian rights incident to it, and, as limited by that grant, he, Bernard, and Nay are as between themselves riparian owners on a stream in legal effect one-half of its actual size.

To the above outline of the rights of the parties there is an exception whose mention we have reserved until this point in order to simplify the discussion. This exception arises from the fact that either in the deed to the Folker place containing the grant of one-half of the stream or by contemporaneous agreement between the grantor and grantee there was reserved or given the grantor the right to take from the water diverted by Folker, and after it had been diverted, one inch for use on the Bernard place and two inches for use on other lands of the grantor. The right to some, at least, of the latter two inches is now appurtenant to the land of the plaintiff Holmes. The rights to this inch and two inches, respectively, were rights in the water which Folker was given the right to divert, so that to the extent of these rights the owners of the land to which the rights became appurtenant became co-owners, as it were, with Folker in the right granted him. The two plaintiffs, as the owners of such lands, have therefore a direct interest in the right granted Folker, and for that reason have the right to complain of any diversion of the defendant which encroaches upon the Folker right, at least to the extent to which such diversion affects their receipt of water under that right. The final situation then, as to the fundamental rights of the parties to this action, omitting the rights of Nay as the owner of the uppermost 101-acre tract which he acquired from the government, which rights we have previously discussed, is that each of the plaintiffs has the right to complain of any diversion by Nay whereby the diversion under the Folker grant of the full one-half of the natural flow of the stream without any diversion by Nay is prevented, at least to such an extent as to deprive them of their one inch and two inches, respectively, and that as to the other one-half of the stream all three parties are in the position simply of riparian owners entitled to have the use of the water for stock, domestic, and irrigation purposes upon their riparian lands reasonably apportioned between them.

[9] The judgment appealed from is not in conformity with the rights of the parties as so outlined, and the findings are not such as to make it possible to direct a judgment which does conform to them. A new trial is therefore necessary. For the purposes of it, there are a few minor points which should be determined. We have said that the rights of Nay as the owner of the 101-acre tract are confined to the use of the water on that tract, and that such rights do not include the right to use the water on the parcel of the Mexican grant which he owns. But this does not mean that he cannot divert water on the 101-acre tract and carry it to the other tract and there use it. It means only that he cannot do so under his rights as owner of the 101-acre tract. But the owner of riparian land is not required, so far as a lower ripa-

rian owner is concerned, to make his diversion on his land. He can make it above if he wishes, provided no unreasonable loss of water is caused by his so doing. Turner v. James Canal Co., 155 Cal. 82, 99 Pac. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823. The defendant Nay, then, has, to the extent to which he has the right to divert water as the owner of what was once a part of the Mexican grant, the right to go off that land and make a diversion and convey water to it for use thereon.

[10] It seems also that part of Nay's land lies between the main stream and a branch, the latter coming into the former before the stream reaches the land of either of the plaintiffs, so that some of Nay's land is in the watershed of the main stream above where the branch comes in and some is in the watershed of the branch. It seems also that Nay is taking the water from the main stream and using at least a portion of it on land in the watershed of the branch. This is complained of, but this he has the right to do. Both watersheds are but parts of the watershed of the stream as it passes the plaintiffs' lands, and the rule that the owner of a tract of riparian land may not convey and use the water without the watershed of the stream has no application. The water is not conveyed and used without the watershed of the stream which passes the plaintiffs' lands, and that stream is the stream in which the plaintiffs have rights. They have no rights in the main stream and the branch above as separate streams. The situation is the exact converse of that presented in Anaheim, etc., Co. v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062, where the junction of the stream and the branch was below the lands of the complaining riparian owner. Any other rule would be wholly impracticable and would, in many cases, practically destroy the riparian rights of an upper owner.

[11] The plaintiffs also complain of the muddying and pollution of the water by the defendant. They have the right to complain of this except in so far as it is a reasonably necessary incident of the use of the water by the defendant. He has the right to use the water and cannot be prevented from using it because of the fact that necessarily such use may somewhat impair the quality of the water. But he cannot exercise his right in such manner as to injure those below him maliciously or unnecessarily. The case certainly comes under the principle of the familiar maxim "Sic utere tuo, ut alienum non lædas." It may be that, where the question is one of a reasonable manner of use as between an upper and a lower riparian owner, a manner of use which perhaps would not violate the principle of the maxim quoted as between strangers would yet be unreasonable as between those occupying the relation to each other of riparian owners on the same stream. While the facts of the present case suggest this question, it is not definitely presented by them and is not argued by counsel and we do not decide it. We mention it merely to avoid the possibility of this opinion being taken to establish as the law of the case that the freedom of the defendant in his manner of using the water is limited only by the principle of the maxim quoted.

[12] Considerable appears in the evidence and much is said in the briefs about the wasting of water on both sides. No one has the right to divert water otherwise than for a beneficial use. This is true even as to a diversion made under a grant. In other words, the Folker grant must be read with the implied condition that it was a grant of the right to divert water for beneficial uses and not otherwise.

[13] But, on the other hand, no one has the right to complain even of an unlawful diversion unless he is injured thereby, and it is apparent that a riparian owner is not injured by a diversion, lawful or unlawful, which is below both his land and his own point of diversion. This last is the present situation as between the defendant and the diversions by the plaintiffs. The result is that, while the plaintiffs may complain of any wastage by the defendant, since both their lands and their point of diversion under the Folker grant are below the defendant's diversion, the defendant may not complain of wastage by them, since he is not injured by it.

[14] Of course, in apportioning the use of the water between the parties in accord with their rights as riparian owners, it is the reasonable use, or the possibility of reasonable use, for beneficial purposes that alone should be considered, and if the plaintiffs have been diverting water which they did not use for a beneficial purpose, the share of the water to which the defendant may be entitled cannot be affected thereby.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

186 Cal. 358

In re PAUSON'S ESTATE.

PAUSON et al. v. CHAMBERS, State Controller. (S. F. 9232.)

(Supreme Court of California. June 27, 1921. Rehearing Denied July 25, 1921.)

1. **Appeal and error ⟸1010(1)—Finding of trial court not disturbed if supported by evidence.**

It being a question of fact whether a gift is made in contemplation of death within the meaning of the Inheritance Tax Law (St. 1911, p. 713), the finding of the trial court will not be disturbed, if supported by evidence, though the conclusion of the appellate court on the same evidence might be different.

2. **Taxation ⟸881—Age of donor, purpose and manner of transfer, and continued control by donor considered in determining whether transfer made in contemplation of death.**

In determining whether a gift was made in contemplation of death within the meaning of the Inheritance Tax Law (St. 1911, p. 713), the old age of the donor, the fact that he transferred or sought to transfer all his property, that the fortune was large, and the transfer made for the benefit of his heirs and in such fashion that, as president of the corporation to which it was transferred, he still had the management and control of the same and received therefrom an income commensurate with his customary expenditures, are important considerations.

3. **Taxation ⟸881—Gift in lieu of will is transfer in "contemplation of death" within Inheritance Tax Law.**

Under Inheritance Tax Law (St. 1911, p. 726) § 27, defining "contemplation of death" as including that expectancy of death which actuates the mind of a person on the execution of his will and in no wise limited and restricted to that actuating one in making a gift causa mortis, and declaring the intent and purpose of the act to be to tax any and all transfers made in lieu of or to avoid the passing of the property transferred by testate or intestate laws, a gift made by a donor in lieu of making a will and to accomplish substantially the same purpose is subject to taxation, the phrase "in contemplation of death" being intended to cover all dispositions of property without valuable and adequate consideration, substantially testamentary in character, Civ. Code, §§ 1149, 1150, defining such phrase with reference to a gift causa mortis, being inoperative.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contemplation of Death.]

4. **Taxation ⟸881—Evidence held sufficient to show gift made in contemplation of death within Inheritance Tax Law.**

In a proceeding to fix an inheritance tax pursuant to St. 1911, p. 713, imposing a tax on transfers in contemplation of death, evidence that deceased, aged 78, transferred practically all of a large fortune to a newly organized corporation in consideration of the entire capital stock thereof, which he distributed among his children, and that he was elected president of the corporation at an annual salary sufficient to pay the household expenses of himself and family and his personal expenses, *held* sufficient to sustain a finding that the gift was made in contemplation of death within the meaning of the statute.

5. **Taxation ⟸893—Superior court sitting in probate may fix inheritance tax on property transferred prior to decedent's death.**

In view of Inheritance Tax Law (St. 1917, p. 895) §§ 15 and 16, authorizing the probate court to fix a tax on property transferred in contemplation of death to any person or corporation taking any property by virtue of probate proceedings pending in such court, the superior court sitting in probate had jurisdiction to fix a tax on property transferred prior to the death of decedent, though its jurisdiction is limited and statutory, where the transferees also took property by virtue of the probate proceedings.

6. **Appeal and error ⟸185(1)—Objection to jurisdiction of probate court to fix inheritance tax must be made below.**

Where, in the absence of a separate probate court, the right to an inheritance tax was litigated in the superior court, which has general jurisdiction, under the Constitution, of such matters, parties appearing without objection in opposition to the state controller's application cannot be heard to complain on appeal that the court was without jurisdiction.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Application by John S. Chambers, Controller of the State of California, to fix inheritance tax on property transferred in contemplation of death by Frank Pauson, decedent, objected to by Samuel B. Pauson and others. From an order fixing the tax, objectors appeal. Affirmed.

A. L. Weil, of San Francisco (Harris F. Shaw, of San Francisco, of counsel), for appellants.

Robert A. Waring, of Sacramento, and H. C. Lucas and A. W. Brouillet, both of San Francisco, for respondent.

Garret W. McEnerney, of San Francisco, amicus curiæ.

WILBUR, J. This is an appeal from an order of the superior court fixing an inheritance tax upon certain property transferred by the deceased, Frank Pauson, upon the ground that such transfer was made in contemplation of death. At the time of the transfer the decedent was 78 years of age and in vigorous health. He consulted an attorney, stating to the attorney that it was his intention to transfer all his property to a corporation to be organized under the name of Frank Pauson & Sons. Pursuant to this intention such corporation was organized.

The deceased transferred to it about $600,000 worth of property in consideration of the entire capital stock of the corporation, 40 shares of which was issued to each of his four sons and 20 each to four daughters and one share to the deceased. Three daughters who received 20 shares each had in 1913 received a gift of $50,000 each, and the method of distributing the shares adopted was to equalize the amount received by each child. The shares were issued December 8, 1915. At the organization meeting of the corporation the deceased was elected president and voted a salary of $20,000 per annum. This amount was intended to pay the household expenses of the members of the family, which consisted of the father and the adult children, except one daughter, and also to pay the personal expenses of the father. It subsequently developed that, due to an oversight, $42,339.15 worth of property had not been transferred to the corporation and remained a part of decedent's estate at the time of his death. The deceased died November 26, 1916, less than one year after the organization of the corporation, but from a sudden acute illness.

[1] The question is whether or not the finding of the trial court that this gift was made in contemplation of death within the meaning of the statute in force at the time of the transfer, namely, the Inheritance Tax Law of 1911 (Stats. 1911, p. 713), is sustained by the evidence. At the outset it should be borne in mind in considering this case and determining the effect of the decisions heretofore rendered by this and other courts upon the subject that the question of whether or not a gift is made in contemplation of death is a question of fact, and that if from the evidence the trial court can properly infer that the transfer was or was not made in contemplation of death, the finding of the trial court would not be disturbed, even though the conclusion of the appellate court on the same evidence might be different.

[2] The appellant asserts that the sole question in this case is whether or not it must be held as a matter of law that a transfer made by a person 78 years of age is, because of his age alone, to be deemed a transfer in contemplation of death. It is true, of course, that the age of the donor is an important consideration. The fact that he transferred all of his property or sought to do so, that it was a very large fortune, appraised at the time of his death at $939,065.34, and that the transfer was made for the benefit of his heirs and in such fashion that as president of the corporation he still had the management and control of his property and received from the income thereof an amount fully commensurate with his customary expenditures are most significant.

[3] The phrase "transfer in contemplation of death" has been a subject of much litigation, and we are informed by the briefs that every case involving that question that can be found in the United States has been therein presented to us for our consideration. This phrase is found in the inheritance or transfer tax legislation in many states—Pennsylvania, New York, Illinois, Wisconsin, Indiana, Iowa, Michigan, Georgia, and California. The New York courts gave a very narrow construction to the phrase "transfer in contemplation of death," treating it practically as an equivalent of a gift causa mortis. Matter of Seaman, 147 N. Y. 69, 41 N. E. 401; Estate of Reynolds, 169 Cal. 600, 603, 147 Pac. 268. The other states have refused to follow the New York courts, and without exception have taken a more liberal view. Appellant claims that the general effect of all such decisions is that the phrase "in contemplation of death" means "in contemplation of an impending death."

The brief filed by amicus curiæ thus states the rule contended for by the appellant:

"It is apparent from the foregoing review of the history and interpretation of the term 'contemplation of death' that a gift is made in contemplation of death only 'when the donor is looking forward to his death as impending.'"

The rule is also stated by amicus curiæ as follows:

"It has also been universally held that, even though gifts, other than deathbed gifts, may be taxable, nevertheless it is necessary, to constitute a transfer in contemplation of death, that the grantor be so ill or infirm as to warrant a finding that he was looking forward to his death as impending when he made the gift."

However, the phrase "in contemplation of death" is defined in the Inheritance Tax Law in force at the time of the transfer under consideration in this case. In the Inheritance Tax Law of 1911 (Stats. 1911, § 27, p. 726), after defining the words "estate," "property," "transfer," "decedent," "county treasury," "district attorney," and "inheritance tax appraiser," the following definition occurs:

"* * * 'Contemplation of death,' as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in no wise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift causa mortis; and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws."

In the Estate of Reynolds, 169 Cal. 600, 147 Pac. 268, the definition of "contemplation of death" contained in section 27 of the act of 1911 is quoted with the following comment:

"This amendment also served the purpose of elucidating without changing the law, by giv-

ing fuller expression to the legislative intent and meaning."

In that case, however, the transfer under consideration was made in April and May, 1911, and the statute of 1911 did not go into effect until July 1, 1911. The statement is therefore obiter dictum. It also appeared in that case that the decedent at the time of the transfer was suffering from a sarcoma; that he had undergone several surgical operations which had failed to eradicate the sarcoma. One of the gifts held liable to tax was made two days before a critical operation for the amputation of the right leg at the hip. Others were made after the recovery from the effects of the operation, but after he had begun again to fail. These transfers to the wife were made by decedent prior to and following an operation considered absolutely necessary to save his life. It was said:

"It would seem to be clear beyond peradventure that as to these transfers, they were made in that contemplation of death which the law designates, and that they were gifts in life substituted for gifts by will."

The transfers to the son, also involved, were made when he knew that he was in failing health and "it was known, and he knew, that his tumor had returned and that the days of his life were numbered. * * *" The court concluded:

"Indeed, it seems quite plain that, as in the case of the widow, so in the case of the son, the father in contemplation of death was transferring by gift instead of devise the valuable business which he owned and had theretofore conducted."

It is obvious from the foregoing that the finding of the trial court in that case was justified even under the rule contended for by the appellant and amicus curiæ in this case. The case is not authority as to the interpretation of the law of 1911.

We see no particular difficulty in the interpretation of the law of 1911 when construed in the light of the general purpose of the Legislature in imposing such taxes and in the light of the interpretation theretofore strued in the light of the general purpose of death" and in view of the litigation then pending in this state in which the meaning of that phrase was involved. The general purpose of the inheritance tax laws as stated in the act is as follows:

"To tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws."

In other words, the taxing of transfers was purely ancillary to and in aid of taxes imposed upon the right of succession; the purpose of such ancillary legislation being to tax transfers which were made in lieu of succession or testamentary disposition. That the object of such imposition of taxes upon transfers made in contemplation of death is to prevent the evasion of laws imposing a tax upon the right to succeed to an estate at death is conceded in all the cases. It is obvious that this purpose is not achieved when the phrase "transfers made in contemplation of death" is limited, as in New York, to gifts causa mortis. This court, in the Estate of Reynolds, supra, declined to follow this narrow view. It is equally obvious that the legislative intent will be frustrated if the transfer, in order to be taxable, must be made with a sense of impending death, for under this view no tax can be collected where a donor in expectation of death and for the purpose of vesting title in his heirs makes a transfer inter vivos with no contemplation of death other than that involved in arranging his affairs so that when the contemplated event occurs the property will be distributed or vested in accordance with his wishes in that event. To put the matter more concretely, if the phrase "contemplation of death" is to receive the narrow construction contended for by appellants, it would be possible for a man 78 or 98 years of age to organize a corporation and transfer all his property thereto without consideration, issue the stock to his heirs in the proportion he desires them to succeed to upon his death, and for the purpose of effecting such succession, and thus evade or avoid all inheritance taxes on such transfer because he was in good health at the time of the transfer, and has no warning that indicates to his mind that death is impending, although he knows that his life expectancy is short and is making such arrangement with that fact in mind. Substantially this view was taken by the Supreme Court of Wisconsin in State v. Thompson, 154 Wis. 320, 142 N. W. 647, 46 L. R. A. (N. S.) 790, Ann. Cas. 1915B, 1084, in sustaining the finding of the trial court that a gift by the decedent Joseph Dessert of $500,000 to his daughter, partly made when he was 89 and partly when he was 87½ years of age, was not made "in contemplation of death." The Legislature of that state, however, immediately amended the law (St. 1919, § 1087—1, subd. 3) by adding the following:

"Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section."

The Supreme Court of Wisconsin held in Estate of Ebeling, 169 Wis. 432, 172 N. W. 734, 4 A. L. R. 1519, that the law conclusively established the taxability of such a gift, and with reference to the decision on the Estate of Thompson, supra, said:

"The circumstances of that case forcibly brought to the attention of the Legislature the fact that after a person had attained the age of 89 years, an age when he could not expect to live many more years, when his thoughts, naturally, were consumed rather with the disposition of property already accumulated than with the accumulation of more, he could bestow his property upon the objects of his bounty and thus evade the inheritance tax. * * *

"It is clear to our minds that the Legislature intended to define what should constitute a transfer in contemplation of death. It was the legislative purpose to make the statute effective. It realized that, if a person after reaching the age of 80 or 90 years could dispose of his property free from the tax, it could be easily evaded by those possessing the larger fortunes. So it was enacted not only that the tax should apply to gifts made in contemplation of death but to gifts made within 6 years prior to death."

It is equally clear that our Legislature of 1911 intended to define the phrase "in contemplation of death" so as to cover, among other things, all dispositions of property "without valuable and adequate consideration," substantially testamentary in character (see section 27, supra, Stats. 1911, c. 395, p. 726), or, to use the language of the statute, to tax "all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws." The statutory definition of the phrase, contemplation of death, includes: First, "that expectancy of death which actuates the mind of a person upon the execution of a will"; and, second, is in no wise to "be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift causa mortis"; and, third, "it is hereby declared to be the intent and purpose of this act to tax any and all transfers [and this includes transfers in contemplation of death] which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws." The phrase "all transfers" in this clause certainly includes transfers made "in contemplation of death." It is clear from a consideration of this definition that it was thereby intended to cover transfers made by a donor in lieu of a transfer by will. The characteristic phrase used for centuries as indicating the mental attitude of the testator in making a will is that he is of a sound and disposing mind and memory; that is to say, the testator of sound mind is also of a mind to direct the disposition of his property at and after his death. A somewhat different introductory phrase is sometimes used in a will as follows:

"Having in mind the uncertainty of life and the natural rights of others and my obligations to them, and it being my intention and purpose to dispose of all the property, real, personal, and mixed, which I may own at the time of my death," etc. Commentaries on Will, Alexander, vol. 3, 2669.

If the donor in that frame of mind decides that he will make a gift in lieu and instead of making a will and to accomplish substantially the same purpose he would accomplish by a will, such a transfer clearly comes within the scope of the statute in question. There is nothing inconsistent with this view in the decision in Estate of Minor, 180 Cal. 291, 180 Pac. 813, 4 A. L. R. 456, where the transfer was made to the transferee in contemplation of marriage, or in the decision in Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837. Neither of these decisions, however, involved the law of 1911, although in Estate of Minor it is said that the result would be the same under the law of 1911 as under the law in force at the time of the transfer (1908). In Spreckels v. State, 30 Cal. App. 363, 158 Pac. 549, the transfer was made when the Inheritance Law of 1905 (Stats. 1905, p. 341) was in force, and the case of McDougald v. Wulzen, 34 Cal. App. 21, 166 Pac. 1033, arose under the same statute. Neither case required a construction of the statutory definition of the phrase "in contemplation of death," and both affirmed the conclusion of fact drawn by the trial court that the transfers were not made in contemplation of death, as sufficiently supported by the evidence, and hence not to be disturbed by the appellate court. In both cases it is conceded that the judgment would have been affirmed on the same evidence if the conclusion of the trial court as to the fact had been exactly opposite. In the case at bar the finding is in favor of the tax, and must be sustained if supported by the evidence.

[4] We are urged to consider the history of the phrase "contemplation of death," as used in our own statute defining gift causa mortis (sections 1149, 1150, Civ. Code), and the construction placed upon that phrase by other courts and at common law, as authority for its construction in the Inheritance Law. The express declaration of the Legislature of 1911 that the words in that statute shall not be limited and restricted to that expectancy of death which actuates the mind of a person making a gift causa mortis would seem to dispose of this contention. Moreover, in considering the interpretation to be placed upon our own statute and its definitions, we must recognize that the amendment of the Inheritance Tax Law in nearly every session of the Legislature (Stats. 1893, p. 193; Stats. 1895, p. 33; Stats. 1897, p. 77; Stats. 1899, p. 101; Stats. 1903, pp. 55, 268; Stats. 1905, pp. 341, 374; Stats. 1909, p. 557; Stats. 1911, p. 713; Stats. 1913, p. 1066; Stats. 1915, pp. 418, 435; Stats. 1917, p. 880) has been largely at the instance of attorneys acting for the state or its various officers engaged in collecting its tax, and that such amendments have been made to clarify the law and to meet the contentions of those opposing the collection of the tax, and that such legislation has sometimes been obtained before this court or any other has passed upon the contentions of the parties, thus attempting by legislation to settle the question for all

future taxation at an earlier period than, in view of our congested calendar, it has been possible for this court to determine such questions. Some of these amendments have been thereafter shown to be unnecessary, and, as stated in Estate of Reynolds, supra, merely declaratory of the law as it already existed. Others have extended the law to cases not originally included. We think the change in the Inheritance Law of 1911 was of the latter character. At any rate, it is clear in this case that the trial court in holding that the gift in question was made in contemplation of death was amply sustained by the evidence.

[5] The appellants contend that the superior court sitting in probate had no jurisdiction to fix a tax on property transferred prior to the death of the decedent. There is no doubt that the jurisdiction of the superior court sitting in probate matters is a limited and statutory one (In re Haas, 97 Cal. 232, 31 Pac. 893, 32 Pac. 327; Ryder's Estate, 141 Cal. 368, 74 Pac. 993), but sections 15 and 16 of the Inheritance Tax Law (Stats. 1917, c. 589) specifically authorizes the probate court to fix a tax upon property transferred in contemplation of death "to any person, institution or corporation taking property under and by virtue of said probate proceedings." This provision of the statute refers to a situation such as that presented by the record in this case where the children all took property by virtue of the probate proceedings as well as by the transfer.

[6] Moreover, the parties appeared without objection in opposition to the application for the fixing of a tax upon the property transferred and litigated the matter. As we have no separate probate court, and the right to a tax was litigated under the application of the state controller and the objections thereto in the superior court, a court having general jurisdiction under the Constitution of such matters, such parties so appearing cannot now be heard to complain that the court was without jurisdiction. The court had jurisdiction of the subject-matter and of the parties.

The order of the court declaring the tax a lien upon the shares of stock theretofore transferred to the children was merely declaratory of the law. It does not appear that the stock was to be taken possession of by the court or by any officer connected with the court for the purpose of executing the judgment.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.

Justice SHAW, deeming himself disqualified, does not participate in the foregoing opinion.

186 Cal. 316

ELLSWORTH v. BRADFORD et al.
(L. A. 6551.)

(Supreme Court of California. June 22, 1921.)

1. Corporations ⟸215—Stockholders' statutory liability holds them as principal debtors, and not as sureties or guarantors.

The statutory liability of a stockholder is an independent original liability to the creditor which can be enforced directly against the stockholder quite independently of any judgment against the corporation; the stockholders being primarily liable as principal debtors, and not as sureties or guarantors.

2. Corporations ⟸215—Stockholder's statutory liability is not for corporation's benefit.

The stockholder's statutory liability is not for the benefit of the corporation, and is in no sense a part of its assets, like unpaid subscriptions to stock, and is of the same nature as that of an individual partner to the partnership debts.

3. Limitation of actions ⟸58(4)—Judgment against corporation does not create new liability nor extend limitation statute for suing stockholders.

A judgment against the corporation does not create a new liability nor extend the time prescribe by the statute of limitations for bringing suit against stockholders made liable by statute.

4. Corporations ⟸253—Judgment against corporation admissible as prima facie evidence in action to enforce stockholders' individual liability.

In an action against stockholders of a corporation on their individual liability, under Const. art. 12, § 3, and Civ. Code, § 322, it was not error to admit a judgment against the corporation, since, in view of Code Civ. Proc. § 1851, such judgment is prima facie evidence of the existence of the corporate liability, and leaves open to the stockholder any meritorious defense he may have to the original obligation without requiring the creditor in every instance to preserve and produce anew the evidence in support of his claim.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Lucie E. Ellsworth against A. S. Bradford and another. Judgment for plaintiff, and the defendants appeal. Affirmed.

Gray, Barker & Bowen, Hocker & Austin, and Donald Barker, all of Los Angeles, for appellants.

S. L. Carpenter and S. E. Vermilyea, both of Los Angeles, for respondent.

W. C. Petchner, Gibson, Dunn & Crutcher, and Edward E. Bacon, all of Los Angeles, amici curiæ.

SLOANE, J. The appellants were sued in this action on their statutory liability as

stockholders of the National Home & Town Builders, a corporation, for their proportionate share of the corporation's liability for damages as evidenced by a judgment in favor of plaintiff against the corporation for conversion of plaintiff's property.

The only point involved on this appeal is as to the admissibility and effect of the judgment against the corporation as evidence to establish the liability of the stockholders.

[1] Upon the trial the court admitted the judgment fixing the liability of the corporation, as competent evidence against the stockholders, in determining their individual liability under section 3, art. 12, of the California Constitution and section 322 of the Civil Code.

This ruling of the court is assigned as error. It is the contention of appellants that as they were not parties to the action the judgment cannot be used in any way to establish their personal liability.

Strangely enough, the question has apparently never before been directly passed upon by the appellate courts of this state.

It has been definitely held that, in an action by a creditor of a corporation to recover from a stockholder his unpaid subscription to capital stock, a judgment against the corporation conclusively establishes the creditor's claim as against the stockholder. Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Tatum v. Rosenthal, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97.

But the distinction between this class of cases and that in which the statutory liability is sought to be enforced is very obvious. The amount unpaid on stock subscription is a debt owing by the stockholder to the corporation, which the creditor has a right to subject to the satisfaction of his judgment against the corporation. The statutory liability, as has been repeatedly held by this court, is an independent original liability of the stockholder to the creditor which can be enforced directly against the stockholder, quite independently of any judgment against the corporation, and is not dependent upon an adjudication of indebtedness in an action against the corporation, but upon the actual existence of such indebtedness. Under the provisions of the California law stockholders are held to be primarily liable as principal debtors, and not as sureties or guarantors. Young v. Rosenbaum, 39 Cal. 646; Sonoma Bank v. Hill, 59 Cal. 107; Hyman v. Coleman, 82 Cal. 650; [1] Brown v. Merrill, 107 Cal. 446, 40 Pac. 557, 48 Am. St. Rep. 145; McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; Eva v. Andersen, 166 Cal. 420, 137 Pac. 16.

[2] The stockholder's statutory liability is not for the benefit of the corporation and is in no sense a part of its assets like unpaid subscriptions to stock. Fletcher on Corporations, § 4210; Williams v. Carver, 171 Cal. 658, 154 Pac. 472; Zang v. Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145; Mechanics' Sav. Bank v. Fidelity Ins. Co. (C. C.) 87 Fed. 113.

The liability has been declared by this court to be of the same nature as that of an individual partner to the partnership debts. Mokelumne Hill Canal & Min. Co. v. Woodbury, 14 Cal. 265; Robinson v. Bidwell, 22 Cal. 388; Davidson v. Rankin, 34 Cal. 505.

In Buttner v. Adams, 236 Fed. 105, 149 C. C. A. 315, the United States Circuit Court of Appeals, referring to the California, law, says:

"That state is one of the few in which the liability of the stockholder is not collateral, but is original, and partakes of the nature of the liability of partners. The result is that an action at law lies 'directly against the shareholders as against partners on their joint contract,' and need not be predicated on a judgment against the corporation."

Following out the analogy of the law of partnership, it is the accepted rule that in no case will a judgment entered after service on less than all the partners be given the effect of a personal judgment against partners not actually served. 20 R. C. L. p. 937; Sugg v. Thornton, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. Ed. 447; In re Grossmayer, 177 U. S. 48, 20 Sup. Ct. 535, 44 L. Ed. 665; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Phelps v. Brewer, 9 Cush. 390 (Mass.) 57 Am. Dec. 56; Welsh v. Kirkpatrick, 30 Cal. 203, 89 Am. Dec. 85; Feder v. Epstein, 69 Cal. 456, 10 Pac. 785; Davidson v. Knox, 67 Cal. 143, 7 Pac. 413; Code Civ. Proc. § 388.

It requires no citation of authorities to the general rule that a judgment is not admissible in evidence against any person not a party or privy thereto. In Phelps v. Brewer, supra, it was held that partners sued in an action cannot enter an appearance for partners not sued.

[3] Accepting the logic of the authorities cited, and applying the strict rules of evidence governing the use of judgments against persons not parties, nor in privity therewith, it is difficult to reach a different conclusion than is contended for by appellants and upheld by division one of the second appellate district, from which this case comes to us on petition for rehearing. That court held that—

"Defendants were entitled to have produced sufficient proof of the facts showing the alleged conversion of plaintiff's stock by the corporation. The fact that the plaintiff in an action against the corporation had recovered a judgment for the same cause was not evidence of the existence of the liability against the stockholder."

Recognizing, as we must, that the stockholder becomes liable to the corporation's creditors solely as an original debtor, and not in any way as a surety or guarantor for the corporation, and that this liability arises

[1] 23 Pac. 62, 16 Am. St. Rep. 178.

by operation of law from the creation and existence of the debt, not through any power of the corporation to bind him to personal liability for its obligations, it would seem requisite to fixing such liability in an action against the stockholder to prove the facts establishing the corporate debt. The law makes the act of the corporation creating a corporate liability binding on the stockholders, but it does not extend the power of the corporation any further in the matter or authorize it to represent the stockholder in putting up a defense against his personal indebtedness. The limitation of the authority of the corporation to in any way enlarge or extend or renew the stockholder's statutory liability is declared in the decisions of this court holding the corporation powerless to extend such liability by a new promise, or by agreement extending the period of the statute of limitations, or by changing the form of the indebtedness. Hyman v. Coleman, supra, 82 Cal. 650; [2] Winona Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077. In Winona Wagon Co. v. Bull, supra, this court adopts the following language from Trippe v. Huncheon, 82 Ind. 307, as to the relation of the corporation to stockholders' liability:

"The corporation has nothing to do with this liability, nor has it the right or power to represent its members as to this individual obligation. It is a matter between the creditors of the corporation and its members, not as corporators, but as individuals."

A judgment against the corporation does not create a new liability, nor extend the time prescribed by the statute of limitations for bringing suit against the stockholders. Larrabee v. Baldwin, 35 Cal. 168; Stilphen v. Ware, 45 Cal. 110.

The case of McGowan v. McDonald, supra, is referred to as giving support to the competency of a judgment against the corporation as evidence of the stockholders' liability. It is there held that—

"In a suit against a stockholder to enforce his liability the first fact to be established is the indebtedness of the corporation, and when that is established the liability of the stockholder results as a necessary sequence. It would seem, therefore, that any evidence which is competent and sufficient to show the liability of the corporation must be competent and sufficient to show the liability of the stockholder."

The evidence sought to be introduced in the case cited was not a judgment against the corporation, but entries made by the corporation bank in passbooks of the plaintiffs, depositors of the bank, showing balances due the depositors. There is a difference between the facts going to establish the indebtedness and the judgment based on such facts. The stockholder might dispute or disprove the original facts if produced in evidence against him. He cannot dispute the judgment under the rule contended for where it is held to be conclusive against him.

In Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110, it was held there was no prejudicial error in admitting the judgment against the corporation, but in that case, as was pointed out in the decision:

"There was other evidence from the books of the bank to show the indebtedness. * * * The cause was tried by the court and when so tried we do not understand the objection of irrelevancy is tenable unless it is plainly apparent that the court has rested its decision on the irrelevant testimony."

[4] Looking beyond our own courts for the rule governing the effect and admissibility of this class of evidence, we are involved at once in a Babel of confusion. Hardly any two states have identical laws governing the liability of stockholders for corporate debts. California is almost alone in making the liability direct, immediate, and enforceable independently of proceedings against the corporation.

In many of the states the liability is secondary and contingent on the insolvency of the corporation. In some an existing judgment against the corporation and exhaustion of the remedy thereon is a prerequisite to pursuing the stockholders' liability.

It is true that most of the text-writers and many of the judicial decisions concede the existence of a generally accepted rule that a judgment against the corporation establishes the existence of the liability as against the stockholder, either conclusively or as prima facie proof, and the statement of the rule is usually fortified with a long list of authorities. 7 R. C. L. pp. 420, 421; 14 Corpus Juris, p. 1062, § 1654; Morawetz, Corp. (2d Ed.) § 886; 3 Clark & Marshall on Corp. § 824; 1 Cook on Corp. § 224; 7 Fletcher, Corp. § 4236, p. 7419.

It is impracticable to review the authorities here, but the result of our examination of most of them is the conclusion that they are generally inapplicable to the peculiar statutory liability imposed by the laws of California.

There are a few that are substantially in point, and these variously state the rule as making such judgment conclusive against the stockholder, not admissible against him for any purpose, or as constituting prima facie proof of the indebtedness.

Much of the confusion of authorities arises from a failure to distinguish between the controlling effect of a judgment against the corporation in an action to subject unpaid subscriptions or other corporate assets to the creditor's claim, and such judgment in cases where the liability of the stockholder was an independent indebtedness to the creditor and created no privity with the corporation in the matter of enforcing its payment.

Thompson on Corporations, vol. 4, p. 1395, favoring the admissibility of the judgment against the corporation as conclusive as to

the stockholder's liability, fairly states the attitude of the courts as follows:

"The courts are not agreed as to whether or not the foundation of the action to enforce the statutory liability of stockholders is the judgment against the corporation or the original indebtedness. The decisions are not harmonious, even in the jurisdictions in which it is held that the judgment against the corporation is conclusive upon the stockholders. However, it is believed to be the rule in the majority of the jurisdictions, and certainly the correct one, that the judgment against the corporation is the foundation of the action against the stockholder.

"But in other jurisdictions the action against the stockholder must be on the original indebtedness, and not on the judgment. The test in this respect, it seems, is that where the liability created by statute is upon the stockholders as individuals, and not as corporators, and where the liability is absolute, and in the nature of a primary obligation to pay all debts contracted by the corporation, then the corporation has nothing to do with the liability, nor has it the right nor the power to represent the stockholders as to such individual obligations. Under many such statutes the courts say that the action must be upon the original indebtedness."

The leading cases supporting the conclusive effect of such judgments are perhaps: Ball v. Reese, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638; Hancock v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; Holland v. Duluth Iron M. & D. Co., 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480.

The argument of Ball v. Reese, supra, which is typical of all the decisions upholding the same rule, is that:

"The ruling proceeds upon the theory that the corporation represents its stockholders within the limits of its corporate power. Through its officers and agents it can make contracts binding upon its members, and as it has to bring and defend suits in regard to any interest of the corporation, its action in that respect, if there is good faith, necessarily binds the stockholders as to any matter in litigation."

It is conceded in all the authorities that the stockholder is not estopped by any such judgment to defend against fraud or collusion in securing the judgment against the corporation.

The leading cases holding a judgment against the corporation inadmissible for any purpose as against the stockholder are in the courts of New York. It is claimed that there is a lack of uniformity on this question in the New York decisions, but, where the point has been raised in actions on the statutory liability of stockholders, the rule seems to be settled that a judgment against the corporation is not admissible. The leading cases are Miller v. White, 50 N. Y. 137, and McMahon v. Macy, 51 N. Y. 155. The most recent decision cited is Assets Realization Co. v. Howard, 70 Misc. Rep. 651, 127 N. Y. Supp. 798, affirmed by the New York Court of Appeals by a memorandum decision. The opinion of the Supreme Court in the case last cited reviews the entire field of the New York decisions, and states as its conclusion:

"The reasoning and logic upon which these decisions are based cannot be questioned. The stockholder in the action against the corporation is not a party to the proceeding. Until the action is brought to enforce his individual liability, he has not had his day in court. He is not privy to the corporation. * * * A judgment against the corporation undoubtedly binds the assets and property of the corporation itself, but does not bind the stockholders. Miller v. White, 50 N. Y. 137. The stockholders, no matter how meritorious a defense they might have, would have no right to be made parties to an action against the corporation, and contest in that action the validity of the debt in suit. It would be against every principle of justice and equity to hold the stockholder liable by virtue of a judgment against a corporation where he had no opportunity to * * * litigate his liability. Consequently the courts have properly held that the judgment against the corporation itself is neither conclusive nor prima facie evidence of the liability of the stockholder. * * *"

A third line of decisions has taken the middle course, and upholds the admission of judgment against the corporation as prima facie evidence of the existence of the liability or indebtedness as against the stockholder. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626; Grund v. Tucker, 5 Kan. 70; In re Warren's Estate, 52 Mich. 557, 18 N. W. 356.

The grounds upon which this form of evidence is held admissible, but only as establishing a prima facie case, are not very fully set forth in the cases cited.

Under the numerous authorities cited in the learned briefs of counsel for appellant and respondent and amici curiæ on this appeal there cannot be said to be any such well-beaten path pointed out along either of the courses advocated as to prove a compelling influence in guiding the footsteps of this court in following one or the other.

Whatever preponderance of authority there may be for making a judgment against the corporation conclusive evidence of the liability of the stockholder, it is overbalanced by the weight of reasoning, and the established rules of evidence against it. Logically, the same grounds of reasoning would perhaps forbid admitting such judgment as prima facie evidence, but there is persuasive authority and strong grounds of public policy for giving at least presumptive weight to such evidence. While the statutory liability of the stockholder is original, and independent so far as its continuance and enforcement are concerned, it has its origin in the acts of the corporation. Its existence and obligation arise on the same state of facts as to both. The stockholder has a twofold concern in every such corporate liability—one as affect-

ing his interest as a stockholder; the other relating to the individual obligation imposed upon him by law. It is the duty of the corporation to protect his rights as a shareholder in any action brought against it. If this duty is performed its benefits extend to his personal and individual liability, for both involve the same state of facts.

There is a strong presumption at least that the corporation has interposed to the rendition of a judgment against it every meritorious defense that would avail the stockholder on his statutory liability.

Moreover, if it becomes the established doctrine that a judgment against the corporation is unavailing against the stockholder, creditors will feel compelled in all cases where they are not willing to entirely rely upon the solvency of the corporation for recovery to join all the stockholders as defendants in the original action to avoid the necessity of trying anew the issues as to the indebtedness every time a subsequent action is brought to enforce the claim against a stockholder.

Such a necessity would impose a burdensome hardship upon both creditors and stockholders and frequently involve needless litigation.

Treating the judgment as prima facie evidence of the existence of the corporate liability would leave open to the stockholder any meritorious defense to the original obligation, without requiring the creditor in every instance to preserve and produce anew the evidence in support of his claim, which in most cases could not be successfully rebutted, but which it might be difficult to reproduce.

This reasoning may be supplemented by the provision of section 1851 of the Code of Civil Procedure that—

"Where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties."

This section of the Code apparently both avoids the objection to using the judgment at all as evidence in a suit against the stockholder and limits its conclusiveness.

It cannot be doubted that in an action on the stockholder's statutory liability the "obligation or duty of a third person," the corporation, is in issue, and by virtue of this provision the judgment against the corporation on such obligation becomes prima facie evidence.

We are of the opinion that the purpose of the stockholders' liability law, and the interests of the parties and the public, will be best served by admitting judgments of this nature in suits to enforce the stockholder's statutory liability as prima facie evidence of the indebtedness sued on.

The only objection urged here to the judgment appealed from arises on the admission in evidence of the judgment-roll in the previous action against the corporation to establish the corporate indebtedness. Such judgment-roll being admissible to establish a prima facie case for plaintiff, and no rebutting evidence having been introduced or offered on the part of defendants, the judgment must be affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LENNON, J.; LAWLOR, J.

52 Cal. App. 526

USHIROHIRA v. STUCKEY. (Civ. 3423.)

(District Court of Appeal, Second District, Division 1, California. May 6, 1921.)

1. Appeal and error ⊂=1011(1)—Finding on conflicting evidence will not be disturbed on appeal.

Where the evidence heard by the trial court conflicted, its finding will not be disturbed on appeal.

2. Animals ⊂=97—Owner's willfulness not element of liability for trespass.

Under St. 1877–78, p. 176, it is the duty of the owner or person in control of cattle to prevent them trespassing, and it is not necessary in order to warrant recovery for the person injured to show that they were willfully allowed to trespass.

3. Animals ⊂=99—Each owner of joint herd liable for whole trespass.

Where several persons maintain a joint herd of cattle, and the cattle do damage by trespass, each of the owners may be held liable for the whole injury.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by S. Ushirohira against L. C. Stuckey. From a judgment for plaintiff, defendant appeals. Affirmed.

A. C. Galloway, of Los Angeles, for appellant.

Fredericks & Hanna and Harold C. Morton, all of Los Angeles, for respondent.

JAMES, J. Plaintiff, by the judgment entered herein, was allowed recovery of a sum of money as damages alleged in his complaint to have been caused to growing crops by reason of certain cattle, belonging to appellant, being allowed to trespass thereon. This appeal is taken from the judgment so rendered, and is brought to this court under what is called the alternative method. Counsel for appellant in his brief makes several points with reference to matters which he affirms are shown by the record, but he makes no attempt at all to comply with the requirement of section 953c, Code of Civil Procedure, by printing in his brief such portions of that record as he desires to call to the

attention of the court. If the case stood upon the presentation made by appellant alone, the court would be justified in assuming that counsel had not desired to have the court consider more than his abstract statements with reference to that record; but the respondent, in order to meet the assumed case, has supplied portions of the testimony which may be looked to in considering the contentions urged for reversal.

[1] The chief claim of appellant is that the court decided the case against the preponderance of the evidence. This contention admits that there was a conflict in that evidence. The law that an appellate court cannot review a question as to the sufficiency of the evidence, in the presence of a conflict, is so elementary, and has been affirmed by so many decisions, that it is now unnecessary to do more than state the rule. Where a conflict in the evidence exists, no question of law arises which an appellate tribunal is authorized to decide; the question is then a matter of fact, in the determination of which the decision of the trial judge is final and conclusive.

[2, 3] Under the existing law (Statutes of 1877-78, p. 176, and amendment, p. 879), liability is created as against the owner or person in control of cattle for damages arising from the trespass of such cattle upon the crops of another (Hicks v. Butterworth, 30 Cal. App. 562, 159 Pac. 224). It is not essential under the act referred to that a plaintiff show that the owner or person in control of the cattle willfully allowed them to commit trespass. It is the duty of the owner or person in charge to so guard such animals as to prevent the happening of the trespass. There is no suggestion in this case that the animals became unmanageable, or beyond the control of persons in charge.

It seems, according to the statements made in the briefs, that one White had charge of the feeding of 157 head of appellant's cattle, 15 head belonging to a second person, 3 belonging to a third person, and 1 to a fourth person; that these cattle were all kept together. Appellant insists that, conceding the evidence is sufficient to show that some of appellant's cattle were among those which committed the trespass, the evidence also shows, as a probability at least, that the number included some of the other animals from the joint herd. We are not prepared to admit that the evidence as it is presented to us will bear the interpretation suggested; but, even though that condition be conceded, appellant's liability would not be changed in any particular. It has been held that, where several persons maintain a joint herd of cattle, and the cattle did damage by trespass, each of the owners may be held for the whole damage. This holding rests largely upon the necessities of the case, for it would be extremely difficult, if not impossible, for a claimant to prove with any degree of exactness the particular amount of damage done by the cattle of each of the owners of the joint herd. Wilson v. White, 77 Neb. 351, 109 N. W. 367, 124 Am. St. Rep. 852. No other alleged errors are so presented by appellant's brief as to require consideration on this appeal.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 545

DYER LAW & COLLECTION CO. v. ABBOTT. (Civ. 3612.)

(District Court of Appeal, Second District, Division 1, California. May 6, 1921.)

1. Pleading ⟸166—New matter in answer deemed controverted without special replication.

New matter in an answer is deemed to be controverted without any special replication.

2. Pleading ⟸291(1)—Plaintiff, who admits execution and genuineness of instrument by failure to file statutory affidavits, may offer evidence in avoidance of its operation and effect.

A plaintiff, who admits the due execution and genuineness of an instrument set out in the answer by failing to file the affidavit required by Code Civ. Proc. § 448, is nevertheless entitled to offer competent evidence in avoidance of the effect or operation of such instrument.

3. Mortgages ⟸218—Payee may sue on note notwithstanding mortgage describing land not in existence.

Payee may sue one of the makers on a note instead of proceeding to foreclose mortgage purporting to secure payment of note, notwithstanding Code Civ. Proc. § 726, providing that where a note is secured by a mortgage the action shall be to foreclose the mortgage, where the property described in the mortgage had no existence and the payee in fact had no lien as security for payment of note, since the purpose of such statute is merely to prevent a multiplicity of suits by compelling creditor to exhaust security of mortgage before taking a personal judgment.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the Dyer Law & Collection Company against F. J. Abbott. Judgment for plaintiff, and defendant appeals. Affirmed.

F. E. Davis, of Los Angeles, for appellant.

Trusten P. Dyer, of Los Angeles, for respondent.

SHAW, J. Defendant appeals from a judgment rendered in favor of plaintiff in an

action brought to recover upon a promissory note.

As a special defense, the defendant by answer alleged that, with the execution and delivery of the note and as a security for the payment thereof, he and plaintiff's assignor executed an agreement, copy of which is set out in the answer, which agreement "is in truth and in fact a mortgage on real estate and was given as security for the obligation sued upon in this action." The agreement contained a clause as follows:

"The payment of the said promissory note and moneys is hereby secured upon the interest of the party of the first part (defendant herein) in what is known as the Dreamland Pier Company at Ocean Park, and the property owned by him jointly with C. A. de Lisle-Holland and W. H. Labb, and also secured on all devices erected on, or so to be, the said pier and property."

The sole contention of appellant is that, in the absence of an affidavit filed by the plaintiff denying the execution of the instrument, its genuineness, as provided by section 448, Code of Civil Procedure, is deemed to be admitted, and since the instrument constituted a mortgage given to secure the payment of the obligation, no action could be instituted for recovery upon the note other than as provided in section 726, Code of Civil Procedure, namely, to foreclose the mortgage and, if the proceeds of a sale of the property were insufficient to pay the amount found due, take judgment for the deficiency.

[1-3] New matter in an answer is deemed to be controverted without any special replication, and hence, while under section 448, supra, the plaintiff herein, by his failure to file the affidavit therein prescribed must be deemed to have admitted the due execution and genuineness of the instrument set out in the answer, he was nevertheless entitled to offer any competent evidence in avoidance of the effect or operation of such instrument. In re Garcelon, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134. It appears that immediately prior to the time when the note would have been barred by the statute of limitations, to wit, on March 28, 1919, defendant by a written instrument renewed his promise to pay the same. The court, upon ample evidence, including that of the defendant himself, found that neither at the said time nor at any time thereafter did defendant have any interest whatsoever in the property described in the purported mortgage; that the property therein described and upon which the mortgage purported to create a lien had no existence; and that at the time of bringing the suit said note was wholly unsecured. It thus clearly and conclusively appears that plaintiff had no lien, by mortgage or otherwise, as security for the payment of the note. Under such circumstances, to allow a personal action upon a note does not violate the policy established by section 726, Code of Civil Procedure (Otto v. Long, 127 Cal. 471, 59 Pac. 895), the purpose of which policy is to prevent a multiplicity of suits by compelling the creditor to exhaust the security of the mortgage before taking a personal judgment in the action against the debtor. Merced Bank v. Casaccia, 103 Cal. 641, 37 Pac. 648. In the instant case it appears that the security, if any ever existed, was exhausted, and that, too, without the fault of plaintiff or its assignor, and no purpose could be served by the idle and senseless act of foreclosing a mortgage in form which, by reason of there being no property, had no substance and did not in fact constitute a lien. As said in Otto v. Long, supra:

"If it can be made to appear that there is no such property as that which the mortgage purports to describe, it would demonstrate that there was no lien, and the debt would not be one secured by mortgage upon real estate."

It conclusively appears from the record herein that the note upon which the action is based was not secured by a mortgage or other lien upon any property whatsoever, and hence, notwithstanding the existence of an instrument which in form purported to, but did not in fact, create a lien as security, plaintiff was entitled to ignore the same and bring an action to recover a personal judgment against defendant upon the note as maker thereof. See Toby v. Oregon Pac. R. R. Co., 98 Cal. 490, 33 Pac. 550; Savings Bank v. Central Market Co., 122 Cal. 28, 54 Pac. 273.

The judgment is affirmed.

We concur: CONREY, P. J; JAMES, J.

52 Cal. App. 612

HOFFMAN v. KENNEDY et al. (Civ. 3596.)

(District Court of Appeal, Second District, Division 1. California. May 12, 1921.)

1. Drains ⟹49—Supervisors can only provide for protection of laborers and materialmen by exacting bond.

The only authority vested in the board of supervisors to provide for the protection of materialmen and laborers as subcontractors under one contracting to construct a storm drain under Drainage Act 1903, as amended, is the exaction of the bond required by section 8a.

2. Drains ⟹49—Statutes held inapplicable to bonds to secure laborers and materialmen.

Code Civ. Proc. § 1183, relative to mechanics' liens on structures not of a public character and Public Improvement Act 1897, as amended by St. 1915, p. 926, are not applicable to bonds given to secure laborers and material-

men on work done under the Drainage Act, 1903, as amended.

3. Drains ⊂=49—Bonds held not statutory bonds, and subcontractor not entitled to recover thereon.

Under Drainage Act 1903 (as amended) § 8a, requiring contractors to execute a bond running to the county in not less than one-half of the contract price, conditioned for the faithful execution of the contract and the payment by the contractor for all labor and materials, a bond, not running to the county, but to any and all persons performing labor or furnishing material, and not conditioned for the faithful execution of the contract, and a bond in the penal sum of one-fourth the contract price, and conditioned in accordance with Public Improvement Act 1897, as amended by St. 1915, p. 926, do not comply with the requirements of the statute, and, it being conceded that they are not good common-law bonds, a subcontractor cannot recover thereon.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Fred Hoffman against James Kennedy and the Guardian Casualty & Guaranty Company. From a judgment for plaintiff, the Guaranty Company appeals. Reversed.

Schweitzer & Hutton and Kyle Grainger, all of Los Angeles, for appellant.

Hartley Shaw, of Los Angeles, for respondent.

SHAW, J. Defendant Guardian Casualty & Guaranty Company appeals upon the judgment roll alone from a judgment rendered against it as surety upon a bond to indemnify all persons performing labor or furnishing materials in the execution of a contract between the county of Los Angeles and James Kennedy for the doing of certain public work.

The material facts of the case, as shown by the findings, are as follows: The county of Los Angeles, on November 8, 1916, duly entered into a contract with defendant Kennedy for the construction of a storm drain in the district known as Long Beach drainage district No. 1 at a cost of $84,936. The contract included the work of excavating a trench in State street in the city of Long Beach wherein to construct the storm drain, and, as a part of the work, provided for the refilling of the trench and resurfacing of the street. On January 16, 1918, plaintiff entered into a contract with Kennedy pursuant to which he, for $2,477.10, furnished materials and did all of said resurfacing work so required of Kennedy under his contract with the county, which work plaintiff completed on May 17, 1918. Whereupon, default having been made in the payment of the amount due under the terms of the contract, plaintiff instituted this action to recover the same upon two bonds executed by Kennedy on November 8, 1916, with the Guardian Casualty & Guaranty Company as surety thereon, each of which bonds is made the subject of a separate cause of action as set forth in the complaint.

The county of Los Angeles, in having the storm drain constructed, acted under and in accordance with the provisions of an act entitled, "An act to promote the drainage of wet, swamp and overflowed lands, and to promote the public health in the communities in which they lie," approved March 21, 1903. Stats. 1903, p. 354, and the amendments thereto, which act as so amended appears in Deering's Gen. Laws as Act 986.

The act (section 8a) provides that—

"Before entering upon such contract, a bond shall be executed and filed, running to the county, in an amount not less than one-half of the contract price of the work, signed by the contractor and two or more sureties, who shall aggregatedly, unless surety companies, qualify before an officer entitled to administer the oath in a sum equal to the amount of the bond, each surety in the amount for which he becomes surety. Such bond shall be conditioned for the faithful execution of the contract by the party contracting to do the work, and the payment by him for all labor and materials furnished for or in the doing of the work. The form and sufficiency of said bond shall be passed upon by some member of the board of supervisors, and such bond shall inure as well to the benefit of any and all persons furnishing labor or materials for the work as to the county."

As stated, two bonds were made at the time of the execution of the contract, each of which is separately set out in the complaint, and upon each of which plaintiff as subcontractor bases his right to recover the amount due under the contract made with Kennedy for the work performed and materials furnished in resurfacing the street.

Appellant attacks both instruments upon the ground that they are insufficient in that neither of them purports to be given under and in accordance with the provisions of the statute, while, on the other hand, respondent, conceding the instruments cannot be construed as common-law bonds, insists that both in terms and substance substantially comply with the provisions of section 8a of the statute above quoted. Reference to the first bond declared upon in the complaint clearly discloses the fact that in its execution the parties had in view the provisions of section 1183, Code of Civil Procedure, providing for liens of mechanics upon structures other than those of a public character. While the statute pursuant to which the bond was exacted, in clear and positive terms requires that the bond in such cases shall run to the county and be conditioned for the faithful execution of the contract by the contractor, the bond in question names as obligee therein, not the county, but "any and all persons who perform labor upon or furnish materials to

be used in the work," etc., and omits altogether the required condition that the contractor shall faithfully execute the contract. It thus appears that the bond, headed "Bond to Laborers and Materialmen," not only omitted material provisions required by the express terms of the statute to be inserted therein, but it contained other provisions, clearly showing that it was not executed under section 8a of the Drainage Act, but was in form and substance the bond required by section 1183, Code of Civil Procedure.

The second bond set forth in the complaint and given at the same time is in the penal sum of one-fourth the contract price named in the contract, whereas the statute in express terms requires that it shall be in an amount not less than one-half of the contract price named. While it runs to the county, it is conditioned, not only that the contractor shall faithfully perform the work and pay for materials and labor, but also pay for "provisions, provender or other supplies, or teams used in, upon or for or about the performance of the work contracted to be done," and provides that the surety, in case of default on the part of the contractor, will pay the same, "provided that such claims or claim shall be filed as required by an act of the Legislature of the state of California entitled 'An act to secure the payment of the claims of materialmen, mechanics or laborers employed by contractors upon state, municipal or other public work,' approved March 27, 1897, as amended by an act of said Legislature approved May 29, 1915." Not only does it appear that this bond was given under the provisions of the act referred to therein, rather than under and in accordance with the provisions of section 8a of the Drainage Act, but that it is not the bond required by the statute, for the reason that it, in violation of the statute, fixes the amount of the bond at one-fourth of the contract price, instead of a sum not less than one-half thereof, as directed by the statute.

[1, 2] The only authority vested in the board of supervisors to provide for the protection of materialmen and laborers as subcontractors under Kennedy was the exaction of the bond required by said section 8a. By reference to the bonds, it is apparent that in the execution of the one the parties were guided alone by the provisions of section 1183, Code of Civil Procedure, and in giving the other they acted under and in accordance with the provisions of the Public Improvement Act of 1897, neither of which statutes is applicable to work done under the Drainage Act of 1903, and pursuant to which the improvement was made.

[3] Respondent, while conceding the bonds, when measured by the requirements of the statute, are not only irregular in form, but that in substance they contain conditions not authorized thereby and omit other and material provisions which the statute in express terms requires to be inserted therein, nevertheless insists the instruments, both in form and substance, are in substantial conformity with the law. In support of this claim he cites a number of authorities from other jurisdictions, an examination of which, however, discloses that the courts, in considering purported statutory bonds containing unwarranted conditions and where like omissions occurred, upheld their validity upon the theory that they were common-law bonds. In our opinion, none of the cases cited are applicable to the facts involved in the instant case. The instruments clearly fail to comply with the requirements of the statute under which they were given, and, however reluctant we feel to reverse a judgment obtained upon a bond given, as here, by a commercial company for a compensation accepted for the service, and no doubt intended for plaintiff's protection, we—since they, as conceded by respondent, cannot under the laws of this state be deemed common-law bonds—feel compelled to so declare.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

52 Cal. App. 581

BENNETT v. MODERN WOODMEN OF AMERICA. (Civ. 3789.)

(District Court of Appeal, First District, Division 1, California. May 10, 1921. Rehearing Denied June 8, 1921. Hearing Denied by Supreme Court July 7, 1921.)

1. Insurance ⟸719(1)—Fraternal society can, under contract, make reasonable by-laws applicable to existing certificates.

A fraternal benefit society, which has issued certificates on applications by which insured agreed to be bound by the society's by-laws then in force and to be thereafter enacted, can make by-laws subsequently enacted, which are not in themselves unreasonable or against express law or public policy, applicable to such existing certificates.

2. Insurance ⟸719(1)—By-law against payments for disappeared members until expiration of life expectancy is unreasonable.

A by-law of a fraternal benefit society providing that proof of death of a member based on disappearance cannot be made until the full term of the member's expectancy of life is contrary to the rule of common law, and Code Civ. Proc. § 1963, subd. 26, that a person not heard from in 7 years is presumed to be dead, and is also unreasonable and against public policy, and therefore does not apply to a benefit certificate issued before its enactment.

3. Insurance ⊂812—Limitation of action on certificate held not applicable, where society had collected dues of absent member.

Though a provision in the by-laws of a fraternal benefit society limiting actions on the certificate to 18 months after the death of insured is valid, where it authorizes reasonable opportunity to begin suit, it does not bar a suit on a policy issued on the life of a member who had disappeared, though the suit was not brought within 18 months after the expiration of 7 years from the disappearance, where the society contended it was not liable until the expiration of the member's expectancy of life, and continued to collect dues from the beneficiary after the expiration of the 7-year period, and the beneficiary made her claim and brought her action within reasonable time after she learned of her legal rights.

4. Insurance ⊂793—Fraternal society held not authorized to pay benefits to niece by marriage.

A fraternal benefit society, which is authorized by the law of its incorporation to pay benefits only to wives, designated blood relatives, and dependents, cannot be required to pay the proceeds of a benefit certificate to a designated beneficiary, who was a niece of insured by marriage only and was not dependent on him.

5. Insurance ⊂770—Fraternal society cannot waive statutory provisions limiting class to be designated as beneficiary.

A fraternal benefit society cannot, by issuing a certificate payable to a designated person who was not within the class who may be designated as beneficiaries under the law of the society's incorporation, waive the restrictions of that law.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Agnes Bennett against the Modern Woodmen of America. From a judgment for plaintiff, defendant appeals. Reversed.

Geo. M. Thomas, of San Francisco, and Truman Plantz, of Warsaw, Ill., for appellant.

Chas. S. Wheeler, and Chas. S. Wheeler, Jr., both of San Francisco, for respondent.

WASTE, P. J. The plaintiff had judgment for the amount of a benefit certificate issued by the defendant upon the life of Frank S. Plummer, and the defendant appeals.

The defendant is a fraternal benefit society organized under the laws of the state of Illinois. It has its principal place of business in that state, with subordinate lodges in various parts of the United States, one of which, known as "San Jose Camp, No. 7777, of Modern Woodmen of America," is located in the city of San Jose, in this state. On the 17th day of March, 1900, the defendant issued to Frank S. Plummer, then a member in good standing in the San Jose Camp, its benefit certificate for the sum of $2,000, payable upon the death of the insured to Annie Plummer, his wife. Annie Plummer died in August, 1905. Plummer thereupon requested of the defendant, and it did, on November 8, 1905, issue to him a new benefit certificate for a like amount as the first, and in lieu thereof, in which Agnes Bennett, this plaintiff, was named as beneficiary. Although designated by Plummer and described in the certificate as his "niece," Agnes Bennett was not a blood relative of his, but only a niece by marriage. Plummer regularly paid his dues and assessments to San Jose Camp until the month of February, 1906, when he disappeared. He has not been seen nor heard from since, although the plaintiff, the defendant, and members of San Jose Camp have made diligent efforts to locate him. Following his disappearance the plaintiff paid, and the defendant accepted, all dues and assessments which became payable by reason of the benefit certificate, until December 31, 1916. She then prepared and submitted to the defendant proof of the disappearance of Plummer more than 10 years previously, and demanded payment of the $2,000 specified in the benefit certificate, upon the theory that Plummer, not having been heard from for more than 7 years, was presumed to be dead. Then defendant refused payment whereon the plaintiff instituted this action, and obtained judgment, for which the defendant has appealed.

Several important questions arise on this appeal. Plummer applied for and received his first policy in the defendant society in 1900. The present policy was issued in 1905. Plummer disappeared in 1906. In 1908 the defendant enacted a by-law, numbered 66, which provides that proof of death of a member, based on disappearance, cannot be made until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired, and that this by-law shall be binding and effective, the statute of any state or rule of common law to the contrary notwithstanding. Until such period has elapsed all payments required by the by-laws of the society must be regularly made; otherwise, the insurance will lapse. The defendant interposed, as one of its separate defenses to the action, that the full term of expectancy of the life of Frank S. Plummer had not expired when this action was brought. On motion of the plaintiff the court struck the allegation from the answer. Appellant complains of this ruling of the court, but its contention is without merit.

The defendant's position, in brief, is that death, which alone matures the policy, cannot be shown in this case, and that the right

of the beneficiary to recover is postponed many years, until the termination of Plummer's expectancy of life, because of amendment No. 66 of the by-laws, and that recovery must be had at such deferred time only upon due proof of the fact of continued absence of the insured during the period, and of the payment by the beneficiary of all dues and assessments necessary to keep the certificate alive until the expiration of that period of expectancy.

[1] In his application for a membership in the defendant society, Plummer agreed to be bound by its by-laws then in force, and to be thereafter enacted. His compliance with such by-laws was, therefore, by his expressed agreement, made a condition on which he was entitled to participate in the beneficiary fund of the order. Where the contract between a member and the order is as here disclosed, it is never to be disputed that all subsequent rules, regulations and by-laws not in themselves unreasonable, against expressed law, or public policy, enter into and govern all of his rights and relationship with the association. Caldwell v. Grand Lodge, 148 Cal. 195, 199, 82 Pac. 781, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356.

[2] But it is a rule of common law, and of the statutory enactment of this state, that a person not heard from in 7 years is presumed to be dead (Civ. Code Proc. 1963, subd. 26), and appellant's by-law is not only unreasonable and violative of statutory enactment, but is against the weight of public policy. It has been repeatedly so held. Reynolds v. North American Union, 204 Ill. App. 316, 327; Samberg v. Knights of Modern Macabees, 158 Mich. 568, 123 N. W. 25, 133 Am. St. Rep. 396; National Union v. Sawyer, 42 App. D. C. 475; Supreme Lodge Knights of Pythias v. Wilson (Tex. Civ. App.), 204 S. W. 891, 894. Its enforcement would not only have the effect to render nugatory a salutary statute, but the further result of making it practically impossible to make proofs of death in cases within the recognized experience of man, and thereby work a substantial injustice to the beneficiary. Sovereign Camp W. O. W. v. Robinson (Tex. Civ. App.), 187 S. W. 215, 219; Reynolds v. North American Union, supra. In Olson v. Modern Woodmen of America, 182 Iowa, 1018, 164 N. W. 346, L. R. A. 1918F, 1164, this same appellant invoked the defense of this same by-law. The court refused to countenance the plea, holding that its application would impose on a beneficiary the burden of paying all dues and assessments during the whole period of expectancy of the assured, thereby making the certificate practically worthless.

[3] As a further and separate defense the appellant alleged that respondent's cause of action was barred by an express limitation in the contract of the time within which the action could be maintained, and by the statute of limitation. The benefit certificate provides that no action can or shall be maintained thereon until after the proofs of death and claimant's right to benefits, as provided for in the by-laws of the society, have been filed with the Head Clerk, and passed upon by the board of directors, nor unless brought within 18 months from the date of the death of the member. The court found that Plummer died some time in the month of February, 1913; that being 7 years after the date of his disappearance. This action was commenced on June 10, 1917. Appellant contends, therefore, that the suit was not only barred by the limitation of the contract, but also by the 4-year limitation of section 337, subdivision 1, of the Code of Civil Procedure.

It is undoubtedly the general rule that a condition in a policy of insurance, providing that no recovery shall be had thereon unless suit be brought within a given time, is valid, if the time limited is, in itself, not unreasonable; but to permit the defendant, under the peculiar facts of this case, to successfully interpose the defense of either the provision in the certificate, or of the statute, would be to extend the rule of limitation too far. The appellant, through its local camp officers, its general attorney associated with its Head Camp, and presumably others, had prompt notice of the disappearance of the assured, and engaged to endeavor to locate him. Just what it did in that regard does not appear. Although fully apprised of the fact that Plummer disappeared in February, 1906, the appellant for 10 years continued to demand and to take from the respondent dues and assessments required by its by-laws to keep the benefit certificate in force, and the assured in ostensible good standing. Even after it knew, or should have known, that Plummer was presumed to be dead in 1913, and the beneficiary entitled to offer presumptive proof of his death, it continued for 3 years more to exact these payments. It did not furnish the respondent the necessary blanks required by it for proofs of death, although it was one of its rules that such proofs would not be considered, unless made on the forms furnished by it. The respondent had given the appellant such information as she had concerning Plummer and his disappearance, and knew that the appellant had engaged to locate him. She complied with all the demands of the society, relying, as she testified, upon the belief that the appellant would initiate the proper steps for the payment to her of the benefits provided under the certificate of insurance at such time as the amount was properly payable. When she finally sought independent legal advice and presented proofs of the disappearance of the assured, sufficient to invoke the presumption of death, arising under the rule of the statute, more than 18 months had elapsed after

the presumption of death had been raised.

Respondent then acted with all convenient dispatch, but before appellant's board of directors passed upon the proofs of Plummer's disappearance, and considered and rejected her claim for benefits under the certificate, more than 4 years from the presumptive date of death had elapsed. Yet until that action was taken by appellant, plaintiff was prohibited by the by-laws from maintaining this action. Although required by the by-laws to bring her action within 18 months after death of the insured, respondent was forbidden to do so until her proofs of death and claims were acted upon by the board of directors of the appellant. To give literal effect to this by-law would be to suspend the remedy of respondent until some action was taken by the appellant and provide for the running of the statute at the same time. While in some cases this appears to have been done, the compelling facts of this particular case warrant our adherence to the rule announced in Case v. Sun Insurance Co., 83 Cal. 473, 476, 23 Pac. 534, 8 L. R. A. 48, and in holding that plaintiff's action is removed from the application of the general rule of limitation.

"To hold otherwise, would enable the insurer to collect assessments indefinitely, in disregard of the forfeiture, so long as it suited its interest to do so, and to assert a secret intention to insist upon the forfeiture, whenever such course better accorded with its advantage." Modern Woodmen of America v. Lane, 62 Neb. 89, 97, 86 N. W. 943, 944.

The precise question was considered in Kelly v. Ancient Order of Hibernians Life Ins. Fund of Minnesota, 113 Minn. 355, 129 N. W. 846, on identical facts. The court denied the intervention of both contract and statutory limitation, saying:

"The association ought not to be permitted to take advantage of its own neglect and refuse payment on the ground that the beneficiary did not sooner compel payment."

One other contention of the appellant remains to be considered. It is that the respondent is not one of the persons whom the insured might legally designate as a beneficiary under the benefit certificate. The Modern Woodmen of America filed its articles of association in Illinois, in 1884. Neither the statute of that state, passed in 1883, under which it was incorporated, nor its own charter, placed a restriction upon the class of persons whom its members might designate as beneficiaries. In 1893, however, the Illinois Legislature passed a new act, regulating fraternal benefit societies, which has continued and is still in existence, and which provides that payment of death benefits by such societies "shall only be made to the families, heirs and blood relatives, affianced husband, or affianced wife of, or to persons dependent upon the members." By the terms of this act, also all fraternal societies then doing business in Illinois were declared to be duly organized, and were authorized to continue doing such business, provided they made application for official permission, and otherwise complied with the provisions of the act.

The appellant immediately made application for, and was given authority "to carry on the business of fraternal beneficiary society insurance under the provisions of the said act of 1893, and amendments thereto." In the application to the state of Illinois for this permission, the Modern Woodmen of America represented that the death benefits of the society were paid only to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the members, the statement being couched in the exact language of the statute. Subsequently appellant amended its by-laws to conform to the statute of 1893, regarding beneficiaries, and when Plummer substituted this plaintiff as beneficiary in place of his deceased wife in 1905, it was and is provided that its benefit certificates shall be made payable only to the wife, surviving children, or some other person or persons specifically named as beneficiary, "who are related to the member as heir, blood relative, or person dependent upon him, or member of his family," and that no payment shall be made to any other person. Notwithstanding this inhibition, Plummer directed that the new benefit certificate be, and it was, issued to "Agnes Bennett [this respondent] related to said member [Plummer] in the relationship of niece," but the trial court found as a fact, and it is conceded that the respondent is not a blood relative, legal heir, dependent, or a member of the family of the decedent. Clearly, then, for two reasons she is not entitled to claim as a beneficiary under the benefit certificate. The statute of Illinois and appellant's by-laws prevent it.

[4] "The statute of Illinois is the organic law of this society. It is under this law that it lives, moves, and has its being. From this law it gets its right to do business, and by this law it is regulated and controlled." Bush v. Modern Woodmen of America, 182 Iowa, 515, 541, 152 N. W. 31, 36, and 162 N. W. 59 (on rehearing). Under the provisions of the Illinois statute of 1893 to the effect that all fraternal benefit societies should be governed by it, and the application of appellant to do business in pursuance of its requirements, the Modern Woodmen of America has been governed and controlled by the terms of that law since its enactment. Bastian v. M. W. A., 166 Ill. 595, 607, 46 N. E. 1090. The statute became an integral part of the charter of the society, as binding upon its members after its passage as any by-law that could have been adopted by the order.

Machado v. Ellison, 35 Cal. App. 337, 340, 169 Pac. 917. It must be considered as part of the contract of insurance, and inserted for the purpose of a construction of the policy, as an additional provision, as if it were literally incorporated therein. Nielsen v. Provident Savings, etc., Co., 139 Cal. 332, 337, 73 Pac. 168, 96 Am. St. Rep. 146.

It has been repeatedly held that a by-law such as the appellant has adopted is reasonable, and that after its adoption a member of the society has no right to make a beneficiary belonging to any other than one of the classes therein designated. Caldwell v. Grand Lodge, A. O. U. W., 148 Cal. 195, 199, 82 Pac. 781, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356; Bush v. Modern Woodmen of America, supra; Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065; Steele v. Fraternal Tribunes, 215 Ill. 190, 74 N. E. 121, 106 Am. St. Rep. 160.

[5] If it be contended that, by inserting the name of the respondents in the certificate, as it did, with benefits payable to her, and in collecting dues and assessments from the member thereafter, the appellant waived the requirement of its own by-law and the provisions of the statute, so far as the statute is concerned it cannot be done.

"There are many things that can be waived by an association of this character, but this is not one of them. The statute expressly and positively prohibited the payment of the benefit fund to any person who is not within the class designated as beneficiaries." Modern Woodmen of America v. Comeaux, 79 Kan. 493, 499, 101 Pac. 1, 3 (25 L. R. A. [N. S.] 814, 17 Ann. Cas. 865); Bush v. Modern Woodmen of America, supra; Steele v. Fraternal Tribunes, supra.

The judgment is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

52 Cal. App. 566

Ex parte WILLIAMS. (Cr. 990.)

(District Court of Appeal, First District, Division 1, California. May 7, 1921.)

1. Criminal law ⟸234—Substituted magistrate cannot consider evidence introduced before predecessor.

Where the magistrate before whom a preliminary examination was begun was absent at time the examination was concluded and another magistrate was called to sit in that department, the substituted magistrate could not, in determining whether probable cause to believe defendant guilty had been shown, consider the evidence introduced before his predecessor, since Pen. Code, §§ 858–883, providing for preliminary examinations, require the essential principles of procedure and evidence to be followed in such examinations, though they are less formal than the final trial of the case.

2. Criminal law ⟸234—"Depositions" before former magistrate cannot be considered by subsequent magistrate.

The fact that Pen. Code, § 869, designates the written testimony received before a magistrate at a preliminary examination as "depositions" does not entitle such testimony to be considered by a magistrate, who was substituted during the course of the examination for a magistrate before whom it was instituted, since the term "deposition" is employed in the Penal Code in a special and restricted sense, and not in the sense of evidence which is permitted to be embodied in writing; it is the sense in which it is used in Code Civ. Proc. § 2019.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deposition.]

3. Habeas corpus ⟸34—Pleading not guilty to information does not waive right to habeas corpus for illegal commitment.

The entry of a plea of not guilty to an information based on a preliminary examination does not waive the right of accused to habeas corpus to procure his discharge under Pen. Code, § 1487, subd. 7, authorizing a discharge on habeas corpus where a party has been committed without reasonable or probable cause.

4. Habeas corpus ⟸3—Right not lost by failure to move to quash information.

Pen. Code, § 995, subd. 1, requiring an information to be set aside on defendant's motion when defendant had not been legally committed by a magistrate, does not authorize the relief, if the magistrate has heard and considered evidence, though it is insufficient, and therefore section 996, providing that the failure to make that motion precludes defendant from thereafter making the objection, does not prevent habeas corpus to procure defendant's discharge on the ground that he was committed without reasonable or probable cause under section 1487, subd. 7, where the magistrate heard some evidence, which was insufficient to show reasonable cause, and based his order of commitment on evidence heard before another magistrate that he was not authorized to consider.

Habeas corpus proceedings by Frank D. Williams to secure his release from the custody of the Chief of Police of the City and County of San Francisco. Writ granted.

Elliott Johnson, of San Francisco, and A. J. Woolsey, of Oakland, for petitioner.

John T. Williams, Matthew Brady, Dist. Atty., and I. M. Golden, Deputy Dist. Atty., all of San Francisco, for respondent Finn.

RICHARDS, J. Application for a writ of habeas corpus. The facts of the case upon which the applicant bases his claim of right to be discharged from custody are briefly these: The applicant herein, Frank D. Williams, was arrested upon a charge of perjury embraced in a complaint filed in the police court of the city and county of San Francisco. The preliminary examination upon said charge came on for hearing before depart-

ment 2 of said police court, then presided over by Judge J. J. Sullivan, on December 7, 1920; whereupon certain evidence was introduced and testimony taken before Judge Sullivan. The cause was then continued for further hearing to December 21, 1920, at which time further evidence was educed and testimony taken before said judge, and the cause was then continued for further hearing until December 22, 1920, at 2 o'clock p. m. When the case was called upon the last-named day and hour, Judge Sullivan was absent, and the cause was continued by the clerk of his court to December 23, 1920, at 10 o'clock a. m. When again called for hearing at that time Judge Sullivan again failed to appear to conduct the hearing of the cause, whereupon and after some delay Judge McAtee, at that time the police judge of another department of said court, was called in to department 2 thereof by the district attorney, and requested by him to sit therein and complete the preliminary examination of said cause. Judge McAtee proceeded to do so over the objection of the defendant, who requested that there should be a hearing de novo of the case. Judge McAtee refused to accede to this request, stating that he would proceed from where the hearing before Judge Sullivan had left off, but would familiarize himself with the depositions already taken before the latter. The matter was then continued until the following day, when Judge McAtee proceeded to hear certain evidence which, it is conceded, would in itself be wholly insufficient to support the defendant's commitment upon the charge; and, the matter being submitted, Judge McAtee held the defendant to answer, basing his decision chiefly upon the evidence which had been taken before Judge Sullivan in the case.

The main contention of the applicant for this writ is that his commitment upon the charge in question was without probable cause, since the committing magistrate had no power in deciding the case to consider the evidence which had been introduced and testimony which had been taken before Judge Sullivan, and that without such evidence there was not sufficient evidence heard by Judge McAtee to justify his commitment upon said charge.

[1] We think this contention must be sustained. While it is true that preliminary examinations of persons accused of crime, when held before a committing magistrate, and in the manner provided for in sections 858 to 883, inclusive, of the Penal Code, are usually less formal in matters of procedure than would be required upon the trial of the cause, it cannot be held that the essential principles of procedure and of evidence may be departed from by committing magistrates in the conduct of such examinations. By the terms of sections 858, 859, and 860 of the Penal Code the magistrate is required to inform the defendant of his rights to counsel, and to allow him a reasonable time to procure such counsel. By section 864 of the Penal Code the magistrate must inform the defendant as to the nature of the charge made against him by reading to him the depositions of the witnesses examined at the time of the filing of the complaint and issuance of the warrant for his arrest, and must also issue subpœnas for such witnesses as either the prosecution or the defendant requires. By section 865 of the same Code these witnesses, when produced at the hearing, "must be examined in the presence of the defendant, and may be cross-examined in his behalf"; and by section 866 thereof, "when the testimony of witnesses on the part of the people is closed, any witnesses which the defendant may produce must be sworn and examined." By section 869 thereof the testimony of these witnesses, in cases of homicide only, must be reduced to writing by or under the direction of the magistrate; but in all felony cases he may, in his discretion, order the testimony and proceedings to be taken down in shorthand and transcribed and authenticated as in said section provided. The written record or transcription of the testimony so taken is in said section denominated a "deposition," and is to be filed in the superior court as a part of the record therein in case the defendant shall be held to answer upon the charge, and a copy thereof furnished to the defendant or his attorney upon demand. Section 871 of the same Code provides that "if, after hearing the proofs, it appears either that no public offense has been committed, or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged;" while section 872 thereof provides that "if, however, it appears from the examination that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof," he must be held to answer.

The foregoing sections of the Penal Code clearly indicate to our minds that the essential procedure upon a preliminary examination of a felony charge does not differ materially from that required upon the trial of the cause. The magistrate who is to make the order, either discharging the defendant or holding him to answer upon the charge, must base that order upon evidence which he has admitted and upon testimony which he has heard in the usual way in which such evidence is presented and such testimony taken. He has no right to predicate his said order upon something which has not occurred before him, upon evidence the admissibility of which he has not passed upon, and upon testimony the weight and value of which he has not measured by the appearance, the narration, and the manner of testifying of the witnesses present in person before him. It

has been expressly held that upon the trial of a cause in a superior court judges cannot be changed in the midst of a hearing with the effect that the substituted judge could be entitled to decide the cause upon evidence which he had not himself heard or passed upon. Guardianship of Sullivan, 143 Cal. 462, 77 Pac. 153. We are satisfied that a like procedure must obtain upon the hearing of preliminary examinations.

[2] The respondent herein, however, urges that since the testimony taken upon a preliminary examination is, when transcribed, denominated a "deposition" in the sections of the Penal Code above referred to, such "depositions" were entitled to be read by Judge McAtee, even though the witnesses whose testimony had been thus transcribed had not appeared or testified before him.

There are two answers to this contention; the first being that the term "deposition," as used in the foregoing sections of the Code, does not bear the same meaning as given to the same word when used to distinguish this form of evidence permitted to be embodied in writing under section 2019 of the Code of Civil Procedure. The term is employed in the Penal Code in a special and restricted sense, and the uses of testimony when taken upon a preliminary examination and thus reduced to writing are also those restricted uses specified in the provisions of said Code above referred to, and are not the general uses to which depositions taken in conformity with the provisions of the Code of Civil Procedure may be put; and the second answer is that except in cases of homicide the testimony taken at preliminary examinations is not required to be reduced to writing at all except in the discretion of the magistrate; and, this being so, to hold that Judge McAtee could be permitted to read either a written report or transcript of oral testimony which had been taken and heard before Judge Sullivan would be, by natural sequence, to permit the former to talk over with Judge Sullivan the testimony which the latter had heard, and by such loose method to determine whether or not the defendant should be held to answer to the charge. Without pursuing this branch of the case to further lengths of absurdity, it is clear to our minds that the defendant could not be held to answer upon testimony which Judge McAtee had not himself admitted and heard. It is to be noted that it is not a mere error in the admission of evidence of which the applicant herein complains, but an essential violation of his right to have the order for his commitment based only upon evidence which had been heard and weighed by the identical magistrate who had assumed to issue such order. It is conceded that the testimony which Judge McAtee did actually hear was entirely insufficient to justify the order holding the defendant to answer to the charge.

[3] It is, however, further contended by the respondent herein that, assuming that the applicant herein would have been entitled to apply for and be awarded the relief sought upon this writ, he has lost that right by his plea of "not guilty" to the information subsequently filed, and also by his failure to take advantage of the error of Judge McAtee complained of by way of motion to set aside such information permitted to be made under section 995 et seq. of the Penal Code. These last-named sections of said Code provide that an information must be set aside upon the defendant's motion when it appears that "before the filing thereof the defendant had not been legally committed by a magistrate"; and it is also therein provided that the objections which may be made upon such motion are waived by the defendant if not so made.

We cannot agree with the contention of the respondent in this behalf. Section 1487 of the Penal Code specifies the several grounds upon which applications for discharge on habeas corpus may be based. Subdivision 7 of said section provides for the applicant's discharge from custody "where a party has been committed on a criminal charge without reasonable or probable cause." No limitation is expressly imposed by the Penal Code upon the time within which a writ of habeas corpus upon this ground may be applied for; and we are satisfied, not only that no good reason exists, but that there is no authority for holding that a party held to answer on a felony charge could be held to have waived his right to a writ upon this ground by the fact that he had entered or that there had been entered for him a plea of "not guilty" to the charge. On the other hand, the uniform practice has been to permit writs of habeas corpus to be applied for and granted after the entry by the defendant of his plea. A sample of the many cases in which this right has been recognized is to be seen in the recent case of ex parte Hartwell, 28 Cal. App. 627, 153 Pac. 730. In conformity with this long-established practice, we hold that the defendant did not waive his right to apply for this writ by the entry of his plea of "not guilty."

[4] The respondent further contends that the applicant herein waived his right to the relief applied for by this writ through the fact that he did not move to set aside the information under subdivision 1 of section 995 of the Penal Code, relating to informations, which provides that an information must be set aside upon the defendant's motion when it appears (subdivision 1) "that before the filing thereof the defendant had not been legally committed by a magistrate." Section 996 of the Penal Code provides that if the defendant fails to make said motion he is precluded from thereafter making said objection. We are satisfied that these last-named sections

of the Penal Code are not in conflict with, and do not constitute a limitation upon, section 1487 of the Penal Code, relating to the grounds upon which writs of habeas corpus may be applied for. We think the distinction between the two remedies is quite clearly indicated in People v. Beach, 122 Cal. 37, 54 Pac. 369, wherein the Supreme Court reversed the order of the trial court setting aside an information on the defendant's motion made upon the ground that the evidence taken upon the preliminary examination was insufficient to show that a public offense had been committed. In so doing the Supreme Court said:

"If the magistrate had no power or jurisdiction to hold the examination, if no complaint had been made charging the defendants with a public offense, and, perhaps, if no evidence at all was taken by the magistrate, and there was no waiver by the defendants, it might be held that the defendants had not been legally committed. People v. Howard, 111 Cal. 655. The phrase 'legally committed' refers to the examination of the charge and holding the defendant to answer by the magistrate. Ex parte Baker, 88 Cal. 84. If a magistrate, upon a complaint duly made charging a public offense, had heard the evidence and has committed the defendant, that ends the matter so far as concerns this motion. * * * The right to have a charge dismissed is regulated by statute, and, as we have seen, the phrase 'legally committed' means only that the accused has been committed by a magistrate who has jurisdiction to hold the examination, and who has actually heard the evidence and determined that probable cause exists for holding the defendant. The point was decided in People v. More, 68 Cal. 500. Counsel attempt a distinction on the ground that the alleged defect there was that venue was not shown, but the difference is not obvious. If the point was founded in fact there as here the evidence failed to show an offense for which the magistrate could legally hold the accused person. The decision was a construction of section 995 of the Penal Code, and holds that on the motion to set aside the information the superior court cannot review and overrule the finding of the magistrate that the evidence taken before him was sufficient."

In the case of People v. Sacramento Butchers' Protective Ass'n, 12 Cal. App. 471, 107 Pac. 712, a similar question arose, and in determining it the District Court of Appeal for the Third district expressly held that the objection that the evidence was not sufficient to warrant the order of commitment could not be inquired into upon a motion to set aside the information under section 995 of the Penal Code, but must be taken advantage of in some other proceeding. The writ of habeas corpus is the proceeding wherein the right on the part of a defendant to seek his discharge upon the ground that the evidence taken before the committing magistrate was insufficient to justify his commitment is expressly given to him. In the case at bar the committing magistrate, Judge McAtee, was properly sitting in Judge Sullivan's court during the absence of the latter under the provisions of the city charter of San Francisco creating the several departments of the police court. He had jurisdiction to hear and determine the charge against the defendant pending in that court. He heard some evidence therein which, however, it is conceded, was insufficient in itself to justify holding the defendant to answer upon said charge; but he also, as the record discloses, undertook to read over a transcription of some testimony taken before Judge Sullivan which was neither presented nor presentable in that form in evidence before Judge McAtee, and he undertook to hold the defendant to answer in part, and in the main part, upon what he had learned from a perusal of such transcription. This was not a mere error in the admission of evidence, since the reporter's transcription of something which had occurred before another magistrate was not evidence nor admissible as such. The defendant was entitled to have the witnesses against him appear and testify in his presence before the magistrate upon whom was to devolve the duty of determining from such evidence so taken whether or not probable cause had been shown for his commitment; and since it is conceded in this matter that the testimony which Judge McAtee heard was insufficient to constitute reasonable or probable cause for the defendant's commitment, it follows that his application herein must be granted, and the defendant discharged.

It is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

52 Cal. App. 590

JEFFERS v. HULEN et al. (Civ. 2280.)

(District Court of Appeal, Third District, California. May 10, 1921.)

1. **Mortgages ⟸38(1)—Evidence held to show deed a mortgage.**

Evidence *held* to support finding that deed from brother to sister was intended as a mortgage.

2. **Wills ⟸93—Deed held ineffective as gift.**

Deed from brother to sister *held* ineffective as a gift, upon testimony by the sister that she was to have the property if "anything happened" to her brother, as this indicated that a present transfer was not intended, but rather a testamentary disposition of the property.

3. **Mortgages ⟸605—Where mortgagee in possession, receiving rents, tender of amount to redeem not required, as amount determinable only on accounting.**

Where mortgagee had been in possession, receiving the rents and profits, a decree allow-

ing redemption was not erroneous on the ground that no tender had been made before suit of the amount of the mortgage debt with interest, since the amount was determinable only upon accounting, which, in fact, was had, rentals received being deducted from interest, and the amount so ascertained and stated in the interlocutory judgment was paid by plaintiff before final judgment.

4. Mortgages ⟸617—Burden on mortgagee to show amounts paid for taxes or improvements.

The burden is on the mortgagee, resisting redemption, to show the amounts expended for taxes paid or improvements made.

5. Quieting title ⟸10(2)—Neither party need trace title back of admitted common source.

Where both parties claim under a common source of title neither need go back of that common source in the proof.

6. Appeal and error ⟸1011(1)—Finding on conflicting evidence conclusive on appeal.

On conflicting evidence as to adverse character of defendant's holding, a finding against her allegation of ownership is conclusive on appeal.

7. Trial ⟸397(3)—Finding as specific as allegations is sufficient.

Where defendant did not set up prescriptive title, but alleged merely ownership and possession for 10 years, and the court found against her allegation of ownership, its failure to find specifically upon the question of prescriptive title claimed by her was not error, the finding being as specific as the allegations of the answer.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by C. B. Jeffers, adminstrator, against Nettie M. Hulen and others. From judgment for plaintiff, defendants appeal. Affirmed.

Terry W. Ward, and F. W. Henderson, both of Merced, for appellants.

Edward Bickmore, of Reno, Nev., for respondent.

FINCH, P. J. Plaintiff, as administrator of the estate of W. C. Jeffers, deceased, brought this action against the defendant to quiet title to 10 acres of land in the possession of the defendant. The complaint is in the usual form, and the answer, in addition to the customary denials, alleges that the defendant is, and for more than 10 years prior to the commencement of the action has been, the owner and in possession of the land. W. C. Jeffers, on the 10th day of September, 1908, executed an instrument in the form of an ordinary grant, bargain, and sale deed, caused it to be recorded, and on the next day delivered it to defendant. On the same day she gave him $250 in the form of a check. At other times thereafter she gave him sums of money aggregating more than $100. The plaintiff claims and attempted to prove that the instrument, in form a deed, was intended as a mortgage to secure payment of the $250 advanced by the defendant. The defendant contends that such instrument was intended as a deed of gift. The plaintiff replies that, if intended as a gift, it was an attempt to make a testamentary disposition by deed contrary to law.

W. C. Jeffers was a brother of the plaintiff and the defendant. He retained control of the land in controversy after the transaction related until December, 1910, when he left for Mexico, where he died in 1911.

1. The court found that the deed was intended as a mortgage. Is the finding supported by the evidence? A witness for the plaintiff testified that, directly after the deed was made, the defendant said that W. C. Jeffers had borrowed $200 from her, and had given the deed as security; that in 1913 she said, "I have got a deed to that 10 acres, and I can hold it, but I won't do it;" that in 1915 she said that all she required was her money back. Another witness testified that in 1912 the defendant said that all she wanted was her money back. Another witness stated that defendant said she did'nt want the place, and she did not claim it; that all she expected "was to get her money back she had loaned" her brother.

The defendant testified that when W. C. Jeffers handed the deed to her he said, "Here is your deed," or something to that effect; that he said, "I don't want you to take a mortgage, because I am going here and there, and getting into trouble, and want you to have this property if anything happens to me;" that he told her, "If I am riding on a freight train and get killed I want you to have my property;" "he told me he deeded the property to me; in case anything happened he wanted me to have it." Another witness for the defendant testified that W. C. Jeffers said, "I made this deed over to Nettie, so if anything goes wrong I want her to have it." The defendant further testified that "one time he asked sister and I why we didn't go up and paper my house; * * * then one time he asked me if I paid my taxes, with reference to this place."

In 1912 the defendant's brother Ben Jeffers, wrote her that he desired to rent the land in controversy for a period of 5 years, and in her reply she said: "As to 5 years that suits me too unless Cay (W. C. Jeffers) returns to claim it."

[1] From the foregoing résumé it is quite clear that the court's finding that the instrument was intended as a mortgage finds sufficient support in the evidence.

[2] 2. The defendant's contention that the instrument was intended as a deed of gift cannot be sustained, even when the fullest credence is given to her testimony. She was

to have the property if "anything happened" to her brother. This indicates that a present transfer of title was not intended, but rather a testamentary disposition of the property. The instrument was ineffective for that purpose. Cox v. Schneer, 172 Cal. 380, 156 Pac. 509.

[3] 3. The defendant contends that it was incumbent upon the plaintiff to pay or offer to pay, the amount of the mortgage debt, with interest before commencing suit. In actions such as this where the mortgagee has held possession and received the rents and profits, an accounting must be had, before the plaintiff can know how much to pay or offer. The court ascertained the sum due the defendant, and provided in the interlocutory judgment that the plaintiff should pay such amount within 60 days under penalty of dismissal on his failure so to do. The plaintiff paid the required sum within the 60 days, and thereupon final judgment was entered. This procedure was in accordance with the usual practice in this state. Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; De Cazara v. Orena, 80 Cal. 132, 22 Pac. 74; Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473. In determining the amount to be paid the defendant, the court allowed interest on the loan, and deducted what was received as rental.

[4] 4. The court did not allow the defendant anything for taxes paid or improvements made by her. The burden was on the defendant to show the amounts so expended, and, failing to offer such proof, she is not in a position to complain. Wise v. Burton, 73 Cal. 175, 14 Pac. 683; Carpentier v. Small, 35 Cal. 355.

[5] 5. Appellant insists that the evidence does not show title in the estate of W. C. Jeffers. It sufficiently appears that C. B. Jeffers deeded the land to W. C. Jeffers, and that the latter was in possession of the same when the instrument involved in this suit was executed. Appellant makes no claim of title other than that acquired from W. C. Jeffers. Where both parties claim under a common source of title, it is not necessary for either to go back of that common source in the proof. Ginaca v. Peterson, (C. C. A.) 262 Fed. 904; Phillips v. Menotti, 167 Cal. 328, 139 Pac. 796.

[6, 7] 6. Appellant contends that she has established title by prescription. Her answer does not set up a prescriptive title, but alleges merely ownership and possession for 10 years. The testimony relative to the adverse character of her holding was conflicting, but there was ample evidence to show that it was not adverse. The court found against the allegation of ownership, and such finding is conclusive on appeal. No complaint is made of the failure to find specifically upon the question of the prescriptive title claimed by the defendant, and none could well be made, because the finding is as specific as the allegations of the answer.

No error appearing, the interlocutory and the final judgments are affirmed.

We concur: BURNETT, J.; HART, J.

52 Cal. App. 579

COLLINS v. SUPERIOR COURT OF MONTEREY COUNTY et al. (Civ. 3886.)

(District Court of Appeal, First District, Division 1, California. May 9, 1921.)

1. Courts ⊜475(6)—Court of any county may appoint guardian for child of divorcee notwithstanding order concerning custody.

Civ. Code, § 138, relating to disposition of children of persons submitting themselves and their marital relations to the jurisdiction of the superior court, does not confer jurisdiction upon the court to appoint a guardian for the children, and a superior court of another county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, under Code Civ. Proc. §§ 1747, 1748.

2. Guardian and ward ⊜19—Child on attaining 14 has absolute right to select suitable guardian.

Under Code Civ. Proc. § 1748, a minor on arriving at the age of 14 years has the absolute right to nominate a guardian and displace one already appointed, even though the displaced guardian may be one of his parents; discretion of court only being exercised in determination of the question whether the nominee is a suitable person.

Application by Henry W. Collins for a writ of mandate prayed to be directed to the Superior Court of Monterey County and Hon. J. A. Bardin, as Judge thereof. Writ granted.

C. F. Lacey, of Salinas, for petitioner.

Roy A. Bronson, of San Francisco, amicus curiæ.

WASTE, P. J. The petitioner is here seeking a writ of mandate directing the superior court in and for the county of Monterey to hear and determine an application for guardianship. The respondent, being in doubt as to its jurisdiction in the matter, has declined to proceed.

Until November 1, 1916, petitioner, Henry W. Collins, and Isabel Collins were husband and wife. On that date they were divorced by a decree duly entered in the superior court in and for Marin county, and the custody of Benjamin Collins, the minor son of the parties, was awarded to the mother. That decree is in full force and effect. The boy remained with his mother, who removed

to Solano county, until he became 14 years of age, when he went to live with petitioner, his father, who has for a number of years resided in Monterey county. The petitioner has filed in superior court of Monterey county his application to be appointed guardian of the person of his son, Benjamin, who in writing nominated his father as his guardian, and requested that he be appointed. The court refused to cause notice of the hearing of the petition to be given, or to proceed in the matter, holding that the superior court of Marin county, in which the parents were divorced, has exclusive jurisdiction to hear and determine any matter relating to the custody and care of the minor.

[1] The authority of the superior court of Marin county to award the custody of the minor to one of the parties in the divorce action was not exclusive. It was but the exercise of the general power conferred by section 138 of the Civil Code, to make a proper order for the custody of the child. Ex parte Gordan, 95 Cal. 374, 377, 30 Pac. 561. That section does not confer jurisdiction upon the court to appoint a guardian for such minor. The superior court of each county, when it appears necessary or convenient, may appoint guardians for persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants, or residents of the county. That authority is conferred by section 1747 and following sections of the Code of Civil Procedure. Section 138 of the Civil Code was enacted for the protection of children of persons who may submit themselves and their marital relations to the general jurisdiction of the superior court. Harlan v. Harlan, 154 Cal. 341, 350, 98 Pac. 32. In guardianship matters the court acts strictly in a special proceeding, and by virtue of power conferred upon it to appoint guardians in the designated cases. The validity of its proceedings must be determined solely from a consideration of the sections of the Code of Civil Procedure, supra. Guardianship of Salter, 142 Cal. 412, 413, 76 Pac. 51; In re Campbell, 130 Cal. 380, 383, 62 Pac. 613.

[2] In the instant case the petition filed in the superior court shows that the minor is an inhabitant of Monterey county. He is 14 years of age, and has the absolute right to select and nominate his guardian, who, if approved by the court, must be appointed. Code Civ. Proc. § 1748; Guardianship of Kirkman, 168 Cal. 688, 144 Pac. 745; Guardianship of Meiklejohn, 171 Cal. 247, 152 Pac. 734; Guardianship of McSwain, 176 Cal. 287, 168 Pac. 117. These cases are also authority for holding that a minor, upon arriving at the age of 14 years, may nominate and displace a guardian already appointed, and that even though the displaced guardian may be one of his parents.

"The whole scheme," says the court, in discussing the provisions of the Code of Civil Procedure relating to the appointment of guardians, "contemplates the absolute right of the minor to have a guardian of his own selection after he is 14 years of age, provided alway he selects a person who is, in the judgment of the court, a suitable person to act as guardian. The discretion of the court can be exercised only in the determination of the question whether the nominee is a 'suitable person.'" Guardianship of Kirkman, supra.

To uphold the contention of the respondent would be to deny the minor the exercise of this absolute right.

Let a writ of mandate issue, directed to the superior court of the state of California in and for the county of Monterey, and Hon. J. A. Bardin, judge thereof, commanding them to entertain said guardianship proceeding, and determine the same.

We concur: RICHARDS, J.; KERRIGAN, J.

52 Cal. App. 551

POWERS v. MARINE ENGINEERS' BENEFICIAL ASS'N, NO. 35, et al. (Civ. 3778.)

(District Court of Appeal, First District, Division 1, California. May 6, 1921. Hearing Denied by Supreme Court July 5, 1921.)

1. Corporations ⊂=54—Rules and regulations must conform to statutes.

Any rule or regulation adopted for the management of the business of a corporation, the control of its officers, or the rights and duties of its members among themselves and between them and the corporation, must conform, at least substantially, to the express provisions of the statute.

2. Corporations ⊂=56—Could not adopt by-law by custom and usage.

By-law of nonprofit corporation providing for the election of officers by balloting through the mail, void because in conflict with Civ. Code, § 321b, not formally adopted after amendment of 1915 to section 599, permitting nonprofit corporations to adopt by-laws providing for such an election, could not be adopted by custom and usage of the corporation in conducting its election in such a manner, in view of sections 301, 303, 304, requiring by-laws to be in writing, adopted by a formal vote of two-thirds of the members at a meeting called and assembled, or by written assent of two-thirds of the members.

Application by Edward J. Powers for writ of mandamus against the Marine Engineers' Beneficial Association, No. 35, and others. Writ granted.

George D. Collins, Jr., of San Francisco, for petitioner.

Bell, Brookman, Simmons & Creech, of San Francisco, for respondents.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

KERRIGAN, J. This is a petition for a writ of mandamus to compel the election of officers of the defendant in the manner required by section 321b of the Civil Code.

The defendant, Marine Engineers' Beneficial Association, No. 35, is a nonprofit corporation organized and acting under the laws of California, and of which the defendants Carberry and Searey are alleged to be respectively president and secretary de facto. The petitioner is a member of the organization in good standing and has been such ever since he joined it in the year 1910. In 1912 the association amended and readopted its by-laws, and in article VIII thereof provided that balloting for the election of its officers should be conducted through the mail. This by-law was and is in conflict with the provisions of section 321b of the Civil Code, which requires the election of officers to be held at a meeting of the members of the association and by ballots or votes cast by the members actually present or by proxy at such meeting. In August, 1915, however, section 599 of the Civil Code was amended so as to permit nonprofit corporations to adopt by-laws similar to the one here in question. In part this section reads as follows:

"Corporations now organized or that may hereafter be organized for purposes other than profit, may, either in their by-laws, ordinances, constitutions, or articles of incorporation, provide for * * * the manner of voting by the members of the corporation, which may be by ballot in the manner provided for by section 321b of this Code, or in any other manner provided for by the by-laws, ordinances, constitutions, or articles of incorporation of any corporation now organized, or that may hereafter be organized, for purposes other than profit."

It is conceded that since this amendment nonprofit corporations such as the defendant may adopt by-laws permitting the election of officers by balloting through the mail. It is also conceded that no express by-law relating to the election of officers has been adopted by the defendant since the adoption of article VIII of its by-laws in the year 1912, and that since that time and since the amendment of section 599 of the Civil Code in 1915 the officers of the defendant have been elected annually in the manner required by said article VIII, to wit, by balloting through the mail. It also appears from the undisputed testimony of the petitioner taken at the hearing upon this application that he did not vote at the election of officers held in December, 1920, nor in the preceding annual election; indeed, he sought, under the provisions of sections 312 and 315 of the Civil Code, to have the election of the year 1919 annulled and set aside on the ground that it was void because in violation of the provisions of section 321b of the Civil Code. However, before that proceeding could be disposed of on appeal the time for holding the election of 1920 arrived, and the officers of the association refusing to hold said election in accordance with the requirements of section 321b, and, on the contrary, following the method permitted by said article VIII of the by-laws of the association, the petitioner brought the present proceeding for the purpose already outlined.

The respondents contend that, although said article VIII has not been formally adopted as a by-law of the corporation since the amendment to the statute permitting the election of officers of nonprofit corporations by balloting through the mail, it has in effect been adopted by custom and usage.

[1, 2] We are unable to subscribe to this contention. Any rule or regulation adopted for the management of the business of the corporation, the control of its officers, or the rights and duties of its members among themselves and between them and the association, must conform, at least substantially, to the express provisions of the statute. Sections 301, 303, and 304 of the Civil Code establish the law in California as to the method of adopting by-laws. Section 301 provides that when by-laws are adopted originally they must be adopted by a majority of the stockholders or members of the corporation at a meeting called for that purpose, or by the written consent of either two-thirds of the stock or two-thirds of the members without a meeting for that purpose. Section 304 provides that the by-laws may be amended or a new by-law adopted at the annual meeting of the corporation, or at any other meeting properly called for that purpose, by a vote or by the written assent of two-thirds of the subscribed and outstanding stock, or by two-thirds of the members. This section contains the further provision that the by-laws originally adopted and any amendment thereto or new by-law must be copied in a legible hand in some book kept in the office of the corporation, to be known as the "book of by-laws," and that the book must be open to the inspection of the public during office hours each day except holidays. Assuming, for the purpose of this case, that the practice of following the requirements of said article VIII after its adoption was authorized by the amendment to section 599 in the year 1915, and that such practice had continued for a sufficient length of time to constitute a custom or usage, still we have no doubt, in view of the plain and express provisions of the Code regarding the adoption and amendment of by-laws, that it cannot be held that such custom or usage, consisting in repeated compliance with the provisions of a by-law admittedly invalid at its adoption, can take the place of compliance with the statutory requirements. In order to amend a by-law there must be a substantial compliance with the provisions of the law. 1 Fletcher, Cyc. Corp.

§ 487. To permit usage or custom to make a by-law would be in violation of the clear requirements of the statute, and as a result by-laws, instead of being express, formally adopted, in writing and open to the public, would depend for proof of their existence upon the uncertainties and infirmities of oral testimony. If a by-law may be adopted by usage, it would follow that a by-law could be repealed or amended by custom or usage, and we apprehend that hardly any one would so contend.

The authorities support this position:

"When either the general law or the charter of the corporation prescribes the mode in which by-laws may be adopted, the by-laws which the corporation seeks to make must be adopted in such mode in order to be valid." 1 Fletcher, Cyc. Corp. § 487.

"By-laws are made by the stockholders in meeting assembled." 1 Cook on Corp. p. 21; 2 Cook on Corp. § 625.

"By-laws, to be valid, whether made by the stockholders or directors, must be adopted at a meeting called and conducted in accordance with law." 3 Clark & M. on Private Corp. p. 1955.

"It has been said that the existence of a by-law may be shown by proof of custom, or by acts of acquiescence of the members of the corporation, or by the uniform procedure of the corporation. But the import of the cases is not so much that the custom may take the place of a by-law, but that it may be resorted to as evidence of the adoption of a by-law." 1 Thompson on Corp. § 991.

"Custom itself does not take the place of a by-law, but is merely evidence that such a by-law has been adopted." Boisot on By-laws (2d Ed.) § 9.

There are a few cases which hold that a by-law may be proved by implication and by custom; but we have found no case, and our attention has not been called to any, which goes to the length of holding that a by-law may be created or adopted by usage where statutory law, as in this state, requires it to be in writing and adopted by a formal vote of two-thirds of the members at a meeting called and assembled, or by the written assent of two-thirds of the members.

The plaintiff did not vote at the meeting held in December, 1920, nor has he made any representations or done any act which would, as asserted by respondent, estop him from contesting the validity of the election here in controversy.

It follows from the foregoing that the petitioner is entitled to a peremptory writ of mandate requiring the respondents to hold an annual election, and to hold the same in the manner and method provided by section 321b of the Civil Code.

Let the writ issue.

We concur: WASTE, P. J., RICHARDS, J.

52 Cal. App. 797

BOWEN v. CREIGHTON et al. (Civ. 3684.)

(District Court of Appeal, First District, Division 1, California. May 6, 1921. Rehearing Denied June 4, 1921. Hearing Denied by Supreme Court July 5, 1921.)

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Mandamus by Walter M. Bowen, in behalf of himself and all other members of the Marine Engineers' Beneficial Association, No. 35, against E. A. Creighton and others. Writ denied, and petitioner appeals. Reversed.

Geo. D. Collins, Jr., of San Francisco, for appellant.

Bell, Brookman, Simmons & Creech, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by petitioner from a judgment in a special proceeding prosecuted under the provisions of sections 312 to 315 of the Civil Code, to annul and set aside an election of officers of the defendant corporation held in the month of December, 1919.

The facts in this case, and the case of Edward J. Powers v. Marine Engineers' Beneficial Ass'n et al. (No. 3778) 199 Pac. 353, this day decided, are substantially the same, and the points raised in this case are disposed of by what we have said in the last-named case, except as to respondent Thomas Healey, who in the election of officers in the year 1919 was elected for a term of five years. It follows from what we have said, in the case of Edward J. Powers v. Marine Engineers' Beneficial Ass'n that the election for the year 1919 was void, and that there should be a new election to fill the office now held by said respondent Healey.

The judgment is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

186 Cal. 386

HUDDART et al. v. McGUIRK et al.
(L. A. 6607.)

(Supreme Court of California. June 28, 1921.)

1. Appeal and error ⊂=1008(1)—Finding not disturbed unless unmistakably shown to be erroneous.

A finding of the trial court will not be disturbed unless the evidence unmistakably shows it to be erroneous.

2. Boundaries ⊂=48(7)—Adjoining owners not bound by mistaken understanding as to location of boundary.

Adjoining owners were not bound by their mistaken understanding as to location of boundary in the absence of an agreement fixing such location as the boundary.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Meyers, Judge.

Action by John Huddart and another against J. A. McGuirk and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

John E. Daly and James H. Daly, both of Long Beach, for appellants.

A. Guard Hill and Samuel Weil, both of Los Angeles, for respondents.

OLNEY, J. The parties to the action may be considered as a single plaintiff and a single defendant. The action is one of ejectment. The plaintiff secured judgment after trial, and the defendant appeals.

The plaintiff and defendant are the owners of adjoining tracts of land, and the dispute is as to the proper boundary line between them. The two tracts were once a single parcel, of which the plaintiff's land is the eastern half and the defendant's the western. The tracts were conveyed by the original owner of the entire parcel by descriptions by metes and bounds, and the plaintiff claims that the boundary line is that located by survey according to the calls of these descriptions. The defendant claims that the bound-

ary is a line some 30 feet to the east, marked for a portion of the way by a ditch. The distance between the two lines is some 30 feet.

[1] Since the boundary line as the plaintiff claims it to be is the line as determined by the calls in the respective deeds under which the parties hold, it is evident that that line is the correct line unless the defendant was able to show that in some valid manner a different line had been determined upon. The finding of the court was against any such determination, and, unless the evidence unmistakably shows that such a determination was nevertheless had, the judgment must be affirmed.

There was no fence between the properties nor any other thing whose apparent purpose would be to separate the two tracts, nor was there originally any fixing or marking of the boundary. The defendant relies upon subsequent agreements between himself and the then owners of the plaintiff's tract fixing the ditch line and the continuation of it as the boundary line. He testifies to four conversations between himself and different owners of the plaintiff's tract which might be claimed to amount to agreements of this character. These conversations were respectively with one Foreman, one Roberts, one Saylin, and the plaintiff himself. His testimony as to the conversations with Foreman and the plaintiff was flatly contradicted by them. His testimony as to the conversation with Saylin is uncorroborated and was not of such a character that we cannot say the court was not justified in disbelieving it. His testimony as to the conversation with Roberts is corroborated by the testimony of the latter, but here again the testimony of both the defendant and Roberts is not of such a character as absolutely to require the court to give full credence to it. Furthermore, it is very doubtful if any of the conversations as testified to, with the possible exception of that with Foreman, can be said to amount to agreements fixing a boundary line as to which there was a dispute, or as to whose true location the parties were in doubt. This was a necessary element in any valid agreement fixing the line as other than the true line.

[2] The conversations hardly amounted to more than statements that each party understood the ditch line to be the true line. This is a very different thing from fixing a disputed or doubtful boundary, and if in fact the understanding of the parties as to the location of the true line was in error, they are not bound by their mistaken understanding. Clapp v. Churchill, 164 Cal. 741, 130 Pac. 1061.

There was also testimony by former owners of the plaintiff's property that they supposed the ditch was on the line or about on the line, and by one at least of such former owners that he had told a purchaser that the ditch was the line or on the line. But it was wholly immaterial what former owners of the plaintiff's tract believed as to the location of the line, or what they told those who had purchased or were purchasing from them. The boundary could neither be shifted nor fixed by their belief or by their statements to those in privity with themselves. It could be shifted only in the manner prescribed for the transfer of interests in real property, and it could be fixed, in case its true location was in dispute or not known, only by agreement with the then owner of the other tract. Clapp v. Churchill, supra.

Stress is laid upon the fact that for years, without objection, the defendant cultivated up to the ditch on his side, and the plaintiff and the former owners of his tract up to the ditch on their side. But the acquiescence so shown was material only as evidence that there was an agreement between the owners of the respective tracts fixing the boundary whose true location was theretofore uncertain. Clapp v. Churchill, supra. It is sufficient for the purposes of the present case to say that the acquiescence shown was not of such a nature as to require the conclusion that it was in conformity to an agreement fixing a disputed or uncertain boundary line, or that it itself amounted to such an agreement. In fact we would say that the evidence as a whole quite decidedly supports the implied finding of the trial court that such acquiescence as was shown was merely in what the parties mistakenly believed to be the true line without any notion on their part of fixing a disputed or uncertain boundary.

We might add as a circumstance of some little weight that the ditch was not of such a character as actually to separate the properties. It was shallow, being only about a foot deep, was ploughed over from time to time, extended only part way across the properties, and, the plaintiff testifies, was not there at all when he purchased.

The case may be summed up by saying that the defendant's evidence was not such as to require the trial court to find that there had been a valid agreement fixing as the boundary a line other than the true line as called for by the descriptions in the respective deeds under which the parties hold. This being true, the judgment cannot be reversed.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

186 Cal. 400

RUPPE et al. v. CITY OF LOS ANGELES et al. (L. A. 6110.)

(Supreme Court of California. June 29, 1921.)

1. Master and servant ⊜305—Employer liable for employee's assault in course of employment, though contrary to instructions.

Where a city's employee, sent to wire a building and set electric meters therein, committed an assault on plaintiff, in charge thereof, it is immaterial to the city's liability whether or not the assault was authorized by it, or was committed by its employee in violation of his instructions, having been an act done by him in the course of his employment.

2. Master and servant ⊜306—Master not liable for servant's willful wrong outside employment.

A master is not liable, where his servant steps aside from his employment to do a willful wrong.

3. Master and servant ⊜302(3)—Assault held committed by employee within scope of employment.

In an action against a city for injuries to plaintiff from an assault by the city's employee, sent to the building of which plaintiff had charge to wire it for electricity and set meters therein, evidence that the assault was committed by the city's employee while endeavoring to open a door against plaintiff's resistance, for the purpose of going on with his work, justified a finding that the assault was committed in the course of the city employee's employment.

4. Master and servant ⊜330(3) — Evidence held to show assaulted party's authority.

In an action against a city for damages from an assault committed by the city's employee, sent to wire and set electric meters in a building of which plaintiff had charge, evidence *held* sufficient to justify finding that plaintiff had authority from the owner of the building to stop the going on of the work.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Doris Ruppe and others against the City of Los Angeles and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Albert Lee Stephens, W. B. Mathews, Charles S. Burnell, Trent G. Anderson, Ray C. Eberhard and Lewis E. Whitehead, all of Los Angeles, for appellants.

Hibbard & Kleindienst, of Los Angeles, for respondents.

OLNEY, J. The defendants may be considered as one for the purposes of discussion, and that one the city of Los Angeles. From a judgment against it for $500, had after a trial without a jury, the city appeals.

The complaint alleges, and the court finds, that the defendant was engaged in the business of supplying electric energy for light and power to its inhabitants, and had in its employ as a meter setter one Nealon; that Nealon, with certain fellow employees of the city, was sent by it to wire a certain building and set meters therein, so that electric energy might be furnished by the city in the building; that the plaintiff was in charge of the building, and attempted to prevent Nealon and his fellow workmen from entering and doing the work they had been sent to do; and that Nealon, in order to force his way into a certain portion of the building for the purpose of there doing some work, assaulted the plaintiff, inflicting personal injuries upon her. For these injuries a recovery was sought by the complaint and allowed by the judgment appealed from.

[1] The evidence as to the commission of the assault was conflicting, and the finding of the trial court upon that issue is conclusive, and is not attacked. The chief contention of the city is that, upon the facts alleged and upon the evidence, it is not liable for the assault. Its point is that it is not alleged, and the evidence does not show, that the assault was authorized by the city; that, in fact, the evidence shows without contradiction that it was contrary to Nealon's express instructions. It is, however, wholly immaterial whether or not the assault was authorized by the city, or was committed by Nealon in violation of his instructions. It is plain enough that it was committed by him in the course of doing that which he had been sent to the building by the city to do, and in furtherance of its doing; that it was, in other words, an act done by him in the course of his employment. The rule is elementary that a master is responsible for the acts of his servant done in the course of his employment, even though those acts be unauthorized or contrary to the master's explicit instructions. As between the master and third persons, the acts of the servant, done as a part of the doing of that which he is employed to do, are as if done by the master himself, and the question of authority as between the master and servant to do the particular acts is quite immaterial. Cooley on Torts (3d Ed.) pp. 1016–1030; section 2338, Civ. Code; Rounds v. Delaware, etc., Co., 64 N. Y. 129, 21 Am. Rep. 597; Otis Elevator Co. v. First Nat. Bk., 163 Cal. 31, 39, 124 Pac. 704, 41 L. R. A. (N. S.) 529; Johnson v. Monson, 190 Pac. 635.

[2, 3] Reliance is placed by the defendant upon the authority of Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154. It is there said:

"By the general law of master and servant, the master is not liable for the malicious torts of the servant committed outside the scope of his employment. The wrongful act must be one which the servant is empowered under some circumstances to do."

But the court was there speaking of an act malicious on the part of the servant, an intentional doing by him of a wrongful act. A master is, of course, not liable where his servant steps aside from his employment to do a willful wrong, and frequently the willful or malicious character of his act is quite material in determining whether he did so step aside or was truly going on with his master's business. But even if the act be malicious or willful, and yet be one done in furtherance of the purpose of the servant's employment, the master is liable. This is plainly implied in the first sentence quoted from Rahmel v. Lehndorff, and is the thoroughly well-established rule. See the preceding reference to Cooley on Torts. In the present case, in the first place it is not found that the assault complained of was malicious, and in the second place it is found that it was committed in the course of Nealon's employment. This finding is justified by the evidence, which shows that the assault was committed by Nealon while endeavoring to open a door against the plaintiff's resistance for the purpose of going on with his work.

Something, perhaps, should also be said as to the statement in the second sentence quoted from Rahmel v. Lehndorff, that—

"The wrongful act must be one which the servant is empowered under some circumstances to do."

If this be taken to mean that the act must be one which the servant is authorized under some circumstances to do, the statement is undoubtedly too narrow. A very simple illustration will make this plain. A servant employed to drive an automobile exceeds the legal speed limit and as a result injures some third person. It will not be questioned that the master is liable. This would be true, no matter how explicitly the master had instructed the servant never to exceed the speed limit, and although the exceeding of that limit is a crime, and something which it cannot be presumed the servant was authorized to do under any circumstances. It would be true, because the master has intrusted the servant with the driving of the automobile, and, having done so, is responsible for what the servant does in driving it. In other words, while the master has not empowered the servant to break the law, in the sense that he has authorized him to do so, he has empowered him, in the sense that he has intrusted him with the performance of a duty, in whose performance it is possible for him to break the law. The word "empowered," as used in the sentence quoted, must be taken to mean empowered in this sense, and not in the sense of "authorized." Within the rule of the sentence quoted, as so interpreted, the assault by Nealon falls, and his master, the city, is responsible for it.

[4] The only other point made by the city is that the plaintiff had no authority whatever to stop the city's employees from wiring and metering the building, and was a gratuitous intruder upon them in their work. But, whether this be material or not, the trial court found to the contrary, and the finding is supported by the evidence. The building contained four flats, of which one was rented and occupied by the plaintiff, and the others were unoccupied. She was intrusted by the owner with the keys of the building, showed the unrented flats to prospective tenants, and rented them, and, according to her testimony, was in immediate charge of the building with authority to keep trespassers out. She also testifies that when the city's employees came to the building she telephoned to the daughter of the owner, who had full authority, and received from her authority to stop the going on of the work. This testimony was certainly sufficient to sustain the finding mentioned.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.; Lennon, J.

186 Cal. 212

SKIDMORE et al. v. WEST, County Treasurer. (Sac. 2992.)

(Supreme Court of California. June 16, 1921.)

1. Counties ⇐48—Gathering of information with view to supervisors' proceeding in matter of land sold to state for taxes may not be required of county officers.

Pol. Code, § 4041, subd. 1, giving the board of supervisors power to require the making of reports by all county officers, is limited to such reports as they are required by law to make and such other reports as are incidental to the supervisors' general supervision, and they may not require the tax collector, county auditor and county recorder to examine certain records of the county officers, state surveyor general's office, and the United States land office with relation to lands sold to the state for taxes for many years delinquent prior to 1912 and a report to the supervisors with recommendations for further disposition, but may contract with other parties for the furnishing of such information with a view to the supervisors taking further proceedings.

2. Counties ⇐113(4)—Board of supervisors may contract with third persons for furnishing of information not the duty of officers to furnish.

In view of Pol. Code, § 3897. as amended in 1905 (St. 1905, p. 31) and 1913 (St. 1913, p. 559), relating to tax sales and the discretionary power vested in the board of supervisors, the matter of acquiring information deem-

ed essential to a proper determination of the question whether there was unredeemed property sold to the state for taxes as to which it was advisable to initiate proceedings for sale, in view of the consequent risk of expense to the county and of the amount for which the property could be sold, with a view to recommending a lower price, if advisable, not being the official duty of any county officer, the board could contract for the same with a compensation of a part of the amount received by the county.

3. Counties ⟸113(4) — Supervisor's contract for furnishing information as to unredeemed lands sold for taxes not construed as including duties of county officials so as to render it invalid.

For the purpose of invalidating a contract between the county board of supervisors and third persons for furnishing information as to unredeemed lands sold to the state for taxes, a requirement that they report their recommendations as to further disposition of property involved and submit "lists for authorization from the state controller to advertise and sell under section 3897, Pol. Code," will not, because of the requirement for submitting lists, be construed as referring to actual manual work of preparing the resolutions of the board or applications to be made by the tax collector to the state controller, which duties are enjoined on officials.

4. Counties ⟸113(4)—Contract to furnish information to determine proceedings as to land sold for taxes not invalid because officers are required to furnish some of the information.

A contract with the board of supervisors to furnish certain information preliminary to determining proceedings, as to lands sold to state for taxes, is not rendered invalid because the duty to furnish some of such information is required of officers by Pol. Code, §§ 3716, 3728, since they refer to reports of "debts" due the county, which the county officials are required to report on, and after the land was sold to the state for taxes there was no longer any "debt" or "indebtedness" due the county in the sense of those words as used in the statutes.

5. Counties ⟸126—Courts are not concerned with the wisdom of a county's contract in the absence of fraud or mistake.

With regard to the wisdom of a contract between a county and parties who were thereunder to furnish information for the supervisors' proceeding in regard to the lands sold to the state for taxes, and particularly with regard to the method and amount of compensation provided, the courts have nothing to do, in the absence of fraud or mistake.

Wilbur, J., dissenting.

In Bank.

Application by C. E. Skidmore and another for a writ of mandamus directed to George C. West, Treasurer of Placer County, to compel payment of a warrant for services in collection of delinquent taxes. Writ granted.

Raymond Benjamin, of San Francisco, for petitioners.

J. B. Landis, of Auburn, and Fred P. Tuttle, Jr., both of Auburn, and Meredith, Landis & Chester, of Sacramento, for respondent.

Hugh B. Bradford, of Sacramento, and C. C. McDonald, of Woodland, amici curiæ.

ANGELLOTTI, C. J. This is a mandamus proceeding to compel the payment by respondent, treasurer of Placer county, of a warrant for $2,231.48 issued by the county auditor upon a claim of petitioners allowed by the board of supervisors of the county. The matter was submitted upon a general demurrer to the petition. The only question presented is whether the purported contract between petitioners and the county of Placer, made on behalf of the county by its board of supervisors, was in excess of the authority of such board and therefore void.

The material facts shown by the petition are substantially as follows:

On March 5, 1918, more than 1,000 parcels of land in Placer county which had been sold to the state for delinquent state and county taxes, the delinquency in such case being prior to 1912, remained unredeemed and unsold by the state, and none of the assessments thereon had ever been canceled. The result was that Placer county had not received any of the money coming to it on any of said assessments. Under these circumstances the board of supervisors entered into the contract here involved with petitioners, neither of whom was an officer of the county. The contract is evidenced by a resolution of the board, and is as follows:

"It is ordered that C. E. Skidmore and A. L. Kramer be and they are hereby authorized to check deeds to the state, by the tax collector of Placer county, California, for delinquent taxes as shown in Books of Tax Deeds numbered 1 to 9, inclusive, covering approximately 1,000 deeds, that do not show redemption cancellation or sale on deeds or certificates of sale, and submit report covering each deed together with recommendations as to further disposition of same and submit lists for authorization from state controller to advertise and sell as provided for by section 3897, P. C., and that in payment of such services the county of Placer will pay said Skidmore and Kramer a commission equal in amount to 50 per cent. of Placer county's proportion of all moneys collected from and after this date from redemption or sales of property which has gone delinquent to the county prior to the year 1912.

"Said 50 per cent. commission is based upon the county's proportion of money received after this date, and applies only to money actually collected by the county.

"Payments to be made at the time of the regular monthly meetings of the board of supervisors for the amounts due on said date.

"No payments to be made, however, until the said Skidmore and Kramer have furnished an affidavit setting forth that they have check-

ed the records at the United States land office, the state surveyor general's office, the county recorder's office, and the county auditor's office, and have submitted to the board of supervisors their report and recommendations as hereinabove provided, and until a certificate is received from the county auditor showing the amount that has been paid to the county as its share of the money collected from such redemption sales of property examined and reported on by said Skidmore and Kramer from date hereof.

"Dated this 5th day of March, 1918."

The work so contracted for was fully completed by petitioners, and the result of the action initiated by the supervisors upon the report of petitioners was that between March 5, 1918, and August 29, 1918, there was paid into the county treasury as Placer county's proportion on account of redemptions and sales of said parcels of land the sum of $4,462.96. Under the terms of the contract petitioners are entitled to a sum equal to one-half of this amount, and this is the sum specified in their warrant, which the treasurer refuses to pay.

It is conceded by learned counsel for petitioners that authority in law is essential to action by the board of supervisors, and that such board is without authority in law to contract with private parties for the performance of duties which the law enjoins upon county officers.

[1] In so far as its express terms are concerned, we are not strongly impressed by the claim that this contract provided for the performance by petitioners of duties which the law enjoins upon officers of the county. According to such terms it appears to be confined, in so far as petitioners are concerned, to an examination of certain records in certain county offices, the state surveyor general's office, and the United States land office, with relation to the parcels of real estate sold to the state for taxes delinquent prior to the year 1912, which covered a period of many years, and a report thereon to the supervisors with their recommendations as to further disposition, accompanied by lists for authorization from the state controller for sale by the tax collector. And this was for the information of the board of supervisors, with a view to further proceedings by them. The county offices involved were those of the tax collector, the county auditor, and the county recorder. We find no statute enjoining upon any of these officers the duty to make in their respective offices the examination and report thus called for, even if called upon by the supervisors to so do. An examination of the statutes prescribing their duties fails to disclose anything that can fairly be so construed. Respondent relies in this connection upon subdivision 1 of section 4041, Political Code, the section prescribing the powers of the board of supervisors, which says they have power "to supervise the official conduct of all county officers; * * * to see that they faithfully perform their duties, direct prosecutions for delinquencies, and, when necessary, require them to renew their official bonds, make reports and present their books and accounts for inspection." Manifestly the provision here as to the power to require the making of reports is limited to such reports as the officers are required by law to make and to such other reports as are incidental to the general supervision given to the supervisors of the official conduct of the officers. The case of County of Humboldt v. Stern, 136 Cal. 63, 68 Pac. 324, also relied on, is not in point for the reason that the office there involved was that of county clerk, the incumbent of which was under the law ex officio clerk of the board of supervisors, and who by express mandate of law was required to "perform all other duties required by law, or any rule or order of the board." It was very properly held therein that it was his official duty, in response to an order of the board, to furnish the board with data from its records. The words of the contract here were very carefully limited to services to be performed for the board of supervisors with a view to such action as they might properly and advisedly take under the law looking to proceedings for the sale by the state of unredeemed property sold to the state for taxes, in order that the amount of money due the county on account thereof might be obtained and paid into the county treasury, and we cannot see that in any respect it called for the performance of duties which were enjoined by law upon any county officer.

[2] In the determination of the question of the power of the board of supervisors to contract for the services here involved, we are brought to a consideration of the question of the functions and powers of the board with regard to property sold to the state for taxes. When property is thus sold under our system, the county does not receive its portion of the tax until the property is redeemed or sold under direction of the state controller by the tax collector of the county. Until the year 1905, section 3897 left the matter of such a sale entirely in the hands of the state controller, providing for a sale by the county tax collector only on direction of the controller, and in so far as the law was concerned there was nothing for any other officer or for the county to do in the matter until the controller gave such direction. As is still true, every step subsequent to such direction, both as to redemption and sale, was prescribed by statute, and the public officer by whom it was to be taken designated. The supervisors had no function whatever to perform in the matter. While the law was in this condition, the case of House v. Los Angeles Co., 104 Cal. 73, 37 Pac. 796, was decided. The supervisors of Los Angeles county made a contract with one House under which the latter was to col-

lect from owners, by causing them to redeem, what might be due on account of taxes on real estate sold to the state, and for which services he was to be paid a percentage (15 per cent.) on the account so collected. It was held, after a careful review of the statutes relative to the matter, that the board of supervisors had no voice whatever in the matter and could not intervene to accelerate or retard a redemption, and that, the law having confided the duties to be performed in such matters to officers specially designated for their discharge, the supervisors have no authority, express or implied, in the premises, and hence that the contract was beyond the power conferred upon the board. The opinion as a whole clearly holds, as is stated in a syllabus, that the supervisors had no power or authority to enter into a contract with a private individual to proceed and cause to be collected from owners what may be due on account of sales of real estate made to the state for delinquent taxes, and to pay him a percentage upon such collections, and also that the supervisors had no function whatever to perform in the matter. If it had not been for certain amendments of section 3897, Political Code, there could be no claim, in view of this decision, that the contract here involved was valid. These amendments are here relied upon by petitioners. The amendment of 1905 (St. 1905, p. 31) modified the effect of a provision of the section that at the sale no bid shall be accepted "for less than the amount of all the taxes levied upon such property, and all interest, costs, penalties and expenses up to the date of such sale," by providing further that, if the board of supervisors of the county shall, by resolution entered on their minutes, declare that in their judgment the property described in the resolution "is not at that time of value great enough that it can be sold by the state" for such a sum, and that it would be to the best interest of the state to sell for a lesser sum, to be stated in the resolution, "upon receipt of a copy of said resolution, certified by the clerk of said board of supervisors, the state controller may thereupon, by written authorization, direct the tax collector to sell for such lesser sum." In 1913 (St. 1913, p. 559) the section was further amended by the addition of a proviso which impliedly authorizes the board of supervisors to direct the tax collector of the county "to apply for an authorization of sale of any property which has been deeded to the state" and to "authorize him to order the necessary advertising [in case a sale is authorized by the controller] to be done at county expense." These are the material amendments relied on. Their effect was to devolve certain functions in the matter of the sales on the board of supervisors, for the exercise of their judgment and discretion. Those functions substantially were: First, in the event that their judgment was that any property sold to the state for taxes was not of value great enough to sell for the whole amount due, and that it would be to the best interest of the state to sell for a lower specified sum, to so say by resolution, a certified copy of which transmitted to the state controller would authorize him to fix a lower sale price; and, second, to direct the tax collector to apply to the state controller for an authorization to sell any property deeded to the state, and to authorize him (the tax collector) to do the necessary advertising at the county expense. It cannot be doubted that the board of supervisors had the power to obtain such information as was reasonably essential to a proper discharge of these functions, even to the extent of contracting for the furnishing thereof at the expense of the county, if it was not the official duty of some county officer to furnish the same, for it is well settled that such a board has such powers as are necessary to the discharge of duties imposed by law. We cannot say that any of the information required by the contract here involved may not reasonably have been deemed by the board essential to a proper determination of the question whether there was unredeemed property as to which it was advisable to initiate proceedings for a sale in view of the consequent risk of expense to the county, and of the question of the amount for which the property could be sold, with a view to recommending a lower price where it was deemed inadvisable to proceed on the basis of the whole amount due. Necessarily the board must be held to be invested with considerable discretionary power in determining what information is essential to its intelligent action, and in such matters the courts may not properly interfere unless it is apparent that the service contracted for has no possible relation whatever to a proper discharge of its functions.

[3] Special objection is made as to the requirement of the contract that petitioners should include with their report their "recommendations as to further disposition of the property" involved, and should submit "lists for authorization from state controller to advertise and sell under 3897 Political Code." As to the recommendations, which were, of course, simply an expression of the conclusion of the investigation whether or not, in view of the data, which they had collected as to title and value, sale proceedings could be initiated to advantage, we feel that it cannot fairly be held that the board was without power to have for its guidance the advice contracted for. Exactly what was meant by the requirement that lists for authorization from the state controller should be submitted we do not know, but we do not feel warranted in construing it for the purpose of invalidating the contract, as referring to the actual manual work of preparing the resolutions of the board or the applications to be made by

the tax collector to the controller in the event that such application is directed by the board. These, of course, would be duties enjoined upon officials. We are inclined to the view that it means no more than that the petitioners must submit as a part of their report a list of the unredeemed properties as to which the board may properly take action.

[4] It has been suggested here that certain sections of the Political Code other than section 4041 enjoin upon certain county officers the duty to make reports which would furnish some of the required information. Consideration of those sections has satisfied us that this may not fairly be held. In so far as those sections refer to reports of "debts" due the county, they can hardly be held to cover anything here involved, for after sale and deed to the state for the taxes there is no longer any "debt" or "indebtedness" due the county in the real sense of those words, or in the sense contemplated by these sections. See section 3716, Pol. Code. In so far as certain other sections are concerned, as, for instance, section 3728, Political Code, the reference is only to ordinary current reports which would not cover any period of time involved in the work here contracted for by the board. For instance, the report called for by section 3728, Political Code, is an annual report to be prepared "from the 'assessment book' of" the current year. It seems to us an undue strain of any of the sections to which reference is made, either in the opinion previously filed or in any of the briefs, to find therein authority for the proposition that in contracting for the work called for the supervisors included work within the scope of the lawful duty of any county officer to perform.

[5] With the question of the wisdom of this contract in so far as the county was concerned, and especially with regard to the method and amount of compensation provided, the courts have nothing to do, in the absence of a claim of fraud or mistake. There is no pretense of any such claim in this matter. The question in this proceeding is simply one as to the power of the board, and in view of the amendments to section 3897, Political Code, we see no escape from the conclusion that the contract was one within the power of the board to make, and that the petitioners are entitled to the relief sought. It should be noted that this was the conclusion of the District Court of Appeals of the Third Appellate District, which court first heard the matter.

Let a peremptory writ of mandate issue as prayed in the petition.

We concur: OLNEY, J.; SHAW, J.; LAWLOR, J.; LENNON, J.; SLOANE, J.

WILBUR, J. I dissent. The petition and argument upon rehearing have not changed my opinion in regard to the matter. In view of the fact that many of the Code sections cited in the previous opinions have not been discussed by the parties in their briefs, it was proper to grant a rehearing for the purpose of considering such arguments as might be presented in regard to their meaning or effect. Nothing has been presented, however, which changes my opinion in the matter, although it is true that there was an inadvertent statement in the opinion concerning the effect of section 3680 of the Political Code, it being the duty of the tax collector, and not the assessor, to mark upon the tax bills the words "Sold to the state." Omitting the words "and tax bills" thus inadvertently used, and also omitting the statement of facts which is contained in the main opinion, that opinion is as follows:

"The work so contracted for was fully completed by respondents, and the result of the action initiated by the supervisors upon the report of respondents was that between March 5, 1918, and August 29, 1918, there was paid into the county treasury as Placer county's proportion on account of redemptions and sales of said parcels of land the sum of $4,462.96. Under the terms of the contract petitioners are entitled to a sum equal to one-half of this amount, and this is the sum specified in their warrant which the treasurer refuses to pay.

"If the action of the board of supervisors was unwarranted in law, in whole or in part, the petitioners are not entitled to the writ. The respondent claims that it was the duty of county officials to perform a very substantial part of the labor that the petitioners agreed to perform, and that the contract was therefore void, citing as authority for that conclusion County of Humboldt v. Stern, 136 Cal. 63, 68 Pac. 324, wherein it was held that, as it was the duty of the county clerk to 'perform all other duties required by law, or any rule or order of the board,' it was his duty to furnish the board such data from the records of his office as they might require. In this case the contract required the petitioners to examine the records of the tax collector and report the result to the supervisors for the purpose of securing the authority of the state controller for a sale as provided by section 3897, Pol. Code. Petitioners were also to 'check the records in the county auditor's office.' If it was the duty of the tax collector, or of the auditor or other county officer, to furnish the required data, the supervisors could not under their general powers employ other persons to perform such duties of such county officers at the expense of the county. The provisions of the law fixing the powers and duties of the various officers of the state and county in respect to the assessment and collection of taxes before and after delinquency are found in numerous provisions of the Political Code relating to taxation and to county government. The powers and duties of the board of supervisors are defined in section 4041, Pol. Code, subdivision 1 of which provides that they shall have power 'to supervise the official conduct of all county officers * * * to see that they faithfully perform their duties, direct prosecutions for delinquencies, and, when necessary, require them to renew their official bonds, make re-

ports and present their books and accounts for inspection.' This power would give the supervisors access to all the information needed, or by petitioners agreed to be furnished, from such records. If it be doubted whether the power to require the officers 'to make reports' is sufficiently broad to require them to search the records to determine the amount of unpaid taxes due upon property sold to the state, there are other sections of the Code requiring reports from county officers concerning the financial condition of the county which may properly be considered in that connection. * * * Section 3737, Political Code, requires an annual report of the auditor in regard to the financial condition of the county, including a statement of the indebtedness of the county, the property of the county, the amount in the treasury subject to the payment of such indebtedness, the rate of taxation, the assessed value of the property in detail for the year, and 'Fifth, such other information as the board of supervisors or the controller of the state may require.' There is little doubt that the supervisors would be entitled under this section to require a list of the deeds made to the state as shown by the auditor's books, if by reason of a plan to enforce payment thereof such information was necessary to determine the financial status of the county and its fiscal policy, particularly as the auditor is required each year to compile for the assessor 'a complete and true statement of all property which has been redeemed under or by virtue of any sale made to the state for delinquent taxes, together with a complete and true statement of all property sold to the state and remaining unredeemed.' Section 3678, Pol. Code, and amendment 1917 (St. 1917, p. 430). See, also, section 3739, Pol. Code. This list would include all property sold to the state, whether deeded or not, as it is subject to redemption both before and after such deed. Pol. Code, §§ 3780, 3817. Such information is necessary for the assessor, for until the deed he must continue to assess the property (Pol. Code, § 3813), and mark upon the assessment and tax bills therefor 'Sold to the state,' with date of sale (Pol. Code, § 3680), and after deed should omit such assessment (see Pol. Code, §§ 3787, 3607, 3813, 3773) until the property again passes into private ownership by reason of sale or redemption, which fact must be reported by the tax collector or auditor as the case may be, to the assessor annually (Pol. Code, § 3898, amended Stats. 1907, p. 699; Stats. 1913, p. 560, subd. 3; Stats. 1917, p. 715, subd. 3, § 3739; Stats. 1897, p. 431). By section 4099, Political Code, the treasurer and auditor are required quarterly to make a joint report to the board of supervisors, and at such other time as the board may require, showing the sources of county revenue, distribution of the revenue into funds, the total amount of warrants drawn and paid, and to 'generally make a full and specific showing of the financial condition of the county.' It must be obvious that, where uncollected taxes form a sufficiently important item of county revenue to justify an unusual effort to collect such taxes, such financial statement or report should include a detailed statement of such taxes, if so required by the board of supervisors. The state controller is ordinarily charged with the duty to direct the sale of lands deeded to the state (section 3897, Pol. Code), and upon such authorization it is the duty of the tax collecter to give the necessary notice of sale, and for that purpose to prepare the necessary lists of lands to be sold. The supervisors, however, may by resolution direct the tax collector to apply to the state controller for authority to sell, and in that event to make the advertising expenses a county charge. They may also, in the event that they so find the fact, certify their opinion that certain properties so deeded to the state are not of sufficient value to sell for the amount of the tax.

It is upon these provisions of the law, added by amendment after the decision of this court in House v. Los Angeles, 104 Cal. 73, 37 Pac. 796, that petitioners rely to distinguish their contract from the contract there held invalid. The power of the supervisors to enter into the contract in this case is asserted on the ground they were entitled to have before them the information which petitioners agreed to furnish, in order that they might determine therefrom whether or not to direct the tax collector to apply for authority to sell and whether or not to certify that some of the lands deeded to the state were worth so much less than the taxes thereon as to require an authorization for a sale for less than such tax, penalties, and costs. It is not claimed that the supervisors found any piece of property so deeded to be of such small value as to require the latter resolution, nor is it claimed that there were any circumstances which indicated the necessity of an investigation to ascertain that fact. We may assume, however, for the purposes of this decision, that the authority of the board of supervisors to initiate proceedings for the sale of property deeded to the state was sufficient to authorize them to secure such data as was necessary to determine the desirability of initiating such proceedings, and the question of whether or not they should invoke an authorization from the controller to sell for less than the total amount of taxes, penalties, and costs. It is clear from the foregoing provisions of the Political Code with reference to the duty of county officers to furnish reports and information required by the board of supervisors in relation to county finances, etc., that it was the duty of such officers, when required by the board of supervisors, to furnish all data necessary, to show the amount of unpaid taxes, penalties, etc., upon land deeded to the state, and the amount of land so deeded, together with such other information ascertainable from their respective books and records as the supervisors deem necessary for their enlightenment in exercising their authority in the premises. In view of this duty on the part of county officers, the contract of the board of supervisors with the petitioners, in so far as it agreed to compensate them for furnishing information which it was the duty of the county officers to furnish, was unauthorized and void. With reference to such portions of the work performed by petitioners under their contract as were not by law required to be done by the various county officers, it is sufficient for the purposes of this case to say that, where a substantial part of the duties agreed by petitioners to be performed were contracted for in violation of the law, the con-

tract being entire, the whole contract is void. Section 1608, Civ. Code; Humboldt County v. Stern, supra; Teachout v. Bogy, 175 Cal. 481, 486, 166 Pac. 319."

186 Cal. 404

CONGER et al. v. ITALIAN VINEYARD CO. (L. A. 6385.)

(Supreme Court of California. June 30, 1921. Rehearing Denied July 25, 1921.)

1. Sales ⊂=85(2)—Clause terminating contract in case of legislation interfering with business held not to include revenue act; "interfere."

A contract for the sale of the sellers' crops of grapes for three years to a manufacturer of wines which provided that it should be void in case of any prohibition or other legislative acts which in any way would interfere with the manufacture or shipments of the products of the buyer referred only to legislation placing a ban of some kind upon the manufacture, sale, or distribution of the buyer's products and did not include the War Revenue Act of October 22, 1914, increasing the tax on brandy used in the fortification of sweet wines so as to materially increase the cost of manufacture, but not imposing a tax so high as to naturally result in the discontinuance of the business; as "interfere" is a general phrase bearing the significance of disarrange, disturb, or hinder and must be limited in character by the preceding specific term "prohibition."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interfere—Interference.]

2. Sales ⊂=283—No breach of warranty of crop of grapes where owner of vineyard ratified contract.

There was no breach of warranty within Civ. Code, § 1765, under a contract for the sale of crops of grapes of a specified vineyard, though the mother of one of the sellers was the owner of the vineyard, where it was her son's custom to transact all of her business as though it were his own, and she received a part of the proceeds with knowledge of the transactions, as she thereby ratified the contract.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by A. H. Conger and another against the Italian Vineyard Company. From a judgment for defendant, plaintiffs appeal. Reversed.

Kennicott & Williams, of Los Angeles, for appellants.

O'Melveny, Millikin & Tuller, Roy V. Reppy, and Hewlings Mumper, all of Los Angeles, for respondent.

LENNON, J. On or about the 4th day of May, 1914, plaintiffs and defendant entered into a written agreement which is the subject of this suit. By the terms of this contract plaintiffs agreed to sell and deliver to defendant, a corporation engaged in the manufacture and shipment of wines, and defendant agreed to buy at a specified price, the entire crop of grapes to be grown on a certain vineyard in Riverside county, Cal., during the years 1914, 1915, and 1916. The crop of grapes grown in 1914 was delivered and paid for in accordance with the terms of the contract. On June 28, 1915, however, defendant wrote plaintiffs that the "War Revenue Act" of October 22, 1914 (38 Stat. 745), had so increased the tax on brandy used in the fortification of sweet wines as to make it necessary for defendant to cancel the contract for the purchase of the grapes. To this attempted termination of the contract plaintiffs interposed objection, claiming that the reason assigned by defendant was an insufficient ground for cancellation. The crop of 1915 was actually delivered by plaintiffs and accepted by defendant, but at a price less than that called for in said agreement. This was done under a special agreement, designed to save both parties from unnecessary loss, and upon the express stipulation that neither party receded from its position as to the force and effect of the contract of May, 1914. Defendant refused to accept delivery of the crop of 1916, whereupon plaintiffs sold the said crop for the highest obtainable price at the nearest available market, and brought this action for damages resulting from the sales of the crops of 1915 and 1916 at prices less than the contract price and for special damages growing out of the necessity of delivering the 1916 crop at a market more distant than the place of delivery agreed upon in said contract. Plaintiffs appeal from the judgment of the trial court, which was in favor of defendant.

[1] The following clause in the contract is the source of the main controversy in the case:

"It is further understood and agreed between the parties of the first part and the party of the second part that in case of any prohibition or other legislative acts, enacted either in the United States, the state of California, or San Bernardino county, which in any way will interfere with the manufacture or shipments of the products of the party of the second part, that this contract will then become null and void."

The legislation by which defendant claims the contract in question was terminated, under the clause of the contract above set forth, increased the tax upon brandy used in fortifying sweet wines from 3 to 55 cents per gallon. "Fortification," it was testified, is a process commonly employed in the manufacture of sweet wines and consists in the addition of brandy for the purpose of conserving the natural sweetness of the grapes by arrest-

ing fermentation, and thus checking the transformation of the natural sugar contained in the grapes into alcohol, and preventing the wine from becoming a "dry" wine. There was uncontradicted testimony that by this legislation, raising the tax upon the brandy used in fortifying sweet wines from 3 to 55 cents per gallon, defendant's cost of manufacturing sweet wines, with grapes at the contract price, was increased from $.22685 to $.35875 per gallon—i. e., over 13 cents.

Plaintiffs contend that the clause of the contract above quoted refers only to legislation of a prohibitory nature, aimed directly at forbidding, checking or impairing in whole or in part, the manufacture or shipments of wines and other beverages of alcoholic content, and does not permit a reliance upon a revenue act in justification of a refusal to proceed under the contract. It is thus evident that the point of divergence in the case is the meaning of the words "any prohibition or other legislative acts * * * which in any way will interfere with the manufacture or shipments of the products of the party of the second part." In aid of interpretation plaintiffs invoke the rule that, in the construction of statutes, wills, and other instruments "general words following an enumeration of specific things are usually restricted to things of the same kind (ejusdem generis) as those specifically enumerated." Bouvier's Law Dictionary. It is therefore urged that, notwithstanding the general language, the clause in question provides for a termination of the contract only in the event of the enactment of legislation of a prohibitive character. Defendant's answer to this contention is that the rule invoked is not an inflexible rule of interpretation, but merely an aid to interpretation when the meaning is not otherwise clear. Emery & Co. v. American Ins. Co., 177 Iowa, 4, 17, 158 N. W. 748. Defendant claims that the rule is inapplicable to the present case for the reason that the phrase "other legislative acts which in any way will interfere" renders it apparent that a larger object was in the minds of the parties than indicated by the preceding specific term "prohibition." The very generality of this phrase, however, is the most potent reason for the application of the rule relied upon by the plaintiffs.

Considered in its broadest aspect, the term "interfere" bears the significance of "disarrange," "disturb," "hinder." It will also be observed that, by reason of the use of the future tense, the parties were not obliged to await the actual results of the legislation before terminating the contract, for the contract ceases upon the enactment of legislation which "will" interfere. Consequently, unless the general phrase is limited in character by the preceding specific term "prohibition," the contract becomes inoperative upon the enactment of any law which can reasonably be said to be of such a nature that it is likely in the future to disturb in any way the manufacture or shipments of defendant's products. To carry this interpretation to its logical conclusion, any federal, state, or local legislation affecting freight rates, hours or compensation of labor, regulation as to sanitation, or lowering of importation or tariff rates might be interposed as an interference with the business in question quite as much as this increase in revenue taxation. If the parties contemplated such a general and far-reaching operation of the clause under consideration, it was incumbent upon them to clearly express that intention. Such unusual elasticity cannot be assumed from the vague expression used; it must be clearly provided for. The only reasonable assumption is that the parties had in mind legislation placing a ban of some kind upon the manufacture, sale, or distribution of the products of defendant. In this connection it was natural for them to employ terms of more general import than the single word "prohibition"; for, at the time the contract was entered into, manifold measures were under consideration having for their purpose the prevention of the manufacture or sale of beverages of alcoholic content. It would have been difficult for the parties to designate the multiplicity of methods thus proposed by a single concrete term, and, as a natural consequence, they sought to cover these varied prohibition measures by a general phrase.

It may be that, were the tax imposed so high as to naturally result in the discontinuance of defendant's business, it would be within the field of prohibitory legislation contracted against. However, that was not the nature of the particular act here under consideration. From all that appears, it was purely a revenue measure, and the evidence discloses that defendant produced a greater quantity of sweet wine after the passage of this act than before. Defendant's refusal to proceed with the purchase of the grapes is not, therefore, justified by the clause of the contract above set forth.

[2] Defendant also relies upon an alleged breach of warranty by the plaintiffs as a defense. Section 1765 of the Civil Code provides that—

"One who sells or agrees to sell personal property, as his own, thereby warrants that he has a good and unincumbered title thereto."

Cynthia Conger, the mother of plaintiff A. H. Conger, was the owner of the vineyard upon which the grapes were grown, and it is therefore claimed that there was a breach of warranty of title. There is no merit in this contention; it was not assigned as one of the reasons for declining to proceed with the contract in defendant's notice to plaintiffs in 1915. The evidence shows that it was the custom of plaintiff A. H. Conger to transact all of his mother's business as though it were

his own. It was found by the court, upon sufficient evidence, that "the proceeds of the crops of 1914, 1915, and 1916, so far as received by the plaintiff A. H. Conger, were paid over by him to said Cynthia L. Conger and were accepted by her with the knowledge that the said crops had been delivered to the defendant and to Garrett & Co. [purchaser of the 1916 crop] by the plaintiff Herbert Hill, and that said Herbert Hill had received two-thirds of the proceeds thereof." It was further found that Cynthia L. Conger has never claimed any title to any of said grapes as against the persons to whom they were delivered. It therefore affirmatively appears that the contract was ratified by the owner of the grapes, and that the title promised defendant was not lacking.

The judgment is reversed.

We concur: SHAW, J.; WILBUR, J.; SLOANE, J.; OLNEY, J.; LAWLOR, J.

In re MACHADO'S ESTATE.

MACHADO v. MACHADO

(two cases).

186 Cal. 246 (Sac. 3045, 3077.)

(Supreme Court of California. June 17, 1921.)

1. Executors and administrators ⊜77—Court properly refused to allow administrator credit for money advanced to widow.

On final accounting, court properly refused to allow administrator credit for a sum paid to the widow of deceased by him prior to his appointment as administrator, and long before any family allowance was authorized, and properly relegated the claimant to other remedies.

2. Executors and administrators ⊜491—Administrators held not entitled to commissions under agreement with widow.

Court properly denied claim of administrator for an allowance by way of commissions where he contracted with widow that he would charge no fees, in view of the fact that she subsequently waived her right to administer.

3. Executors and administrators ⊜111(1)—Allowance for attorney's fees in sound discretion of court.

The matter of attorney's fees to be allowed administrator on final accounting rests in the sound discretion of the court.

4. Executors and administrators ⊜278—Allowance properly made administrator for amount paid on unverified claim.

Court did not err in allowing administrator on final account for sum paid on notes held against the deceased, although no verified or other claim was ever presented to the administrator by the holder of the notes, or by any one in its behalf, there being no doubt but what the claim was justly due, and was paid in good faith, under Code Civ. Proc. § 1632.

5. Executors and administrators ⊜77—Allowance made administrator for money expended before appointment.

Court did not err in allowing administrator on final account money expended by him before his appointment in payment of claim against the estate, where, at the time of making the payment, there existed practically no doubt that in a few days he would be appointed administrator, being for the best interest of the estate that the obligation should be liquidated without delay.

6. Executors and administrators ⊜507(2)—Findings unnecessary on settlement of account.

On the settlement of an account of an executor or administrator, findings are not necessary, and an order settling an account need not be supported by a finding, there being implied in support of the order a finding of any facts necessary to sustain it, unless such implied finding is not supported by the evidence.

7. Partnership ⊜251 — Partnership debt rejected from administrator's account should be admitted to partnership account.

Where administrator settled partnership account in the course of his administration of his partner's estate, and submitted the partnership account with the administrator's account, if a payment for which allowance was sought in the administrator's account was rejected as being payment of a partnership debt, it should have been admitted to the partnership account.

8. Executors and administrators ⊜510(12)—Decree allowing final account may be corrected.

When a decree allowing a final account of an administrator is found to be erroneous as to an item or items, the Supreme Court on appeal may direct the decree to be corrected, and as corrected affirmed.

In Bank.

Appeals from Superior Court, Butte County; H. D. Gregory, Judge.

In the matter of the estate of Manuel S. Machado, deceased, of which F. A. Machado is administrator. From orders settling account, Rosie R. Machado, individually and as guardian of the children of deceased, and the administrator, respectively, appeal. Modified and affirmed.

J. Oscar Goldstein, of Chico, for Rosie R. Machado.

Jordan & Brann, of San Francisco, and F. I. Lemos, of Heyward, for F. A. Machado.

OLNEY, J. This appeal was first heard by the District Court of Appeal for the Third District, and after decision by it transferred to this court. In deciding the case the District Court of Appeal handed down an opinion, written by Judge Prewett, very concisely and satisfactorily disposing of most of the

questions involved. That opinion, with the exception of the direction for reversal of the order appealed from, is as follows:

"In the matter of this estate there are two appeals. One is by the administrator and the other by the widow. The administrator was appointed as such upon the waiver and consent of the widow. He agreed to serve without compensation. Differences having arisen between the parties, he tendered his resignation. This resignation was tendered after the trial court had intimated the existence of sufficient grounds for his removal. He filed his final account, and these two appeals are the result of the action of the trial court in allowing and rejecting items therein contained.

"The rulings on 10 items are assigned as error; but as to most of them the action of the trial court is so clearly right that they may be disposed of in a few words.

[1] "(1) The court refused to allow the adminstrator credit for the sum of $725 paid to the widow by him prior to his appointment as administrator and long before any family allowance was authorized. The court properly held that this advancement was not by way of family allowance, and relegated the claimant to other remedies.

"(2) The administrator claims the sum of $236, paid by him for a lot in a cemetery near San Francisco for the burial of the body of the deceased. The court properly held that this lot was purchased by the administrator for his own purposes, and that some of his family are buried therein. The widow testified that she was not consulted about the matter, and that she intends to remove the body of her husband to the county of Butte, where she resides.

"(3) The administrator claims $115 which he paid out for automobiles for the use of guests in attending the funeral. However, this item is not included in the account, it is not made the subject of a finding, and the court neither allowed nor rejected it.

"(4) The administrator insists that he paid a claim of the Butte City National Bank of Chico in the sum of $1,531.65, for which payment he should receive credit. However, it was found by the court upon competent evidence that the payment was not made by the claimant, but by the copartnership of which deceased was in his lifetime a member. Moreover, the payment was made without the presentation of any claim therefor, and the court has not found that the same was justly due, and was paid in good faith. The claim was properly rejected.

"(5) The claim of the administrator for $75 paid to an accountant was rejected by the court upon the ground that the accountant was hired and paid by the partnership. There appears to be no error in this.

[2] "(6) The court denied the claim of the administrator for an allowance by way of administrator's commissions. The court found, and the evidence justifies the finding, that he contracted with the widow that he would charge no fees. This, in view of the fact that she subsequently waived her right to administer, justified the court in refusing to allow the claim.

[3] "(7) The court allowed only one-half the computed attorney's fees to the administrator. The matter rested in the sound discretion of the court. The estate was not wholly administered by the claimant, and it was proper for the court to divide the fees. Neither party is here insisting that the court should have delayed this matter until the close of the administration. We think the court did not abuse its discretion.

[4] "(8) The most important item involved in this appeal is the claim of the administrator for the allowance to him of the sum of $12,509.32 paid on notes held against the deceased by the Gianella Land Company. He paid this sum on February 11, 1918—about two months after the entry of the order appointing him as administrator. No verified or other claim was ever presented to the administrator by said land company, or by any one in its behalf. The court found that this claim was justly due; that it was paid in good faith; that the amount paid was the true amount over and above all set-offs or payments; and that the estate was solvent. These findings are fully supported by the evidence, and these facts were proven to the satisfaction of the court. This method of handling an estate is not to be commended, and the court should scrutinize such transactions with great care. But in this case there seems to be no doubt of the facts, and under the provisions of section 1632 of the Code of Civil Procedure the claim was properly allowed. In a thoroughly clear case the law tolerates such payments.

[5] "(9) There was allowed to the administrator credit for a payment of $1,500 to the Portuguese-American Bank, under circumstances precisely similar to the foregoing, save in one particular. This payment was made on December 21, 1917, being four days subsequent to the date of filing his petition for letters of administration. Whether a payment could be allowed when made by a stranger to the administration, and before he had become connected therewith, need not be at this time determined, although some California authorities incline to their allowance. In re Galland's Estate, 92 Cal. 293, [28 Pac. 287]. In Estate of Heeney, 3 Cal. App. 553 [86 Pac. 842], this court uses the following language: 'One thing is certain, and that is that the law does not contemplate that the claims of an administrator for reimbursement for moneys expended before his appointment can be established by his uncontradicted evidence.' But in the instant case the petitioner had already filed his petition, and the widow had consented in writing to his appointment. At the time of making the payment there existed practically no doubt that in a few days he would be appointed. The estate was paying interest on the amount, and it was clearly for the best interest of the estate that the obligation should be liquidated without delay. Under these circumstances we find no embarrassment in holding that the appointment subsequently made related back, for the purposes of this payment, to the date of filing the petition for letters. This view finds support in 11 R. C. L. p. 464, where we read: 'In effect the subsequent granting of letters of administration relates back to the death of the intestate, and makes valid acts which otherwise would or might have been tortious.' This payment was properly allowed.

"(10) The last of the disputed items is the sum of $2,464.51 paid by the administrator in

liquidation of a note to A. S. Quartos. The item was paid on March 11, 1918, and the court allowed the administrator credit for it in his account. The attorney who drafted the findings for the court omitted therefrom any reference to this claim. We find in the record therefor no determination by the court that the amount was justly due; that it was paid in good faith; and that the amount paid was the true amount over and above all set-offs. That this was an oversight we are assured, from the fact that the court allowed the credit, and that both parties in their briefs take it for granted that the proper findings had been made. Under this state of the record it seems that we have no alternative save to set aside its allowance."

[6] The foregoing opinion is adopted as the opinion of this court, except as to the conclusions reached by it with respect to the items discussed under Nos. 4 and 10. Taking up the latter item for discussion first, it will be noted that the District Court of Appeal concluded that the allowance of this item had to be set aside because there was no finding to support it. This conclusion was based, of course, upon the assumption that a finding was necessary, an assumption which in justice to the court we should say was apparently concurred in by the parties. But on the settlement of an account of an executor or administrator findings are not necessary. This has been repeatedly held. See Estate of McPhee, 156 Cal. 335, 104 Pac. 455, Ann. Cas. 1913E, 899, and cases there cited. This being the law, the fact that the order settling the account is not supported by a finding as to this item is immaterial. There is implied in support of the order a finding of any facts necessary to sustain it, and unless such implied finding is not supported by the evidence the order must stand. There was evidence sufficient to support a finding that the amount paid by the administrator was paid in discharge of a valid debt justly due from the decedent, was the true amount of such indebtedness over and above all offsets, and was paid in good faith. This being the case, the allowance of this item must stand.

[7] As to the item discussed under No. 4, it will be noted that the probate court disallowed it on the ground that it was the payment, not of a debt of the decedent, but of the partnership of which the decedent was a member, having a three-fifths interest. The administrator settled the partnership accounts in the course of his administration of the estate, and submitted the partnership account with his administrator's account, and charged himself in the latter account with the decedent's share of the balance shown by the partnership account. Now it is evident that if the payment in question was one of a partnership debt, and was rejected for that reason from the administrator's account, it should have entered into the partnership account, and, entering there, it would reduce the balance shown by that account, and proportionately reduce the amount chargeable against the administrator as the share of the estate in the partnership balance. In other words, the situation was that the payment should have come into one account or the other. If it was the payment of an individual debt of the decedent, it should have come into the account of the administrator. If it was the payment of a debt of the partnership, it should have come into the partnership account, and in that manner the decedent's share of the debt—three-fifths—have finally come into the administrator's account. The probate court found that the payment was of a partnership debt, and rejected it from the administrator's account. But when the court did this, it followed as a necessary consequence that the payment should have been admitted to the partnership account, unless it were already there. We have examined that account, and it is not there. It follows that it should have been admitted there. Its admission there would, of course, mean that finally the administrator would be charged in his account with an amount less than that with which he was charged by three-fifths of the payment, the decedent's share of the partnership debt. Three-fifths of the payment is $918.99.

[8] There is no necessity for reversing the order in order to allow the administrator this amount. As was said in Estate of Adams, 131 Cal. 415, 420, 63 Pac. 838, 840:

"When the decree allowing a final account is found to be erroneous as to an item or items, this court may direct the decree to be corrected, and as corrected affirm it."

The order appealed from is modified by substituting for the sum of $7,467.05, with which the appellant F. A. Machado is adjudged to be chargeable, and which he is directed to pay over to Rosie R. Machado Costa, as administratrix, the sum of $6,548.06, and as so modified the order is affirmed, the appellant F. A. Machado to recover costs.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

186 Cal. 375

MERCURY AVIATION CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (L. A. 6780.)

(Supreme Court of California. June 28, 1921.)

1. Master and servant ⟸385(11)—Compensation allowable though employee returned to work at same wages.

A master cannot escape liability for compensation for permanent partial disability under the Workmen's Compensation Act because the employee, before expiration of the period covered by payments, returned to work and received the same compensation as before.

2. Master and servant ⟸385(17)—Compensation may be allowed without deductions for voluntary payments of wages.

Though an employer for five weeks during the time servant was totally incapacitated paid him full compensation, and thereafter, notwithstanding the servant's partial disability, continued him at the same scale of wages as before the accident, the employer is not as a matter of law entitled to have such voluntary payments deducted from the amount for which it was liable, Workmen's Compensation, Insurance, and Safety Act, § 11g, declaring that the Commission may take such payments into consideration, and hence, where the Commission merely allowed the employer credit for full payment of wages during the first period of five weeks' disability, the employer cannot complain.

3. Master and servant ⟸385(17)—Allowance of credit for voluntary payments to compensation claimant discretionary.

Under Workmen's Compensation, Insurance, and Safety Act, § 11g, allowance of credit to the employer for sums voluntarily paid to the injured employee is a matter resting in the discretion of the Industrial Accident Commission.

Shaw and Olney, JJ., dissenting.

In Bank.

Application by the Mercury Aviation Company for a writ of certiorari to review an order of the Industrial Accident Commission awarding compensation to George C. Freeman under the Workmen's Compensation, Insurance, and Safety Act for personal injuries. Award affirmed.

Neil S. McCarthy, Herbert Freston, and James, Smith & McCarthy, all of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

LENNON, J. The award of the Industrial Accident Commission here under review is based upon the following facts: On October 9, 1919, George C. Freeman, employed by the Mercury Aviation Company as a mechanic, received an injury to his right arm while cranking an airplane motor in the course of employment. After an interval of five weeks during which he was totally disabled, the employee resumed work with the Mercury Aviation Company, but because of his injury was unable to continue his duties as a mechanic and performed only "light work." From the date of his injury in October, 1919, until April, 1920, when he was discharged from employment, the Mercury Aviation Company continued to pay the employee the sum of $35 per week, which was the full amount of his actual weekly earnings at the time he was injured. After his discharge from employment the employee applied to the Industrial Accident Commission for an adjustment of his compensation claim against the employer. The Commission rated his disability as 11½ per cent. permanent and fixed his compensation at $20.83 a week for forty-six weeks, amounting to a total of $958.18. The Commission allowed the employer a credit of $83.32 for the payment of $20.83 per week during four weeks of the five-week period of total disability, and made an award of $874.86 in favor of the applicant, George C. Freeman. The Mercury Aviation Company petitioned this court for a writ of review, claiming that a larger credit should have been allowed on account of the 100 per cent. weekly payments which it made to the employee continuously from the date of the injury until the time of his discharge.

[1-3] An employer cannot escape the payment of compensation for a permanent partial disability solely upon the ground that the employee returned to work prior to the termination of the period covered by the payments and for the same wages received by him before the injury. Frankfort Gen. Ins. Co. v. Pillsbury, 173 Cal. 56, 159 Pac. 150; Gabriel v. Northwestern P. R. R., 2 I. A. C. 166. It is claimed, however, that, in-as-much as the employee did not in fact earn the full weekly payments received by him after the impairment to his arm, these sums, or at least some considerable portion thereof, were not paid in return for labor and must be regarded as payments of compensation due under the Workmen's Compensation, Insurance, and Safety Act.

Subdivision "g" of section 11 of the Workmen's Compensation, Insurance, and Safety Act of 1917, Stats. 1917, pp. 831, 842, provides:

"Any payment, allowance or benefit received by the injured employee during the period of his incapacity * * * which by the terms of this act was not then due and payable * * * shall not, in the absence of any agreement, be construed to be an admission of liability for compensation on the part of the employer, or the acceptance thereof as a waiver of any right or claim which the employee or his dependents may have against the employer, but any such payment, allowance or benefit may be taken into account by the commission in fixing the amount of the compensation to be paid."

Conceding, then, that the record in the present case shows that the $35 weekly payments exceeded the actual value of the services rendered by the employee subsequent to his injury, nevertheless the employer cannot insist upon a credit for any sums paid as pure gratuities from benevolent motives and not paid and accepted with the understanding that they constituted payments of compensation under the provisions of the Workmen's Compensation Act. Blackford v. Green, 87 N. J. Law, 359, 94 Atl. 401, affirmed 89 N. J. Law, 357, 100 Atl. 1069. Under the provisions of section 11, subd. "g," of the Workmen's Compensation Act of 1917, quoted above, where payments have been made by the employer during the period of incapacity without any agreement between the parties as to the application of the same, the Commission may take the voluntary payments into consideration to the extent that it sees fit in fixing the amount of compensation, but the employer cannot complain if the Commission declines to make deductions on account of such payments. In the instant case it is admitted that there was no express agreement that the payments were made in discharge of any legal liability of the employer. The petitioner elected to pay $35 a week for the five weeks during which the employee was totally incapacitated, although the liability imposed by the act was only $20.83 for four weeks of that period. The reemployment of the injured employee was entirely optional with petitioner, just as it was optional with the employee to continue working, and likewise the amount of wages was a matter for the determination of the parties. Inasmuch as petitioner chose to continue full payments during the period of total disability in the absence of any agreement, and thereafter to accept services from the employee and make regular payments to him without any understanding that the services rendered were not worth the sums paid and that some portion thereof was paid as compensation, it is not entitled, as a matter of legal right, to insist upon the deduction of the payments from the amount of the award. De Zeng Standard Co. v. Pressey, 86 N. J. Law, 469, 92 Atl. 278, affirmed 88 N. J. Law, 382, 96 Atl. 1102.

The extent to which the payments should be considered, if at all, was entirely in the discretion of the Commission. It was logical for the Commission to deduct the amount of compensation payable during the period of total disability to offset the payments made by the employer when it received no return whatever from the employee. There was no abuse of discretion in the refusal of the Commission to credit the employer with the amount by which payments actually made during the period of total disability exceeded the payments called for by the act, nor in refusing to make any allowance for payments made after the employee returned to work.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; SLOANE, J.

SHAW, J. I dissent. I am not able to see why, in reason and justice, the voluntary payments by the employer to the employee on account of his injury should not be set off against the forced contribution imposed by the law on the employer for his benefit. Such kindness should rather be encouraged than discouraged.

I concur: OLNEY, J.

186 Cal. 359

PHILLIPS v. STARK et al. (L. A. 6578.)

(Supreme Court of California. June 28, 1921.)

1. Sales ⟸340—Vendor's election, on vendee's repudiation, to sue for difference between contract price and sum realized on resale, does not preclude recovery of damages instead of contract price.

Under Civ. Code, § 3310, providing that, where title to personal property has passed to a vendee, the detriment caused by his refusal to pay therefor is deemed to be the contract price, the fact that a seller of a bakery, after recovery of possession on the buyer's refusal to pay for it, sued, not for the contract price, but for the difference between it and the sum realized on a resale of the property, did not preclude the court from according him the measure of damages to which he was entitled, the statute not dealing with the vendor's remedy, but with the measure of damages to which he is entitled, if entitled to such remedy.

2. Sales ⟸92—Retaking possession and resale by vendor, on repudiation by vendee, not rescission, though title passed to vendee.

Where the purchasers of a bakery, after delivery of possession, refused to pay, repudiated the contract, and abandoned the property, the seller's act in retaking possession of and reselling it did not indicate any acquiescence in such repudiation or any intent to end the sale, so as to constitute a rescission, he not being required to leave the property without protection, though title had passed to the purchasers.

3. Sales ⟸384(7)—Vendor, on retaking possession and reselling, on breach of vendee's contract to buy, may recover difference between contract price and market value.

Though Civ. Code, § 3310, provides that, where the title to personal property has passed to a vendee, the detriment caused by the latter's refusal to pay for it is deemed to be the contract price, where the seller of a bakery, on the purchasers' repudiation of the contract, retook possession and resold the property, though title had passed by delivery to the purchasers, the value of the property must be offset against the purchase price, whether on

the theory that by repudiating the contract and thrusting the property back on the seller the purchaser put him in the situation of a vendor under an executory contract, in which case the measure of damages is the difference between the contract price and the market value of the property (Civ. Code, §§ 3311, 3353), or on the theory that the vendee is responsible for the full purchase price (Civ. Code, § 3310), but the vendor is liable to the vendee in damages for a conversion, the result being the same in either case, since the measure of damages for a conversion is the market value of the property, under Civ. Code, § 3337.

4. Sales ⟸377 — Allegation of amount for which property resold by vendor on vendee's breach of contract to buy insufficient allegation of market value, difference between which and contract price was measure of damages.

The complaint of a vendor of a bakery suing the vendee for damages for the latter's breach of contract in refusing to pay therefor and repudiating the contract, whereupon the vendor retook possession and resold the property, was defective in not alleging the market value of the property, the difference between which and the contract price was the measure of damages; the allegation of the amount for which it sold on resale being of an evidentiary fact only, not an ultimate fact.

5. Appeal and error ⟸193(1) — Judgment against plaintiff not sustained because of defect in complaint of which no point made by defendant.

A judgment against a plaintiff will not be sustained by reason of a defect in his complaint where no point was made of such defect by defendant.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by A. Phillips against B. Stark and another. From a judgment of nonsuit, plaintiff appeals. Reversed.

Lester Wm. Roth, of Los Angeles (Janeway, Beach & Pratt, of Los Angeles, of counsel), for appellant.

E. F. Gerecht, of Los Angeles, for respondents.

OLNEY, J. This is an appeal by the plaintiff from a judgment of nonsuit. The plaintiff's evidence was in substantial accord with the allegations of his complaint and was to the following effect:

The plaintiff was the owner of a bakery and sold it to the defendants for the price of $10,000. The defendants at the time gave the plaintiff a check for $500 on account, agreed to pay the balance the next day, and received immediate possession. The next day the plaintiff called upon the defendants to obtain the balance of $9,500, and in the course of the interview was tricked into giving them temporary possession of the check for $500. As soon as they got the check, the defendants tore it up, refused to pay anything on the purchase price, and told the plaintiff that the sale was off; that they would have nothing to do with the property, and he could do with it as he pleased. The defendants then abandoned the bakery, and the plaintiff retook possession and sold it at public auction, but without giving the notice to the defendants required by the Code for a sale in enforcement of a vendor's lien. Sections 3049 and 3002, Civ. Code. Upon these facts the plaintiff sought to recover the difference between the contract price of $10,000 and the amount realized on the auction sale, some $6,000.

[1] The delivery of possession to the defendants, of course, operated to pass title, there being nothing to indicate a contrary intent. The case was, then, one where the vendees of personal property, the title to which had vested in them, refused to pay for the property. It therefore came directly within the language of section 3310, Civil Code, providing that, where the title to personal property has passed to a vendee, the detriment caused by his refusal to pay for the property is deemed to be the contract price. Because the case does come within this Code section, and because the plaintiff sued, not for the contract price, but for the difference between it and the sum realized on the auction sale, it is claimed that the plaintiff has elected to pursue a remedy to which he is not entitled. Upon this ground the nonsuit was asked and granted.

But a consideration of the case and of the Code section shows immediately two things: First, that a contract of sale was made and broken by the defendants, and that therefore the plaintiff has a cause of action for damages against them unless in some way he has lost it; and, second, that the Code section is not dealing with the remedy, using the word in its true sense, to which the vendor may be entitled, but with the measure of the damages to which he is entitled, if he is entitled to the remedy of damages. There is, of course, a marked difference between a plaintiff being entitled to a certain measure of damages and his being entitled to damages at all. It is very possible for a party to a contract broken by the other party to it to make such an election of remedies as to preclude him from thereafter seeking and obtaining the remedy of damages, but, if he has not made such an election and is entitled to damages, the fact that he seeks damages according to a wrong measure is almost wholly inconsequential, and does not preclude the court from according him the damages to which he is entitled according to their true measure. This is clearly evident in the present case when we consider that the defendants' contention, as they put it, really amounts to but this, that the plaintiff should have sued them for $10,000, the contract

price, instead of for but $4,000, the difference between the contract price and the sum realized from the auction sale. The defendants certainly cannot complain because they have been sued for too little, and the plaintiff should certainly not be nonsuited upon any such ground.

[2] The foregoing discussion is of the defendants' contention on its face as it is presented. As such, it is very easily disposed of as not involving any question of an election of remedies at all. There lies behind it, however, a real question as to an election of remedies, quite different from the contention as presented, but which we believe the contention was intended to present. That question is: Did the plaintiff by his acts in retaking possession of the property and reselling it make such an election of the remedies he might pursue for the defendants' breach of contract as thereafter to preclude him from pursuing that of a recovery of damages. This is the real question presented by the facts of the case, and we may take it that it is raised by the defendants. To its consideration we pass.

One of the remedies to which the plaintiff was entitled upon the defendants' repudiation and consequent breach of the contract was that of rescission, and, if he chose to avail himself of this remedy, he could not thereafter seek and obtain the different and wholly inconsistent remedy of damages. On the other hand, we think it evident that, unless the contract was rescinded, the plaintiff is entitled to the remedy of damages, since the contract still stands and its breach appears. The question then is: Did either of the two acts of the plaintiff, that of retaking possession or that of reselling the property, amount to a rescission, or, putting it in another way, was either of them inconsistent in any manner with the plaintiff still insisting upon the continuance in effect of the contract and his right to recover for its breach.

As to the retaking of possession, if the plaintiff had done so under such circumstances as to show an acquiescence on his part in the position taken by the defendants that the sale was off, there would at once have been a rescission by mutual consent. It might also be (we express no opinion upon the point) that if, upon the defendants' refusal to pay, the plaintiff had insisted on retaking possession from them without any abandonment of possession on their part, his act in so doing would be taken to manifest an intention on his part to end the sale then and there, and to amount to a rescission. But when the defendants not only refused to pay, but repudiated the contract and abandoned the property, the plaintiff's act in retaking possession of it certainly cannot be said to indicate any acquiescence on his part in the repudiation or any intent to end the sale. Whether he intended to insist upon the contract or not, the only sensible thing for him to do was to retake possession. He either had to do so for the protection of the property or allow it to be lost or destroyed for want of protection. He could, of course, have left it to its fate, but he was not required to follow any such hazardous and unreasonable course. The defendants thrust the necessity of taking possession upon him, and very plainly against his will, and without any thought on his part of acquiescing in their repudiation or himself terminating the contract of sale. Under these circumstances, there was no rescission.

For much the same reasons, the second act of the plaintiff, that of reselling the property, did not amount to a rescission. The defendants had repudiated the contract and abandoned the property. The plaintiff had it on his hands. Was he, in spite of the defendants' absolute and unequivocal repudiation of the contract, to be required to hold it for them indefinitely under penalty of otherwise acquiescing in their repudiation and losing any right of recovery against them? That question has been answered in this state in cases exactly similar except for the fact that title to the property had not passed to the vendee. It has been held a number of times that a resale by a vendor whose vendee has repudiated the contract does not work a rescission. See Tomboy, etc., Co. v. Marks, 197 Pac. 94, and cases there cited. Upon this point we can see no difference between them and such a case as the present where the title has passed before the repudiation, but the vendee by the repudiation has left the property upon the vendor's hands. The actual situation of the parties is exactly the same. The vendees wrongfully refuse to consummate the sale, and the vendor has the property on his hands. In fact, we see no reason why the plaintiff may not insist that the defendants, by thrusting the property back upon him and thereby undoing the delivery by reason of which title passed, have in effect estopped themselves from claiming that their rights are any different than they would have been if the delivery had not been made.

Reliance is placed by the defendants upon the authority of Bennett v. Potter, 16 Cal. App. 183, 116 Pac. 681. The facts of that case upon the point under discussion were identical with those now presented; that is, it was a case where a vendor, left with property on his hands the title to which had passed to the vendee, resold the property, but not in the manner required for the enforcement of a vendor's lien, and brought suit for the difference between the contract price and the amount obtained on the resale. But, while there is no difference in the facts, there is a decided difference in the action which the court took upon the facts. The plaintiff was not nonsuited nor refused any recovery, but quite the contrary. In Bennett v. Potter the trial court had allowed the plaintiff judgment for the difference between the contract

price and the amount realized on the resale. This was reversed on appeal, but not on the ground that the plaintiff was not entitled to recover anything. It was reversed on the ground that, since the resale had not been made in the manner prescribed for the enforcement of a vendor's lien, the defendant was not bound by it, that as a result the plaintiff had been guilty of a conversion of the property for which he was liable to the defendant, and that the amount received by the plaintiff on the resale could not be taken as the defendant's measure of damages for this conversion. It is not said in so many words, but the plain implication from the opinion is that the plaintiff was entitled to recover the contract price offset by the amount of damages done the defendant by the conversion worked by the resale. The decision, therefore, does not justify the nonsuit in the present case, but rather the contrary.

Our conclusion, then, is that neither of the acts of the plaintiff, which it might be claimed amounted to an election of remedies, did in fact do so, and that so far as the plaintiff's evidence shows he still has the right to recover in damages for the defendants' breach of the contract. This being the case, the order granting the nonsuit was erroneous, and the judgment based upon it must be reversed.

[3] Before dismissing the cause, however, there are two things which perhaps should be added. The first is in regard to the measure of the damages to which the plaintiff is entitled. The measure provided by section 3310, Civil Code, in cases where title has passed to the vendee, is the full purchase price. But this measure, of course, is based upon the assumption that because the title has passed, the property has gone from the vendor, and he has nothing but his claim against the vendee without any offsets. But where, as here, although the title has passed, the vendor still retains the property, the value of the property must be offset against the purchase price. The vendor may not have both the full purchase price and the property. It is quite immaterial in the present case upon what theory this is worked out, whether upon that suggested by us, that by repudiating the contract and thrusting the property back on the plaintiff the defendants put him in the situation of a vendor under an executory contract, in which case the measure of damages is the difference between the contract price and the market value of the property (sections 3311, 3353, Civ. Code), or upon that suggested by Bennett v. Potter, that the vendee is responsible for the full purchase price under section 3310, Civil Code, but the vendor is liable to the vendee in damages for a conversion. The result is the same in either case, since the measure of damages for a conversion is the market value of the property. Section 3337, Civ. Code.

[4, 5] The other thing that we would add is that the complaint is defective in not alleging the market value of the property. It does allege the amount for which it sold on the resale, and this was evidence of the market value (Meyer v. McAllister, 24 Cal. App. 16, 140 Pac. 42), but the allegation was only one of an evidentiary, and not of an ultimate, fact. No point was made of this defect, and it could easily have been cured if point had been made of it. The judgment against the plaintiff should not therefore be sustained by reason of it.

Judgment reversed, with leave to the parties to amend their pleadings, if they so desire.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

186 Cal. 267

FEDERAL CONST. CO. v. WOLFSON et al.

(S. F. 8807.)

(Supreme Court of California. June 18, 1921. Rehearing Denied July 18, 1921.)

1. Municipal corporations ⊂=459—Street assessment exceeding one-half of value of property not payable in annual installments void.

A street assessment levied for improvement of street under street improvement ordinance of the city of San Francisco enacted under San Francisco City Charter, art. 6, c. 2, § 33, exceeding one-half of the assessed value of the property, exclusive of the improvements, was void under section 8, subd. 3, unless provision was made for payment of assessment in annual installments, with deferred payments bearing interest at a rate not greater than 7 per cent. per annum, under section 33 and Street Improvement Ordinance, § 16.

2. Municipal corporations ⊂=475—Assessment held payable in "annual installments" within charter.

Requirement in resolution of intention that street improvement assessment levied under street improvement ordinance of city of San Francisco, and San Francisco City Charter, art. 6, c. 2, § 33, be paid in three installments, one at the date of delivery of bond by owner, within 30 days from date of the demand made on owner therefor, and the other two in one and two years from such date, *held* a compliance with section 33, providing for payment of an assessment to exceed one-half of the value of the property in "annual installments."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Payable In Equal Annual Installments.]

3. Municipal corporations ⊂=475 — Board of supervisors' determination as to conditions on which assessment is made payable in annual installments conclusive, unless of no legitimate connection with payment of installments.

Whether the conditions upon which street improvement assessment was made payable in

annual installments were reasonable and just within San Francisco City Charter, art. 6, c. 2, § 33, authorizing board of supervisors to make assessment exceeding one-half of the assessed value of the property payable in annual installments upon conditions deemed reasonable and just by such board, was a question primarily for the board itself, and the board's determination is conclusive unless the conditions have no legitimate connection with the regulation of the method and manner of the payment of the installments.

4. Municipal corporations ⟸488, 489(9)—Requirement that owner give bond waiving irregularities held not an unreasonable or unjust condition to payment of assessment in installments.

Requirement of resolution of intention in street improvement proceedings under street improvement ordinance, enacted pursuant to San Francisco City Charter, art. 6, c. 2, § 33, that owners sign bond waiving irregularities in the proceedings, *held* not unreasonable or unjust within such provision of the charter providing for payment of assessment exceeding one-half of the value of the assessed property in annual installments on conditions deemed reasonable and just by the board of supervisors, since such bond will have reference only to informalities and defects not jurisdictional, in view of the invalidity, for failure of consideration, of any bond given to secure privilege of paying assessment levied by authorities having no jurisdiction.

5. Municipal corporations ⟸475 — Requirement that interest on assessment installments be paid semiannually not violative of charter provision providing for interest "per annum."

Requirement that 7 per cent. interest on installments of street improvement assessment be paid semiannually *held* not violative of San Francisco City Charter, art. 6, c. 2, § 33, providing for payment of assessment exceeding one-half of assessed value of property, in annual installments, with deferred payments to bear interest at a rate not greater than 7 per cent. "per annum."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Per Annum.]

6. Municipal corporations ⟸560—Contractor may sue to recover entire assessment made payable in installments on owner's failure to execute bond.

Under Street Improvement Ordinance of City and County of San Francisco, § 35, authorizing contractor's suit to recover assessment in the event of a void or faulty bond, or owner's failure to give bond, and creating a lien on the property for the full amount of the assessment, the contractor could sue to recover entire amount of assessment, though it was made payable in annual installments, on owner's failure to execute a bond.

7. Appeal and error ⟸1170(3)—Failure to allege that ordinance pleaded was passed on certain date held not reversible error.

In action to recover street assessment, where complaint alleged that proceedings were had under conditions of ordinance specified by number, title, and date of passage, the failure to directly allege that the ordinance was passed on a certain date under Code Civ. Proc. § 459 *held* not reversible error under Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Federal Construction Company against Ferdinand Wolfson, Arthur A. Newhouse, and others. Judgment for plaintiff, and named defendants appeal. Affirmed.

Hugo D. Newhouse, Russell P. Tyler, and Jesse A. Mueller, all of San Francisco, Milton R. Shepardson (Charles W. Cobb, of San Francisco, of counsel, Frank W. Sawyer, of San Francisco, amicus curiæ), for appellants.

H. K. Eells, of San Francisco, A. C. H. Hart, of Los Angeles, and Raymond Benjamin, of San Francisco (Randolph V. Whiting, Fabius T. Finch, Paul F. Fratessa, and John B. Gartland, all of San Francisco, amici curiæ), for respondent.

WILBUR, J. [1] Plaintiff seeks to recover upon a street assessment levied by the board of public works of the city and county of San Francisco for the improvement of Fifteenth avenue, between Fulton and Balboa streets. Plaintiff recovered judgment, and defendants appeal. The proceedings for the improvement of said street were had under the provisions of a street improvement ordinance enacted under the power conferred by section 33 of chapter 2, art. 6, of the Charter of San Francisco (Stats. 1911, p. 1691; Stats. 1913, pp. 1482, 1483, 1623), which ordinance is referred to in the case of Bienfield v. Van Ness, 176 Cal. 585, 169 Pac. 225, and will be hereafter referred to as the Street Improvement Ordinance. The assessment in question exceeded one-half of the value at which the said property was assessed, exclusive of improvements thereon, on the assessment book of San Francisco current at the date of the passage of the resolution of intention. Such an assessment is prohibited by subdivision 3, § 8, c. 2, art. 6, of the Charter of San Francisco, and was unauthorized and void (City Street Imp. Co. v. Pearson, 181 Cal. 640, 185 Pac. 962), unless provision was made in the proceedings for the payment of the assessment in annual installments, deferred payments bearing interest at a rate not greater than 7 per cent. per annum (section 33 supra; St. Imp. Ord., § 16).

By amendment to the charter, adopted in 1913 (article 6, c. 2, § 33, Stats. 1913, p. 1602), it was provided that the board of supervisors were authorized to provide in their street improvement ordinance for such payment in

installments, the language of that section of the charter on that subject being as follows:

"* * * If said board deems it expedient, provision may be made for the payment of any assessment levied in pursuance of the provisions thereof in annual installments covering a term not to exceed ten years upon conditions as to said board may seem reasonable and just, the rate of interest to be paid on such payments not to exceed seven per cent. per annum. In any proceeding for the improvement of streets wherein provision is made for the payment of any assessment in annual installments, the amount of such assessment shall not be limited by the provisions contained in subdivision three of section 8 of this chapter."

Acting under this power, the board of supervisors in its street improvement ordinance provides that the payment of the assessment may be made in annual installments—

"whenever the board of public works shall so determine and declare in the resolution of intention, or whenever the board of supervisors shall so determine and declare in the ordinance ordering the work, and it shall be mandatory on the board of public works to so determine and declare in every case when the amount of the assessment imposed will exceed one-half of the assessed value of the lot or parcel of land against which such assessment is imposed. Such resolution or ordinance shall state the number of installments in which the assessment may be paid, and the rate of interest to be charged on all deferred payments, which rate of interest shall not exceed 7 per cent. per annum." Sec. 28, Street Imp. Ord. of San Francisco.

The petition for transfer to this court after decision in the District Court of Appeal, First Appellate District, was based upon the claim that the assessments were void because not payable in annual installments, and this contention was in turn based upon the proposition that such provision as was made for deferred payments of installments of the assessments was invalid because conflicting with the charter. The petition was granted because the effect of a failure to make provision for payment of annual installments was under consideration in the case of City Street Imp. Co. v. Pearson, supra, since decided.

After our decision of the case a rehearing was granted. We held that the provision in the street improvement ordinance with reference to the payment in annual installments was not a sufficient compliance with the duty imposed upon the supervisors by section 33, supra, to take the assessment out of the provision of section 8 of the same chapter, declaring such assessments to be void when in excess of one-half of the assessed value. Inasmuch as this decision invalidated every bond issued under the street improvement ordinance of San Francisco, where the amount of the assessment exceeded one-half of the assessed value of the lot (section 8, supra; City Street Imp. Co. v. Pearson, supra), a rehearing was granted to enable us to further consider the effect of that portion of section 33, supra, giving the board of supervisors power to fix the conditions for the payment of the annual installments. The clause particularly referred to is above set forth, and is as follows: "Upon conditions as to said board may seem reasonable and just. * * *" We will now proceed to a consideration of that question.

In its resolution of intention to perform the work for which the assessment herein was levied, the board of public works provided that such assessment should be paid in three annual installments, with 7 per cent. interest per annum on all deferred payments. The detailed provisions for such payment is contained in the street improvement ordinance. This ordinance makes no provision for an assessment payable in installments, but does provide that the owner may, by giving a writing, denominated a bond, for the payment of said street assessment, secure the privilege of paying the same in annual installments, the first installment being payable at the date of the delivery of the bond; the bond must be executed and filed in the office of the board of public works within 30 days from the date of the demand made upon the property holder, or, if an appeal is taken, within 20 days after decision on appeal. The form of the bond is set forth in the street improvement ordinance. It recites the proceedings instituted for the improvement of the particular street, acknowledges and admits the validity and regularity of such proceeding, and promises to pay to the contractor or order the assessment in the number of annual installments therein set forth, which installments, in time of payment and amount, were to correspond with the installments provided by the board of public works in its resolution of intention for the improvement of the particular street involved. In the event of the default in the payment of any installment or any interest, according to the terms of the bond all said installments of principal, and interest thereon, become immediately due and payable, and the board of public works is authorized to sell the property herein described and pay the amount so due, together with the expense of such sale, in accordance with the law for the sale of real property upon execution and after notice as therein provided for. The bond further provides:

"That a lien for the full amount of the sum obligated to be paid under this bond, principal, interest and costs, is hereby created and acknowledged upon, in and to the real property described herein and the improvements thereon and appurtenances thereto."

In the case at bar, to comply with street improvement ordinance and with the resolution of intention to improve Fifteenth avenue, the first installment of the assessment was

to be paid at the time of delivery of the bond, the second one year, and the third two years thereafter, "together with interest on each assessment at the rate of 7 per cent. per annum" interest to be paid semiannually, six months from the date of the bond, and every six months thereafter. The appellants claim that the proceedings are invalid: First, because it is claimed the mandatory provisions of the charter and the ordinance requiring the assessment to be paid in annual installments are not complied with by the provision that the property holder may secure the privilege of paying in such annual installments by the execution of the bond in question; second, because the amount of interest on the deferred installments is limited by the charter (section 33, supra) and by the street improvement ordinance (section 28) to 7 per cent. per annum, and because the interest was required to be paid semiannually, and such requirement is, in effect, an increase of the rate above 7 per cent. per annum.

[2] Recurring to a consideration of the first point. The discretion of the board in enacting its ordinance is limited by the requirement that the installments shall be annual, and cover terms not to exceed 10 years, and bear interest not to exceed 7 per cent. per annum. The provisions for the payment of an assessment in three installments, one at the date of the delivery of the bond, the others in equal installments in one and two years, respectively, was a compliance with the requirement that the installments should be annual. The purpose of the enactment was to give the property holder more time in which to pay the larger amounts. Ordinarily the entire payment was made upon demand. By postponing two installments for one and two years, the purpose sought to be accomplished by the act was achieved.

[3] Was the requirement that the property holder sign a bond, waiving irregularities in the proceedings, unreasonable or unjust? In answering this question it is to be observed that we are dealing with the legislative power vested in the board of supervisors by the charter, and that it is primarily for their determination whether the provision made is reasonable and just. In this particular instance the charter expressly authorizes an assessment for more than 50 per cent. of the assessed value of the lot, when provision is made by the supervisors for the payment of the assessment in annual installments upon terms that they may determine to be reasonable and just. If the provision for the issuance of a bond may fairly be said to be incidental to the regulation of the payment by installments, then the determination of the supervisors is binding upon this court. If, however, such requirement has no legitimate connection with the regulation of the method and manner of paying in installments, then the determination by the board of supervisors that such a provision was reasonable and just would not be binding upon the court. In determining this question it is proper to observe that the Legislature of the state, in the Local Improvement Act of 1901 (Statutes 1901, pp. 34, 38, § 13), provided for a very similar written waiver on the part of the property holder, upon giving which the assessment for the improvement of a street was to be paid in installments. This provision is as follows:

"Sec. 13. * * * Provided, however, if at or before the time fixed in the notice of sale the owner of any parcel shall file with the tax collector a written agreement, waiving all objections, of whatsoever kind or nature, against the assessment and all proceedings with reference to the same, and undertaking to pay the assessment on his parcel in yearly installments not to exceed ten in number, the first of which shall be paid at the time said agreement is filed, and the others annually thereafter, one each year, at the time when the first installment of municipal taxes within said municipality is payable, with interest on all deferred payments at the rate of ——— per cent. per annum, being the same rate fixed by the resolution provided for in section five above for deferred payments, payable at the same time as the installments of principal, then, and in that event, the tax collector shall mark upon the record of the assessment, opposite the respective descriptions or numbers of such parcels, memoranda to the effect that time has been given; said waivers and undertakings shall be taken upon printed forms provided by the tax collector, bound in a substantial book and kept among the records of his office; said agreements shall contain a provision to the effect that in case of default in payment of any installment of principal provided for therein, or interest accrued on deferred payments, at the time called for by said agreements, then, in that event, the entire remaining unpaid installments shall become immediately due and payable, and the tax collector shall then forthwith, upon twelve days' written notice mailed to the last known address of the party, sell the property covered by the delinquent payment to realize the entire unpaid balance of said installments, with accrued interests and costs of sale; provided, the same have not been paid before the expiration of said twelve days. At such sale the municipality may be a bidder; said agreement shall provide that the entire unpaid balance may be paid at any time before maturity, together with interest on all deferred payments, until the date of maturity of the installment of principal next falling due."

The board of supervisors of San Francisco were expressly authorized by section 33, supra, of the charter to adopt this or any other state law for the improvement of streets in lieu of the charter plan for such improvement. That portion of the section referred to is as follows:

"Section 33. The method of procedure in this article * * * shall not be deemed exclusive, but the board of supervisors by an affirmative vote of not less than two-thirds of the mem-

bers thereof, may by ordinance substitute therefor any method of procedure in any general law of the state of California now in force and effect, or as the same may be amended or that may hereafter be enacted, providing for any such improvements in municipalities, and levying assessments for the expense or portion thereof upon private property. * * *"

Then follows the portion of the section hereinabove quoted. The closing sentence, it will be observed, is as follows:

"In any proceeding for the improvement of streets wherein provision is made for the payment of any assessment in annual installments, the amount of such assessment shall not be limited by the provisions contained in subdivision 3 of section 8 of this charter."

If the board of supervisors of San Francisco had by ordinance adopted the Local Improvement Act of 1901, with the foregoing provisions in regard to the payment of the assessment in installments, would it be contended that the statutory scheme so adopted did not make provision for the payment of assessments in annual installments within the meaning of that expression as used in the concluding sentence of section 33? If the answer is "No," then it would follow that the making of a substantially identical provision in the street improvement ordinance of San Francisco was also a provision for the payment in annual installments. Indeed, the fact that such a plan was already on the statute books, and that the board of supervisors was expressly authorized to adopt that plan, would seem to indicate that this particular method of paying an assessment in annual installments was within the contemplation of the framers of the amendment to the charter, and of the Legislature in approving the same. Section 33 of the charter, supra, was under consideration by this court in Hayne v. San Francisco, 174 Cal. 185, 162 Pac. 625. In this case the court emphasized the fact that the power of the board of supervisors in adopting a procedural ordinance was to be construed in the light of its power to adopt state laws already in force for the making of similar improvements. In that connection the court made the following statement (174 Cal. 191, 162 Pac. 628):

"Section 33, above quoted, authorizes the supervisors to adopt the procedure prescribed in article 6 of the charter, or 'any method of procedure in any general law of the state,' or to enact an ordinance prescribing a procedure. There were and are in force several statutes providing for the making and collection of assessments to defray the expenses of similar public work in advance of the construction thereof, namely, the act of 1889, the act of 1893, and the act of 1903, each providing a mode for the opening of public streets through private lands (Stats. 1889, p. 70; Stats. 1893, p. 220; Stats. 1903, p. 376); the act of 1901 and the act of 1909, each for the improvement of public streets (Stats. 1901, p. 34; Stats. 1909, p. 1042); and the acts of 1891 and 1893 for changing the grades of streets and for doing the necessary work for that purpose (Stats. 1891, p. 116; Stats. 1893, p. 91). The act of 1901 provides that the assessment for the costs and expenses must be collected before the contract is let for the work to be done. Therefore, when the board of supervisors, by the same section, is empowered to enact a procedure as a substitute for these various modes, the implied meaning of the latter grant is that such ordinance may also provide for the collection of the assessment before the doing of the work, or the letting of a contract therefor."

If the fact that the act of 1901 provides for payment in advance is germane, as there decided, to the question of whether or not the supervisors had power to make similar provisions by its procedural ordinance for the payment in advance, it would seem to follow not only that the supervisors were authorized to provide for the payment of assessments in annual installments, as is also expressly authorized by section 33, but also that the phrase "annual installments" in the concluding sentence of section 33 was intended to apply to the various statutory plans already in force in other parts of the state for the payment in annual installments, as well as the particular method provided in the procedural ordinance. And, in determining whether or not the terms of the procedural ordinance adopted by the board of supervisors contained a provision for the payment in annual installments of the assessments therein provided for, it is proper to consider the corresponding provision therefor in the general statutes which the supervisors were authorized to adopt in lieu of the charter plan of street improvement, and also in lieu of the adoption of a procedural ordinance.

[4] The requirement that the property holder shall sign a bond, waiving irregularities in the proceedings, is not unreasonable or unjust. Under the state laws for the issuance of street improvement bonds, supplementing the Vrooman Act, it is usually provided that the issuance of the bond shall be conclusive evidence of the regularity of all proceedings, and the effect of such legislation is to deprive the property holder of all defenses to the assessment other than those that are jurisdictional. Chase v. Trout, 146 Cal. 350, 80 Pac. 81. The requirement that the property holder shall sign a bond can have no other effect. If there is no jurisdiction in the authorities of the city and county to make the assessment, the bond given to secure the privilege of paying such void assessment in annual installments would be without consideration, and void. City Street Improvement Co. v. Pearson, supra. To require the property holder to waive informalities and defects which are not jurisdictional is not unreasonable or unjust. Where the lot is assessed for more that 50 per cent. of its assessed value for taxation

purposes, the provision of the bond, although containing an express promise to pay the assessment, would not create a personal liability, for such promise would be without consideration. Whether it would create such a personal obligation where the assessment was less than this amount, and the extension is a privilege secured by such a promise, is a matter that need not be determined on this appeal.

[5] We will next consider the question of the provision for the semiannual payment of interest. From one point of view the payment of 7 per cent. interest semiannually increases the rate of interest. Skinner v. Santa Rosa, 107 Cal. 464, 470, 40 Pac. 742, 29 L. R. A. 512; Derby v. Modesto, 104 Cal. 515, 523, 38 Pac. 900. The question, then, is whether by this requirement the board of supervisors have violated that provision of the charter which says that "* * * the rate of interest to be paid on such payments not to exceed 7 per cent. per annum." Section 33, supra. It is to be observed that the charter does not fix the time of the payment of interest, nor specifically provide that it shall be paid annually. The supervisors are authorized by the charter, section 33, supra, to provide for the payment "in annual installments, covering a term not to exceed ten years, upon conditions as to said board may seem reasonable and just." The only limitation upon this power is that with reference to the rate of interest. The terms and conditions under which payments upon the installment plan are to be permitted are left entirely to the board of supervisors, to be prescribed by ordinance. They have full legislative power over the matter, and a wide discretion to be exercised in the procedural ordinance. If the term "7 per cent. per annum" has a meaning so definite and fixed that it always means 7 per cent. payable at the end of the year, then the restriction upon the board of supervisors would prevent them from requiring that interest be paid semiannually. The term "seven per cent. per annum," however, is to be construed in accordance with the common acceptation of that term. The matter of the time of the payment of interest, whether in advance, monthly, quarterly, or semiannually, is ordinarily understood to affect the term and manner of payment, rather than the rate of the interest. The terms commonly used are "7 per cent. payable monthly" or "quarterly" or "semiannually." It is more common to provide for the payment of interest upon notes and mortgages quarterly or semiannually than to provide for such payment annually, and yet the interest rate is always referred to by the rate fixed per annum. The fact that such rate is payable monthly, quarterly, or semiannually does not make the rate usurious where the rate per annum is the highest rate permitted by law. Mowry v. Bishop, 5 Paige (N. Y.) 98; Varn v. White, 68 Fla. 329, 67 South. 142; Crowell v. Jones, 167 N. C. 386, 83 S. E. 551; Goodale v. Wallace, 19 S. D. 405, 417, 103 N. W. 651, 117 Am. St. Rep. 962, 9 Ann. Cas. 545.

In Meyer v. City of Muscatine, 68 U. S. (1 Wall.) 384, 17 L. Ed. 564, the Supreme Court of the United States had under consideration the validity of that city's municipal bonds. The ordinance calling the election provided for a vote of the people upon the proposition, "to borrow for a term of years, not exceeding twenty, on bonds of the city, at a rate of interest not higher than ten per cent. per annum, $130,000," etc. The bonds issued in pursuance of the election provided for interest at the annual rate of 10 per cent., payable semiannually on the first day of January and the first day of July in each year, "and the faith of the city of Muscatine is hereby pledged for the semiannual payments of interest," etc. The court stated the ground of the defendant's opposition to the validity of the bonds issued in pursuance of the election as follows, to wit:

"Because in the stipulation to pay the interest semi-annually at the rate of 10 per cent., the authority conferred by the vote which limited the rate of interest to 'not higher than 10 per cent. per annum' was transcended, and a usurious rate agreed to be paid."

In disposing of the point the court said:

"This objection has no foundation. When a statute fixes the rate of interest per annum, it has always been held that parties may lawfully contract for the payment of that rate, before the principal debt becomes due, at periods shorter than a year." 68 U. S. (1 Wall.) 391, 17 L. Ed. 564, supra.

The theory upon which interest payable semiannually is considered a greater rate than the same interest payable annually is that it is in effect a compounding of interest—the interest being paid, the payee can reloan the money, and thus secure interest upon the interest. There is, however, this important distinction: If the interest is not paid, and no action is taken to enforce the payment, the assessment merely bears 7 per cent. per annum simple interest, so that in effect the requirement of payment of interest semiannually is a term or condition of payment, rather than an increased rate. The legal effect of this provision in the bond is that for nonpayment of interest semiannually the due date of the entire principal of the bond may be accelerated. The board of supervisors are vested with full legislative discretion to determine the terms and conditions under which the annual installments of the assessment may be paid, and the effect of the provision made is that if one-third of the assessment is paid at the time of the issuance of the bond the other installments are to be deferred for one and two years, respectively, provided that in six months accrued interest was paid on the deferred installments, that

in one year the second installment was paid with accrued interest, in six months more accrued interest was paid, and in the second year the entire balance. In Skinner v. Santa Rosa, supra, the court was addressing itself to a situation where the election notice under which the bonds were issued provided that—

"Each bond shall have attached thereto a separate coupon for the interest for every year that such bond has to run, and each of said coupons shall be made therein payable, and shall be payable, at the office of the city treasurer * * * on the first Monday of December of the year for the interest whereof it is given."

In that case the election notice not only fixed annual rate and the time of payment of interest, but declared that it should be paid by coupons showing the annual interest. The notice of election also fixed the amount of taxes to be levied each year for 40 years to pay the amount of such bond. The supervisors after the election passed an ordinance changing the form of bonds, making them payable with interest at 4 per cent. per annum, payable semiannually, and made the bonds and interest "payable in gold coin of the United States of America of the present standard of weight and fineness," while the ordinance calling the election provided for bonds "payable in gold coin or lawful money of the United States." The statute required that the election notice should contain—

"The number and character of the bonds to be issued, *the rate of interest to be paid*, and the amount of tax levy to be made for the payment thereof." (Italics ours.)

Under such circumstances it is said by the court: "That the payment of interest semiannually increases the rate is obvious." The point really decided in that case is that the issuance of bonds providing for the payment of interest semiannually, and requiring the payment to be made in gold coin instead of gold coin or lawful money is a substantial departure from the character of bonds authorized by the people at the election, and that the city had no power to issue bonds—

"in a form which does not substantially comply with the terms stated in the ordinance of submission and notice of election and with the statute under which the proceedings were had."

In Derby v. Modesto, supra, it was held that the power to require the payment of interest semiannually was included in the power to fix the rate of interest. It does not follow, however, that the requirement that interest be paid semiannually is necessarily the exercise of the power to fix the rate of interest, rather than the power to fix the terms of payment. This view finds support in Murphy v. City of San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444, concerning a municipal bond election held under the same statute (Stats. 1889, p. 399, as amended; Stats. 1891, p. 94; Stats. 1893, p. 61) as was the bond election involved in Skinner v. Santa Rosa, supra. It was there said that it was unnecessary to state in the election notice whether the interest was payable annually or semiannually, and that the statement in the election notice that "the rate of interest to be paid on said bonds will be 5 per cent. per annum" is a sufficient compliance with the statutory requirement that the election notice state "the rate of interest to be paid," and declares that the statute "* * * makes no requirement with reference to the publication of the times at which the interest is payable."

If the requirement that the interest be paid semiannually or quarterly increases, the rate of interest over an annual rate, as declared in Skinner v. Santa Rosa, supra, the election notice could not state the "rate of interest" without stating the time of its payment, whether annually, semiannually or quarterly. It was for this reason, no doubt, that the chief justice pointed out in his concurring opinion that this case overruled Skinner v. Santa Rosa, supra, 119 Cal. 634, 51 Pac. 1089, 39 L. R. A. 444, as is also claimed in Carlson v. City of Helena, 39 Mont. 82, 111, 102 Pac. 39, 17 Ann. Cas. 1233. But the statement in Murphy v. City of San Luis Obispo, supra, is dictum in view of the holding that "the ordinance herein stated in sufficient terms that the interest was to be paid annually." The authority of the board of supervisors of the city and county of San Francisco, however, is not as limited under the charter, which grants them power to fix reasonable and just conditions of payment as were the city authorities of Santa Rosa and San Luis Obispo under the statute under consideration in Skinner v. Santa Rosa, supra, and Murphy v. San Luis Obispo, supra. As has been pointed out, the provision requiring interest to be paid semiannually fixes the terms of payment of principal and interest, rather than the rate of interest. There was ample power on the part of the board of supervisors to fix the terms and conditions of payment in a general ordinance covering the whole subject, and, while it is true that we are dealing with proceedings in invitum, and that the law is to be strictly construed in favor of the property holder, we are also dealing with a clearly delegated legislative power, broad in its terms, and limited only in the two particulars with reference to the amount of the several installments and the rate of interest.

If we look to state legislation for aid in determining what conditions for payment in annual installments were considered reasonable and just by the state Legislature, we find that 20 years before the adoption of the charter amendment (section 33, supra [1913]) a law was enacted for the issuance of bonds to represent the amount of assessments on property benefited by street improvements (Stats.

1893, p. 33). These bonds were payable in equal annual installments, interest was payable semiannually, and for any default in payment of principal or interest the whole bond became immediately due and payable, and the property was to be sold to pay the amount. The people of San Francisco in adopting the charter amendment must be deemed to have had in mind this and similar legislative plans for the payment of street assessments in annual installments, particularly as the charter amendment expressly authorized the board of supervisors to adopt such general state laws. As already pointed out, the provisions for the signing of a bond by the property owner for the semiannual payment of interest, and for the acceleration of the due date of the bond, as provided in such statutes, if adopted by an ordinance of the supervisors so enacting, would no doubt be held to provide such a scheme for annual installments as would have removed the inhibition of section 8, supra, under the express terms of the last sentence of section 33 above quoted; and, hence, it follows that a similar provision in a procedural ordinance enacted by the board of supervisors would have the same effect. Hayne v. City and County of San Francisco, supra. We think, on the whole, in view of similar legislation by the state, that the ordinance provides for payments in annual installments within the meaning of the concluding sentence of section 33 of the charter, supra, and for that reason that section 8 of the charter, supra, does not apply, and, hence, that the assessments herein sued upon, although more than 50 per cent. of the assessed value of the lots, are not void for that reason.

[6] Appellants contend, however, that a suit for the entire amount of the assessment before the expiration of three years is not authorized by the ordinance, and that therefore this proceeding is premature. This is only another way of saying that the provision made for the payment of the assessment in annual installments is not in compliance with the charter and is answered by the above considerations. It is true, however, that there is no express provision in the statute for a suit for the full amount of the assessment where the property holder fails to give a bond. It is expressly provided in section 35 of the street improvement ordinance that in the event of a void or faulty bond, or where the bond is not given by the owner, the contractor may sue to recover the assessment. While no express provision is made for the collection of the entire assessment in case the owner fails to give a bond, it is expressly declared that the assessment creates a lien upon the property for the full amount thereof, and in the absence of some provision postponing the time of payment a suit could be instituted at any time after demand as provided in section 35. This, we think, is clearly implied in the ordinance, and authorized by the charter. This conclusion was reached by the District Court of Appeal (First District) in Hutton v. Newhouse, 41 Cal. App. 689, 183 Pac. 276, and a rehearing was denied by this court.

[7] In addition to these points going to the merits of the case, appellants contend that the complaint is faulty for the reason that it does not expressly set out in hæc verba the street improvement ordinance of the city and county of San Francisco. It merely alleges that proceedings were had under and in pursuance of provisions of a certain ordinance of the city and county of San Francisco, giving number, title, and date of passage. Under section 459, Code of Civil Procedure, it is sufficient to plead an ordinance by title and date of passage. It is true that the allegation is not a direct one that the ordinance was passed on a certain date. But this mere formal defect cannot justify a reversal of the case where the terms of the ordinance appear in the record before us. Const. art. 6, § 4½. The point is made that section 459, Code of Civil Procedure, differs from corresponding provisions of the practice act of 1850 (Stats. 1850–53, p. 528, § 61), in that section 459 omits to provide that the courts shall take judicial notice of the ordinance so pleaded. This change is of no significance in the case at bar, for the reason that upon the trial the ordinance was proved by a certified copy thereof.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

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FEDERAL CONST. CO. v. NEWHOUSE et al. (two cases). (S. F. 8793, 8794.)

(Supreme Court of California. June 18, 1921. Rehearing Denied July 18, 1921.)

1. Municipal corporations ⟸454—Small departures from lawful procedure fatal to street assessment in absence of curative provisions.

In proceedings in invitum, small departures from the lawful procedure are fatal to a street improvement assessment in the absence of curative provisions.

2. Municipal corporations ⟸432—Assessment of cost of sewer along property fronting thereon only held proper.

In street improvement proceedings under the San Francisco street improvement ordinance, the assessment of the cost of the sewer only along the property fronting thereon *held* proper.

3. Municipal corporations ⊂=487—Invalidity of sewer assessment not available to owner of land not affected thereby.

In street improvement proceedings, an owner could not complain of the invalidity of the separate and distinct sewer assessment in a block in which such owner's property was not located, since invalidity of sewer assessment did not affect validity of assessment of owner's land for improvement of street.

4. Municipal corporations ⊂=488, 489(5) — Errors in assessment held not to invalidate assessment in view of owner's failure to appeal.

In street improvement proceedings under San Francisco street improvement ordinance, under San Francisco City Charter, art. 6, c. 2, § 33, errors in assessment appearing on the face thereof, which could have been corrected on appeal and which were not jurisdictional in character, *held* not to invalidate assessment, in view of owner's failure to appeal.

5. Municipal corporations ⊂=446—Contractor entitled to assessment on completion of work within contract period, notwithstanding city's delay in acceptance.

A contractor who actually completed street improvement within the time fixed by the contract was entitled to assessment, notwithstanding street superintendent's delay in acceptance of the work until after the time fixed had expired.

In Bank.

Appeals from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by the Federal Construction Company against Arthur A. Newhouse and others. Judgments for plaintiff, and named defendant appeals. Affirmed.

Hugo D. Newhouse, Russell P. Tyler, and Jesse A. Mueller, all of San Francisco, Milton R. Shepardson (Charles W. Cobb, of San Francisco, of counsel, and Frank W. Sawyer, of San Francisco, amicus curiæ), for appellants.

H. K. Eells, of San Francisco, A. C. H. Hart, of Los Angeles, and Raymond Benjamin, of San Francisco (Randolph V. Whiting, Fabius T. Finch, Paul F. Fratessa, and John B. Gartland, all of San Francisco, amici curiæ), for respondent.

WILBUR, J. Defendants appeal from judgments rendered against them foreclosing the lien of street assessments for the improvement of Nineteenth avenue, in San Francisco, with all street crossings but one between Quintara and Vicente streets, by paving, curbing, and sewering; the latter for one block only. The appeals from the two judgments are to be considered together, and only differ for the reason that they are for assessments upon different properties, and against different persons. The same points are raised as in Federal Construction Co. v. Wolfson (S. F. No. 8807) 199 Pac. 512, this day decided, and have been determined therein against appellants' contention. In addition to the points there raised it is claimed that the assessment is void for failure to comply with certain provisions of the street improvement ordinance of San Francisco with relation to the manner of making and levying of assessments. In making the assessment the five separate blocks in which the work was done were separately assessed. In four of the blocks the cost of curbing and paving were added, and a single front-foot rate of $5.881867 was ascertained as the rate to cover this cost and the proper proportion of incidental expenses. In the other block only, between Vicente and Ulloa streets, a sewer was laid, and in this block separate assessments were levied for each item, curbing, paving, and sewer, with a front-foot rate of $.770087 for curbing, $5.125058 for paving, and $1.026121 for sewer. Thus the cost per front foot for curbing and paving in this block was $5.895145. Hence the rate for pavement and curbing is greater by $.013278 in this block.

This increased rate is due to two factors: First, a charge of $15 is made for inspection of curbing in this block, and $90 is made for the inspection of pavements, whereas in all the other blocks the charge for inspection of both paving and curbing is $90. This item of $15 accounts for $.01304 of the difference, and the balance, $.000238 per front foot, is due to the fact that the one-fifth of the whole amount of the incidental expenses for printing and engineering was apportioned to a frontage of 1,150 instead of 1,200 feet, as in the other blocks. If the rate of assessment had been the same in each block, the mere fact of separate estimates in each block would be of no importance.

[1] The difference in the rate of assessment for curbing and paving in the block between Vicente and Ulloa streets of $.013278 in excess of that in other blocks is small, but in proceedings in invitum small departures from the lawful procedure are fatal to the assessment, in the absence of curative provisions. Chapman v. Jocelyn, 187 Pac. 962. In this block the frontage is 1,200 feet, yet only 1,150 feet of curbing is charged for, and the cost is assessed on 1,150 feet of frontage. For some reason, perhaps because the curb was already laid, one 50-foot lot is not assessed for curbing. The contract price of curbing was $.75 per lineal foot. The result of this method was that each lot assessed for curbing was assessed at the same rate for curbing as in all other blocks, except for incidental expenses, as above stated. The cost of engineering, printing, and inspecting was apportioned equally between the five blocks,

and equally assessed within those blocks, with the exception noted. Thus the separation of the assessment into five different blocks resulted in no inequality in the assessment other than that due to the omission of one lot from the curbing assessment and the unequal distribution of the assessment for incidental expenses.

The lot of the defendant Newhouse has a frontage along Nineteenth avenue greater than one-half a block. Only that part of his lot within the quarter block is liable for assessment for the improvement of the adjacent street crossing. There is a failure in the diagram and assessment to indicate the portion of the lot liable for the street crossing assessment, although that assessment is correctly computed upon the frontage of the lot within the quarter block and liable for the assessment. The error is in extending the lien thereof over the whole of the lot. To state the objection in the language of the respondent, the appellant relies upon the failure to draw the usual red line indicating the limit of the quarter block. The error complained of has been held fatal to an assessment under the Vrooman Act (St. 1885, p. 147). Parker v. Reay, 76 Cal. 103–105, 18 Pac. 124; Dyer v. Harrison, 63 Cal. 447, 450. This error, however, only applies to the crossing assessment, amounting to $161.88. These trivial errors could have been readily remedied if the attention of the city officials had been called thereto by an appeal, but it has been uniformly held under the provisions of the Vrooman Act (section 11), that the owner is not aggrieved by an assessment which is void on its face (Ryan v. Altschul, 103 Cal. 174–177, 37 Pac. 339), and may assert its invalidity in court. These errors appear on the face of the assessment.

[2, 3] Before discussing the effect of these errors under the San Francisco street improvement ordinance, one other alleged error appearing upon the face of the assessment may be disposed of, namely, the assessment of the cost of the sewer only along the property fronting on the same. This was the proper method of assessment, as the sewer improvement was virtually a separate and independent improvement, no doubt incorporated in the plan of improvement solely because it was desirable to have the sewers laid before the street was paved. The defendants, in any event, cannot complain of the invalidity of the separate and distinct sewer assessment. If invalid that part alone was invalid. Perine v. Lewis, 128 Cal. 236, opinion denying rehearing, page 241, 60 Pac. 422, 772. The defendants' property is not located in the block in which the cost of the sewer was assessed, and in which the excessive amount of incidental expenses was apportioned, and they cannot complain thereof. See Dyer v. Parrott, 60 Cal. 551.

Defendants were, however, injuriously affected by the failure to include one 50-foot lot in the assessment for curbing, and in the case of a frontage assessment, under the Vrooman Act, where such error appears on the face of the record, the whole assessment is void. See authorities cited in Larsen v. San Francisco, 186 Pac. 757, 763. Two errors, then, appear upon the face of the assessment, one affecting the assessment for curbing, and the other the assessment for the work done in the street crossing. It has been uniformly held, under the Vrooman Act and its various amendments, that where an assessment is void upon its face, even though it could be readily corrected on appeal, a property holder is not aggrieved by such void assessment, and that the contractor, being the party aggrieved, should appeal, and, failing thus to have the assessment corrected, is unable to enforce the invalid assessment. Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339; City Securities Co. v. Harvey, 176 Cal. 682, 169 Pac. 380.

[4] If these decisions under the Vrooman Act apply in this case we must hold invalid the crossing assessment and the curbing assessment. It is to be determined, then, whether the provisions of the street improvement ordinance so far differ from the Vrooman Act as to justify any other conclusion. The point of difference relied upon by respondent is the provision with reference to the remedy by appeal, and the conclusive effect of a failure to appeal contained in section 21 of the street improvement ordinance and section 11 of the Vrooman Act. Section 21 of the ordinance is identical in language with section 26 of the Street Improvement Act of 1911 (Stats. 1911, p. 730), considered in the recent decision in Oakland Paving Co. v. Whittell Realty Co., 195 Pac. 1058. The review of the authorities therein contained makes unnecessary an extensive consideration of them in this case. It must be conceded that the errors of computation which appear on the face of the assessment were such as could have been readily corrected on appeal, and were not jurisdictional in character. It follows that under the curative provisions of the ordinance (section 21, supra) the court cannot declare the assessment void because of these irregularities or informalities, notwithstanding the fact that they appear on the face of the assessment.

The reasons which impelled the court to hold that an assessment void on its face might be so declared by the court, notwithstanding the failure of the property owner to appeal, do not apply. The supervisors having power on appeal to correct the assessment for curbing and for crossing so as to conform to the street improvement ordinance, and opportunity being given to the parties to appeal to them for correction, the question narrows itself down to the inquiry as to whether or not the property holder is

aggrieved by the defect, and for that reason required to appeal. The reasoning of the decisions is such that if we hold the assessment void because of errors appearing on its face he is not aggrieved. If we hold it valid, notwithstanding such errors, he would, of course, be aggrieved. The ordinance specifically directs, so far as the supervisors have power to accomplish that purpose, that the court shall not hold an assessment invalid on account of such defect. If we obey this behest the property holder is the one who was aggrieved by the error in the assessment and he should have appealed for its correction.

The effect of this legislation is merely to throw on the property holder the burden of appealing from an assessment to correct errors or informalities therein, in default of which the assessment is valid. This is a reasonable construction of the ordinance, and, giving it that effect, it follows that the defendants, having failed to appeal to the board of supervisors for the correction of these errors, are bound by the assessment. The decisions of this court concerning the validity of street assessments under the Vrooman Act, and similar statutes, wherein it is held that this court will declare void any assessment which departs from the statutory method of assessment where such departure appears from the face of the assessment, and that the property holder is not required to seek the correction thereof by the city council or other local legislative body, have no application to this ordinance.

All other defects in the assessment and diagram relied on by the appellants to show its invalidity, such as the use of the customary sign to indicate feet (') and inches (") are sufficiently met by stating that the exclusive remedy therefor was likewise by appeal.

[5] There remains but one other question, and that is whether or not the failure to complete the work within the time limited in the contract is fatal to the assessment. Under the Vrooman Act it has been held that such failure invalidates the assessment. Kelso v. Cole, 121 Cal. 121, 53 Pac. 353. It also has been uniformly held under the Vrooman Act that the remedy for a failure to fully perform the contract where the work has been accepted and an assessment issued therefor is by an appeal to the city council or other legislative body, according to section 11. McLaughlin v. Knobloch, 161 Cal. 676, 120 Pac. 27; Creed v. McCombs, 146 Cal. 449, 80 Pac. 679; Lambert v. Bates, 137 Cal. 676, 70 Pac. 777; Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Girvin v. Simon, 116 Cal. 604, 48 Pac. 720; McIntyre v. Los Angeles, 23 Cal. App. 681, 139 Pac. 240, rehearing denied. The court in this case found that the work was completed in time, and appellants attack this finding as unsupported by the evidence. The utmost claimed by the defendants is that some minor portions of the work were incomplete at the time the first extension of the contract expired, and that there was a hiatus between the first and second extension. The plaintiff, however, claims that the work was completed before the expiration of the time fixed in the contract and before the granting of the second extension, and that the purpose of the second extension was merely to carry the time of completion beyond the period of appeal. Evidence was produced by the plaintiff to the effect that the work was fully completed before the expiration of the first extension, and the court found that such was the fact. If the contract was actually completed within the time fixed in the contract by valid extensions thereof, as the court found, the assessment was not invalidated because it was not issued until after the time for completion had expired. If the contractor finished the work within the time required he was entitled to the assessment, even though the acceptance by the street superintendent was delayed.

In view of this conclusion of the trial court as to the fact of completion, which is sustained by the evidence, we are not required to consider whether evidence of noncompletion is admissible under the authority last hereinabove cited (McLaughlin v. Knobloch, and other cases, supra), nor whether the curative clause of section 21 validates the assessment under the decision in Oakland Paving Co. v. Whittell Realty Co., supra. In this connection it should be observed that, while the curative clause of the statute therein considered (Stats. 1911, p. 730, § 26) is the same as in the street improvement ordinance of San Francisco, section 14 of the ordinance expressly provides that—

"In case of failure on the part of the contractor * * * to complete * * * his contract within the time fixed in the contract, or within such extension of said time * * * his * * * contract shall be void, and no assessment shall be made for the work done under said contract."

Whether in the light of this legislative declaration a failure to complete the work within the time indicated could be declared an error, irregularity, or informality, is a question we need not determine, but one which may well command the attention of the board of supervisors of the city and county of San Francisco.

The judgments are affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

186 Cal. 379

LAMMERS v. PACIFIC ELECTRIC RY. CO.
(L. A. 6457.)

(Supreme Court of California. June 28, 1921. Rehearing Denied July 28, 1921.)

Carriers ⇐369 — Ejectment not proximate cause of injuries sustained more than three-fourths of a mile from place of ejectment.

A railroad was not liable for injuries to person on track on theory that it had negligently ejected him for failure to produce ticket or fare, though he was in a helpless condition as a result of intoxication or other causes, where injuries were sustained three-fourths of a mile from the place of the ejectment; the ejectment in such case not being the proximate cause of the injuries.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Richard Lammers against the Pacific Electric Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Frank Karr, R. C. Gortner, E. E. Morris, W. R. Millar, and C. W. Cornell, all of Los Angeles, for appellant.

Earl Rogers and Charles E. Williams, both of Los Angeles, for respondent.

WILBUR, J. The facts are correctly stated in the opinion of the District Court of Appeal, and we adopt that statement of the facts, but with certain minor changes. For that reason we do not use quotation marks.

This is an appeal from a judgment awarding plaintiff the sum of $2,500 as damages for personal injuries sustained, so it is alleged, as the result of being wrongfully expelled by defendant's conductor from its passenger train while in a helpless condition and unable to care for himself at a time and place where he was likely to be injured by other cars of defendant, which were being operated at and past the point of ejectment at frequent intervals.

The injuries suffered were serious. The left limb of plaintiff was crushed by the car wheels passing over it at a point which made it necessary to amputate it above the knee. Several ribs were broken, and he was otherwise injured.

At the time he sustained injuries plaintiff was about 30 years of age. He was low in mentality, and scarcely able to converse intelligently on very ordinary subjects. He had been subject to epileptic seizures or some other nervous affection strongly resembling epilepsy, since the age of 14 years, having as many as two convulsions a month. This affliction, together with his mental feebleness, made it unsafe for him to work with machinery or attempt any labor requiring the exercise of unusual care. He was therefore doomed to the performance of the simpler tasks of life. While not habitually addicted to the use of intoxicating liquors, he was known to have indulged in its use upon occasions to a noticeable degree. His home was near El Monte, some distance out of the city of Los Angeles and on the line of defendant's electric railway connecting Los Angeles with various suburban districts.

Plaintiff purchased a ticket at El Monte for Los Angeles and return on the evening of May 22, 1917. The purpose of the trip made by him to Los Angeles on this evening was to purchase some minor articles. On returning he took the 10:10 p. m. car for El Monte, occupying a seat with an elderly gentleman near the rear of the car. The conductor testified that plaintiff, when first observed by him, was "slouched down" in his seat with his hat over his face, presenting the appearance of a man half asleep or intoxicated. In response to a request for his fare plaintiff took out his pocketbook, but was unable to find either ticket or money. The conductor had difficulty in getting audible or intelligent utterances from him. Upon being questioned as to his destination he stated that he was "going where dad went," referring to the elderly gentleman seated at his side. When further questioned by the conductor as to where "dad" was going, plaintiff replied, "El Monte."

Without any apparent reason therefor, plaintiff said that "dad" would pay his fare. The conductor asked the elderly gentleman if plaintiff was a member of his party, and received a negative answer. Apparently he had no acquaintance with plaintiff. Being unable after a "jumbling" search, to find either ticket or fare, plaintiff was told, according to the testimony of the conductor, to get off the train at Covina Junction, about 10:25 p. m. This he did with the conductor's assistance. The next morning at about 5 o'clock he was found near the left rail of the outbound track about three-quarters of a mile east of Covina Junction badly mangled. Evidently he had attempted to make his way home. The defendant operates a double-track system from Covina Junction past the point where plaintiff was found.

Covina Junction is a railway junction in Los Angeles city. The train carrying plaintiff was a through train to El Monte. Covina Junction is a transfer point for passengers destined for Pasadena, Alhambra, and other points on the Pasadena Short Line, operated by the defendant. It is the stipulation of counsel that—

"Covina Junction * * * is one of these little places where passengers can sit, but not in charge of any one, and with no agent there; one of these shelters with a seat and a roof over it."

There is, however, testimony seemingly in conflict with the stipulation and to the effect that the waiting room was about 10 feet square, with glass on four sides. The nearest residence house was about 100 feet from the station, situated on a slight bluff or elevation at the end of a bridge. The next nearest structure was defendant's substation, about 150 feet distant. The testimony is uncertain as to whether or not either of said buildings was actually occupied by any one at the time of the injury. The next nearest residence was from one-eighth to one-quarter of a mile east of the station. The roadbed of the track leading away from the station was built within the limits of a barranca with slight bluffs on either side. Especially is this true as to the elevation of the inhabited territory on either side. Excavations and depressions appear to have existed in the earth near the track along the route.

The conductor described plaintiff's condition as follows:

"I took hold of him, his left elbow, or arm—some place on the left side to assist him down the steps as he appeared very wobbly—couldn't walk very well. He staggered before he reached the steps. He walked probably 10 feet to the door."

The conductor further testified that plaintiff did not fall at the time he left the car, but walked off a "little bank there in this ditch, walked down this ditch, and that is the last I saw of him. I thought he might be down there until he sobered up."

The elderly gentleman, Prof. Hagen, a teacher of music, and one or two other passengers, described the appearance of the plaintiff as a person plainly under the influence of liquor. He had offered the professor a drink from a pint bottle which he drew from his pocket. His articulation was indistinct. "Any one could tell that he was not right," is the way it was put. After being assisted from the platform to the ground he is described as "leaning backward and forward on his feet."

Witness E. H. Watson testified that plaintiff was very drunk. "I heard him make some foolish remarks; that is how my attention was called to him in the first place." Mr. Watson further testified that plaintiff had two bottles of whisky in his pockets. The testimony of the several witnesses who took special notice of plaintiff makes it clear that the power of locomotion was plainly affected and a deficient or disturbed mental condition was apparent. His conduct was neither boisterous nor offensive.

As a matter of fact plaintiff had in his possession at all times a ticket entitling him to travel as a passenger, but he was unable to produce it at the time it was demanded. His speech was incoherent then as it was when a witness several months thereafter. Witnesses who had known plaintiff for a great many years described his affliction, its effect upon him, and the duration of said seizures.

Plaintiff seems to have denied that he was or had been drinking at the time he was expelled from the train. He claimed that the conductor charged him several times with being "stewed." He also intimated that he was not given a full opportunity to find his ticket. He insists, so far as any intelligent conclusion may be drawn from his testimony, that a "spell" was coming over him such as he was afflicted with, and that he gradually lost consciousness. No one tasted or examined the contents of the bottles that some of the witnesses say he was carrying. One or two witnesses who came into close contact with him after the injury thought they smelled the odor of liquor on his breath, while a like number with equal opportunity failed to detect any odor of liquor. It is immaterial, however, whether the condition was brought about by malady or liquor. The question is, Was he in a helpless condition and unable to care for himself, and, if so, was it negligence on the part of defendant's agent to eject him under the circumstances of the situation at the point at which he was ordered and helped from the train? At least five outbound trains at rather equal intervals passed over the way he had traveled between the time of ejection and the hour that he was found. The number of inbound trains is not given, as the injury occurred on the inner rail of the outbound track. Physical evidence places it beyond question that the injury was caused by the wheels of defendant's cars passing over plaintiff's limb. No member of any one of the several train crews passing after plaintiff was ejected was produced who claimed to know anything about the injury. Plaintiff was discovered by a third party.

From the foregoing statement of facts by the District Court of Appeal it is to be observed that the plaintiff had traveled three-quarters of a mile from the point where he was ejected from the train to the point where he was injured, and that more than six hours apparently elapsed between the time of his ejection and the time of the injury. There is no evidence to support the finding of the trial court that the train which injured the plaintiff was negligently operated, and the District Court of Appeal based its judgment upon the original negligence in ejecting the plaintiff from its train. Assuming without deciding that the defendant was negligent in ejecting the plaintiff from its train in the condition in which he then was, the question is, Was such negligence the proximate cause of plaintiff's injuries? It appears from the testimony of the conductor that, however dangerous the point of his ejection may have been, plaintiff immediately left the tracks of the defendant railway and entered a ditch. If he had remained there he would have been uninjured.

The fact that he was later injured at a point three-quarters of a mile away upon the tracks of the defendant railway is of no significance in determining whether or not the defendant was negligent in ejecting the plaintiff from its train. If the plaintiff had wandered north and been injured by a Southern Pacific Railway Company's train or had succeeded in getting on one of the numerous streets and highways in the vicinity and been injured by a passing automobile, it would hardly be contended that the injury was the proximate result of the ejection.

The only connection between the ejection and the injury would be the fact that if there had been no ejection there would have been no injury. The sale of the whisky to the plaintiff would come nearer being a proximate cause of the injury than the ejection from the railway train. The peril arising from the ejection ceased the moment the passenger left the position where he could be struck by defendant's trains, while the peril arising from the use of the intoxicating liquor continued in operation up to the time of the injury and contributed thereto, and yet it has been uniformly held, in the absence of statute to the contrary, that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication. Joyce on Intoxicating Liquors, § 421; Cruse v. Aden, 127 Ill. 231, 234, 20 N. E. 73, 3 L. R. A. 327.

There is no more reason for holding the defendant liable for the injury in this case than there would be had the plaintiff wandered into some neighboring yard and been shot as a burglar. In each case the injury would have been avoided had there been no ejection of the plaintiff from the defendant's train but in each case the ejection is obviously not the proximate cause. In determining the responsibility of the defendant it must be recollected that the plaintiff, no matter how badly intoxicated he was, was entitled to go wherever he pleased, and that the agents of the defendant had no authority to exercise any restraint whatever over his person. His ability to leave the scene of the ejection is demonstrated by the fact that his injuries occurred three-quarters of a mile away. That the injury was not the proximate result of the ejection is demonstrated by the fact that the plaintiff was able to and did in fact leave the place of danger, and subsequently of his own volition returned to a position of danger on defendant's tracks, and that but for plaintiff's action in so returning to a position of danger the accident would not have occurred.

It is unnecessary to discuss the numerous cases cited by the parties in their briefs upon the question of proximate cause. Under somewhat similar facts of injuries to intoxicated persons who had been ejected from passenger trains the courts have held that the injuries under the particular circumstances of the cases were not the proximate result of the ejection. Hamilton v. Pittsburg, etc., R. R. Co., 183 Pa. 638, 38 Atl. 1085; State v. Washington, B. & A. Electric R. Co., 130 Md. 603, 101 Atl. 546; Kradel v. Pittsburg, H. B. & N. C. Ry. Co., 255 Pa. 427, 100 Atl. 128.

The following cases are cited on behalf of respondent: Doherty v. California N. & I. Co., 6 Cal. App. 131, 91 Pac. 419; Cincinnati, N. O. & T. P. Ry. Co. v. Marrs' Administratrix, 119 Ky. 954, 85 S. W. 188, 70 L. R. A. 291, 115 Am. St. Rep. 289; Louisville & Nashville R. R. Co. v. Johnson, 108 Ala. 62, 19 South. 51, 31 L. R. A. 372; Fagg's Administrator v. Louisville & N. R. R. Co., 111 Ky. 30, 63 S. W. 580, 54 L. R. A. 919; Haug v. Great Northern Ry. Co., 8 N. D. 23, 77 N. W. 97, 42 L. R. A. 664, 73 Am. St. Rep. 727; and Roseman v. Carolina Central R. R. Co., 112 N. C. 709, 16 S. E. 766, 19 L. R. A. 327, 34 Am. St. Rep. 524; but they are so clearly distinguishable on the facts that we deem it unnecessary to discuss them.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SLOANE, J.; SHAW, J.; LENNON, J.; LAWLOR, J.

186 Cal. 344

MILLER v. MURPHY et al. (S. F. 9176.)

(Supreme Court of California. June 25, 1921.)

1. Judgment ⊂⊃900—Parties may maintain separate action between themselves on judgment as a contract.

A judgment is a contract upon which the parties may maintain a separate action between themselves.

2. Judgment ⊂⊃883(12)—Judgment may be pleaded as counterclaim.

An outstanding indebtedness, evidenced by a judgment of a court of record in favor of the defendant and against the plaintiff, is an appropriate ground of counterclaim under Code Civ. Proc. § 438, subd. 2, which is permitted to be pleaded by section 437.

3. Judgment ⊂⊃883(12)—Joint or several judgment warranting separate action against plaintiff may be pleaded as counterclaim.

If a judgment in favor of defendant and against the plaintiff were shown to be joint and several, so that defendant could bring a separate action to enforce its obligation against the plaintiff, it could be pleaded as a counterclaim under Civ. Code, §§ 1430, 1431, 1660, and Code Civ. Proc. §§ 414, 579, and under section 1910 the parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, although other parties were joined with both or either of them.

4. Action ⊂=28—Party may waive tort in conversion and sue in assumpsit.

When one's goods are wrongfully taken and used by another, he may waive the tort and sue in assumpsit for their value, as for goods sold and delivered.

5. Taxation ⊂=531(1)—Evidence held insufficient to support pleading payment of taxes on certain lots.

In an action to recover money advanced by plaintiff to defendant for the payment of taxes on lots 25 and 26 of La Loma Park, tax receipts showing assessment to persons, strangers to the record, for lots 25 and 26 in block 2242 of La Loma Park, Berkeley, are insufficient to support the allegations of the complaint; there being no presumption or inference that the lots were the same.

6. Appeal and error ⊂=695(1)—Affirmance not ordered on ground that bill of exceptions did not contain all the evidence.

Where the evidence is insufficient to support plaintiff's allegation of the advancing of money for taxes on certain lots belonging to defendant as shown on the face of the bill of exceptions, which was settled and allowed as correct, but "subject to objections of plaintiff," the ruling that the evidence is sufficient cannot be sustained on the ground that there was probable evidence to support the judgment where no objections were interposed to the sufficiency of the bill of exceptions.

7. Appeal and error ⊂=909(2)—In view of burden of proof, it would not be presumed that two parcels of land described differently were identical.

In an action to recover money advanced by plaintiff to defendant for taxes upon certain lots, it may not be assumed, in the absence of any averment to the contrary in the records or briefs, that the tracts described differently in the contract from those shown in evidence were identical, since the burden was on plaintiff to show affirmatively that he paid the taxes on the lots described in the contracts, and plaintiff was bound upon objection to the relevancy of the tax receipts to show that they referred to the property in controversy.

8. Appeal and error ⊂=1071(1)—Plaintiff's failure to serve findings of fact and conclusions of law does not require reversal in absence of showing of prejudice.

Where on the submission of the case the court directed plaintiff to prepare and serve findings of fact and conclusions of law as required by statute, plaintiff was at fault in not serving them, but in the absence of a showing of prejudice to defendants from this omission, standing alone as an assignment of error, the matter would be disregarded.

In Bank.

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Suit by Mary Miller, as administratrix of the estate of William Miller, deceased, against Ella M. Murphy and others. Judgment and decree of foreclosure in favor of plaintiff, and the defendants appeal. Reversed.

Whitmore & Henion and Welles Whitmore, all of Oakland, for appellants.

Daniel O'Connell, of San Francisco, for respondent.

SLOANE, J. This is an appeal by defendants from a judgment and decree of foreclosure in favor of plaintiff to enforce the terms of a written contract and lien.

Plaintiff's cause of action arose upon a written agreement, executed by defendants, whereby they jointly and severally contracted to repay to plaintiff money to be advanced by the latter for taxes accrued and accruing on certain parcels of land then in litigation between the parties, in the event that defendants should be adjudged the owners of the land, and creating a lien on the land as security for such advances.

That litigation resulted in defendants' favor, and this suit was brought to establish the amount of the claim and foreclose the lien.

The judgment was for $1,041.33 and costs. The land in question is described in the contract, pleadings, and findings as lots Nos. 17 and 19 in block No. 15 of "Daley's Scenic Park, Berkeley, Cal.," and "lots 25 and 26, as said lots are delineated and so designated upon that certain map entitled, La Loma Park, Berkeley, Alameda County, Cal."

The answer denied, for want of information or belief, the alleged payment of the taxes on this property, and pleaded, by way of set-off, three separate claims of defendants against the plaintiff in the respective amounts of $25.85, $56, and $419.30.

The first two of these were upon judgments in other actions for the recovery of costs against the plaintiff and in favor of one or the other of the defendants. The third claim was for money alleged to have been wrongfully collected by plaintiff from a tenant of defendants as rent of the premises, the ownership of which was then in controversy between the parties to this action, and which was adjudged to be the property of defendants.

The trial court found for plaintiff for the sum of $996.37, the amount advanced for taxes, $67.21 interest, less $22.75, which was, by consent of plaintiff, allowed on the second item of set-off, leaving the balance in favor of plaintiff, for which judgment was given.

Excepting for the $22.25 consented to by plaintiff, all of defendants' items of set-off or counterclaim were rejected.

The appeal is presented on the judgment roll and a bill of exceptions.

Appellants specify as prejudicial error: (1) The admission of certain tax receipts as evidence of payment of taxes by plaintiff

upon this property, over the objection of defendants that it did not appear therefrom, and was not shown in evidence, that they applied to any of the property involved; (2) the refusal of the court to admit or consider evidence offered, or any evidence, of the judgment claims against plaintiff; (3) the refusal of the court to admit evidence offered, or any evidence, in support of the claim for rents belonging to defendants, and alleged to have been wrongfully collected by plaintiff from defendants' tenant; (4) failure of compliance with the provisions of section 634 of the Code of Civil Procedure in the matter of serving copy of the findings before they were signed by the court.

The case comes to this court on rehearing from the District Court of Appeal, where the judgment of the trial court was affirmed. Hearing in this court was granted mainly because of error in ruling that judgments for the recovery of money in favor of a defendant against the plaintiff may not be pleaded as matter of counterclaim or set-off under sections 437 and 438, Code of Civil Procedure.

[1, 2] The defendant may plead in his answer any new matter constituting a defense or counterclaim. (Code Civ. Proc. § 437); and in an action arising on contract the counterclaim may be any claim existing between the parties between whom a several judgment might be had in the action, and (2) consisting of any other cause of action arising upon contract and existing at the commencement of the action (Code Civ. Proc. § 438).

It is well settled in this state that a judgment is a contract upon which the parties may maintain a separate action between themselves. London G. & A. Co. v. Ind. Acc. Comm., 181 Cal. 460, 465, 184 Pac. 864; Weaver v. San Francisco, 146 Cal. 728, 81 Pac. 119; Bean v. Loryea, 81 Cal. 153, 22 Pac. 513; McBride v. Fallon, 65 Cal. 303, 4 Pac. 17; Wallace v. Eldredge, 27 Cal. 499; Reed v. Eldredge, 27 Cal. 346.

In Reed v. Eldredge, last cited, in an action brought upon a judgment, Rhodes, J., says:

"The judgment upon which the action was brought was a contract for the payment of a sum of money evidenced by the record of a court. The debt secured by it differs in no manner from a simple contract debt, though the evidence of the existence of the debt is of a higher and more solemn character than that by which a simple contract debt is proven."

We are of the opinion that an outstanding indebtedness evidenced by a judgment of a court of record in favor of the defendant and against the plaintiff is an appropriate ground of counterclaim under subdivision 2 of section 438, Code of Civil Procedure.

[3] Some question might be raised in this case as to the sufficiency of the showing in the bill of exceptions as to the contents and legal effect of the documentary evidence produced and offered by defendants in support of the judgments pleaded, as against the objection that the evidence offered was incompetent, irrelevant and immaterial but for the fact that it appears from the findings of the court that there was a refusal to consider these items of set-off in any way as constituting proper matter of counterclaim.

The first item set out by way of counterclaim in defendants' answer is a judgment in favor of defendants for costs against the plaintiff and others in proceedings instituted against the defendants in bankruptcy. The record of the judgment in that proceeding was admitted in evidence here, but was apparently disregarded and the claim rejected as not being a proper matter of set-off.

Attention is called in respondent's brief to the fact that the judgment for costs was against other persons than the plaintiff, who are not parties in this action, although the effect of such condition is not argued.

It may be presumed on the face of the record that this was a joint judgment, and cannot therefore, be pleaded as a set-off against one judgment debtor alone. 25 Am. & Eng. Ency. of Law, 521; Atkins v. Churchill, 19 Conn. 396; Phelps v. Reeder, 39 Ill. 172, 177. If it were shown to be joint and several, so that defendant could bring a separate action to enforce the obligation against the plaintiff, we see no reason why it could not be pleaded as a counterclaim. Civ. Code, §§ 1430, 1431, 1660; Code Civ. Proc. §§ 414, 579; Black on Judgments, § 491; Carson v. Moore, 23 Tex. 451; Patterson v. Walton, 119 N. C. 500, 26 S. E. 451; Read v. Jeffries, 16 Kan. 534.

"The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either of them. Code Civ. Proc. § 1910.

On the second claim of the answer the trial court, by consent of plaintiff, allowed defendants a credit of $22.25, but as this item was upon a judgment for $56, defendants are entitled to relief for the court's refusal to consider the amount as a proper item of recoupment for the balance of the claim.

There is no force in the objection that the judgment is in favor of the defendant Ella M. Murphy alone. She has a right to set-off against her joint and several liability to plaintiff, and it satisfies the plaintiff's demand against both defendants to that extent.

[4] The third item of counterclaim is ambiguously pleaded, and it is difficult to de-

termine whether the defendant seeks to recover for a tort, or on an implied contract for money belonging to the defendants, which the plaintiff had received to his own use. Treating defendants' pleading as a waiver of the tort and a claim on the implied contract to a refund of the money so received, we are of the opinion that the set-off may be allowed if the evidence supports it.

It is well settled under the authorities that, when one's goods are wrongfully taken and used by another, he may waive the tort and sue in assumpsit for their value, as for goods sold and delivered. (Pratt v. Clark, 12 Cal. 89; 2 Greenleaf on Ev. § 108; Roberts v. Evans, 43 Cal. 380; De La Guerra v. Newhall, 55 Cal. 23; Lehman v. Schmidt, 87 Cal. 15, 20, 25 Pac. 161.

There are other errors complained of and shown by the record which, although they might be disregarded as not appearing to have been prejudicial, should receive consideration in view of the necessity for a new trial.

[5] The larger part of the amounts to be advanced for taxes by the plaintiff under the contract sued on were assessments upon the property described as "lots 25 and 26, as said lots are delineated upon that certain map entitled La Loma Park, Berkeley."

The only evidence in the record of payment of such assessments were tax receipts on "lots 25 and 26 in block 2242 of La Loma Park, Berkeley," showing an assessment to persons, strangers to the record, together with testimony of the plaintiff that he paid the taxes on this property in the sum demanded in his complaint. The witness at the time was shown the receipts in dispute.

There is no presumption or inference arising from these tax receipts, or plaintiff's testimony, justifying a conclusion that lots 25 and 26 of La Loma Park is the same property described as lots 25 and 26 of block 2242 of La Loma Park. If any presumption may be indulged in the matter, it would more naturally be that there were at least some 2241 other blocks in La Loma Park containing lots numbered 25 and 26, as it is customary to make such subdivision with some regularity as to the number of lots in each block. The inference from the first description would be that these lots were independent parts of the subdivision of the whole tract, and not subdivisions of other subdivisions into blocks.

[6] It is argued that the finding of the court on this point should be upheld on the ground that the bill of exceptions on its face shows that it does not include all the evidence taken on the trial.

There is nothing to indicate that there might have been other evidence on this issue. The bill of exceptions was settled and allowed as correct, and therefore purports to be a full and true statement of the proceedings on the trial. There is appended to the certificate the statement that it is "subject to objections of plaintiff," whatever that may mean. There is nothing before us on this appeal to show any objections interposed to the sufficiency of the bill of exceptions, or any attempt to supply any omissions, if such are claimed, by diminution of the record.

[7] It might perhaps be assumed, in the absence of any averment to the contrary in the records or the briefs, that these tracts as thus variously described were identical. But, on the other hand, the burden was upon the plaintiff to show affirmatively that he had paid the taxes on the lots described in his contract, and, if there was merely a discrepancy in these descriptions, it would have been a very easy matter, and was plaintiff's duty, upon objection to the relevancy of his tax receipts, to show that they referred to the property in controversy.

[8] Defendants also were entitled to service upon them of a copy of the findings before they were signed by the judge. It appears from the record that on the submission of the case the court directed the plaintiff to prepare and serve findings of fact and conclusions of law, as required by statute. The findings were not served. There is no claim or showing of prejudice to defendants from this omission, however, and, standing alone as an assignment of error, it would be disregarded. Baker v. Eilers, 175 Cal. 656, 166 Pac. 1006; Jarvis v. Frey, 175 Cal. 690, 166 Pac. 997; Const. art. 6, sec. 4½.

On the other grounds heretofore stated the judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LAWLOR, J; WILBUR, J.; LENNON, J.

186 Cal. 432

WHITAKER v. TITLE INS. & TRUST CO. (L. A. 5797.)

(Supreme Court of California. July 6, 1921.)

1. Insurance ⟸426½—Company guaranteeing title, subject to validity of judgment for plaintiff's assignor, whose title it stated was good in opinion of its attorneys, responsible only for truthfulness of latter statement.

Where an abstract company guaranteed a title, subject to an action to quiet title against plaintiff's assignor, which the certificate showed had resulted in a judgment for the latter, prior to which the plaintiff in such action had deeded the land to another, who in turn executed a trust deed to a corporation to secure a note, on default in the payment of which the corporation executed a deed, which the certificate stated, in the opinion of the attorneys for the abstract company, passed no title, the only representation as to the effect of such litigation,

for which such company could be held, would be the truthfulness of the statement that such was the opinion of their attorneys; the effect of qualifying the general guaranty of title being to inform the beneficiaries of the certificate that their title was subject to the validity of the judgment in their favor, which the company was unwilling to insure, but which in the opinion of its attorneys was good.

2. Insurance ⟸426½—Abstract maker not liable for omission of details showing nonfinality of judgment for plaintiff's assignor, certificate not purporting to give full record or legal effect of court proceedings.

Though a recital in an abstract of title to real estate, regarding claims adverse to those of the assignee of a note secured by a mortgage thereon, failed to set forth details of certain litigation to quiet title thereto, subject to which the title was guaranteed, showing that a judgment in favor of the assignor was not final, the company making such abstract was not liable for a failure of title resulting therefrom; the certificate not purporting to give the full record or legal effect of such court proceedings, and there being no evidence of conspiracy or fraud.

3. Evidence ⟸258(1), 413—Testimony as to oral statements of abstract company's attorney regarding contents and legal effect of title certificate inadmissible.

In an action against a title guaranty company for the failure of a title guaranteed, subject to the validity of a judgment in favor of plaintiff's assignor, where defendant stated in its certificate that in the opinion of its attorneys the adverse claimant's title was not good, testimony of such assignor as to oral statements made by defendant's attorney regarding the contents of the certificate and its legal effect was inadmissible, being an attempt to vary the terms of a written instrument, and because no showing was made of his authority to interpret the contract of the corporation.

4. Fraud ⟸29—Oral statements of defendant title guaranty company's attorney to plaintiff's assignor as to legal effect of certificate of title not available to plaintiff.

In an action against a title guaranty company for failure of title guaranteed, subject to the validity of a judgment, for plaintiff's assignor, whose title in the opinion of defendant's attorneys was good, testimony as to oral statements made by the head of defendant's legal department to such assignor, who was the immediate beneficiary of the certificate of title, if competent to show an attempt to mislead him, were of no avail to the plaintiff, not having been made or communicated to him, and he having testified that he relied on the certificate alone, and the fraud, if any, being on the assignor, to whose cause of action therefor plaintiff had not succeeded by assignment or otherwise.

5. Insurance ⟸426½—Company not insurer of title, where it assumed only to give opinion of its attorneys.

An abstract company, which guaranteed a claimant's title, subject to the validity of a judgment, for his assignor, stating in the certificate that, in the opinion of its attorneys, an adverse claim as successor in title from the party against whom such judgment was rendered was unfounded, was not responsible as an insurer or guarantor of title, in the absence of proof that such claimant was deceived by fraudulent misrepresentations; it having only assumed to give it as the opinion of its attorneys that the adverse claim was unfounded, not even adopting such opinion as its own, and the language not being ambiguous or misleading.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Frank Whitaker against the Title Insurance & Trust Company. Judgment for plaintiff was affirmed by the District Court of Appeal, and defendant appeals. Reversed.

See, also, 179 Cal. 111, 175 Pac. 460.

C. H. Brock, J. N. Hastings, and O'Melveny, Millikin & Tuller, all of Los Angeles, for appellant.

J. W. Bell, of Los Angeles, for respondent.

R. C. Springer, of San Diego, amicus curiæ.

SLOANE, J. The defendant, Title Insurance & Trust Company, is appealing from a judgment in favor of the plaintiff and respondent, as damages for the failure of title to certain real property, claimed to have been covered and guaranteed by a certificate of title issued by the defendant company to plaintiff's assignor, one C. B. Williams. The exact form of the transaction between plaintiff and his assignor was the assignment of a promissory note by the latter to the former for $7,000, secured by a mortgage upon the real property in question. The note and mortgage were executed to Williams by a corporation, the Caruthers Building Company, and were assigned to plaintiff by Williams without recourse. The corporation was insolvent. Its title to the mortgaged property failed, and the plaintiff here lost his investment in the note and mortgage, amounting to $6,391, besides some further sum in attempting to realize on the security, by reason, as he claims, of relying upon the certificate of title issued by defendant company.

The question before us is the liability of the Title Insurance & Trust Company to the plaintiff upon the certificate of title. There are many intricate questions raised on this appeal, and elaborately briefed and argued, as to the nature and extent of the liability of title insurance and abstract companies in certifying, guaranteeing, or insuring titles to real estate, and as to the rights of third parties relying upon such certificates as successors in interest to the persons to whom such certificates are directly issued. Under

our interpretation of the terms of this contract, however, it will be unnecessary to discuss most of the points presented.

[1] Conceding, without deciding, that the plaintiff is entitled to the full benefit of the certificate issued to his assignor, his rights in the premises are limited to the express terms of the document. Instead of guaranteeing or insuring against the adverse claims to this real property which eventually defeated plaintiff's security, the certificate of the Title Company is expressly made subject thereto. The certificate on its face purports to have been issued to Caruthers Building Company, a corporation, and C. B. Williams. After reciting the examination of the various official records pertaining to this title, the document provides that—

"The Title Insurance & Trust Company hereby guarantees that said title as appears from said records is vested in Caruthers Building Company, a corporation, subject to matters set forth in note following description."

The note referred to is as follows:

"Note.—On November 16, 1906, suit was begun in the superior court in and for said county. Case No. 54219, by William Reid, plaintiff, v. C. B. Williams et al., defendants, wherein it was sought to obtain judgment declaring a certain deed theretofore executed by plaintiff to be a mortgage and to quiet title to lands above described in plaintiff. Notice of the pendency of said action was recorded in the recorder's office of said county on November 16, 1906. Judgment for plaintiff was filed March 17, 1909. Motion for new trial was made and a new trial granted February 21, 1911. Judgment was rendered May 18, 1911, by stipulation of the parties, whereby it was adjudged that defendant C. B. Williams was the owner of said lands at the date of the beginning of said action, and at all times during the pendency of said action, and at the date of said judgment, and that plaintiff take nothing by said action; said Williams being the immediate grantor of the vestee herein. On August 22, 1909, William Reid executed a deed of said lands to William A. Hunter. On August 24, 1909, William A. Hunter and wife executed a trust deed of said lands to Union Trust & Realty Company, to secure a note for thirty-two hundred dollars ($3,200.00), in favor of German-American Savings Bank. On October 24, 1910, the Union Trust & Realty Company executed a deed to Parley M. Johnson, which deed contains recital as to default payment of indebtedness secured by said trust deed and sale thereunder. In the opinion of the attorneys for said company, said Parley M. Johnson obtained no title to said lands by reason of sale and deed to him."

Granting plaintiff the fullest recourse against defendant company, the foregoing is all he has to rely upon. The effect of this reference to the litigation of an adverse claim to real property was to inform the beneficiaries of the certificate that their title, otherwise guaranteed, was subject to the validity of the judgment in their favor in said action which the Title Company was unwilling to insure, but which it states, in the opinion of its attorneys, was good. To put the matter more simply, the Title Company, in effect says:

"We guarantee that your title to this property is good, subject to the validity of certain legal proceedings determined in your favor, and which in the opinion of our attorneys confirm your title, but the conclusiveness of which we do not vouch for."

Is it not plain that the only representation as to the effect of this litigation the defendant could be held for would be the truthfulness of the statement that such was the opinion of their attorneys? There could have been no purpose in qualifying this general guaranty of title, by making it subject to the proceedings set out in the note, other than as a reservation to the guaranty of any failure of title that might arise under this litigation. At best, all the plaintiff has to rely upon here is the opinion of the abstract company or its attorneys, and there is no showing that such opinion was not held and given in good faith.

[2] There are allegations in the complaint that the recitals regarding the adverse claims on this property failed to set forth certain details of the litigation, which, if stated, would have informed persons relying upon the certificate that the judgment in favor of plaintiff's assignor had not become final, and it is averred that the certificate "was so framed for the express purpose of aiding said Caruthers Building Company and said C. B. Williams in selling and disposing of said lands and said note and mortgage, and with the intention of inducing third parties to purchase the same." But the certificate does not purport to give the full record or legal effect of the court proceedings, or to be even an abstract of the record, and we find no evidence in the case to justify a finding of conspiracy or fraud.

[3] Testimony of C. B. Williams was admitted in behalf of plaintiff and over the objection of defendant as to certain oral statements made by the head of the legal department of the defendant company regarding the contents of the certificate and its legal effect.

[4] These conversations were inadmissible, being an attempt to vary the terms of a written instrument, and because no showing was made of authority on the part of the head of the legal department to interpret the contract of the corporation. But, even if competent to show an attempt to mislead Williams, the immediate beneficiary of the certificate of title, they can be of no avail to the plaintiff here, because they do not appear to have been made or communicated to the plaintiff, and in testifying in his own behalf he stated repeatedly that in purchas-

ing the note and mortgage he relied upon this certificate of the abstract company, "and nothing else," as to the title to the real property. If these conversations tended to establish fraud it was fraud upon Williams, and the plaintiff has not succeeded by assignment or otherwise to any cause of action which Williams might have for fraud, particularly as he was in no wise informed of or misled by the representations, but relied solely upon the terms of the written instrument.

[5] And this, as has been pointed out, contained a reservation as to the adverse claim of title under which plaintiff's title was defeated, that the defendant company only assumed to give it as the opinion of its attorneys that the adverse claim was unfounded, and does not even adopt such opinion as its own. It may be conceded that a layman, acting without legal advice, might easily be, and in this instance doubtless was, mistaken as to the legal effect of such an expression; but the language is not ambiguous or misleading, and does not impose upon the defendant, in the absence of proof that the plaintiff was deceived by fraudulent misrepresentations, the responsibility of an insurer or guarantor of title.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SHAW, J.

186 Cal. 409

MILLER v. BRODE. (L. A. 5754.)

(Supreme Court of California. June 30, 1921.)

1 Husband and wife ⊂=266 — Character of property as wife's established by deed to her with husband's consent.

Where the deed whereby a ranch was acquired conveyed it to a wife as sole grantee, and described it as her separate property, being so made with the husband's consent, the character of the property as the wife's separate property was definitely established, being the same as if the husband had himself conveyed community property to her by deed expressing that she took it as her separate estate, which would be an express gift by him to her of community property.

2. Evidence ⊂=461(2)—Evidence husband did not intend property should become wife's inconsequential.

Except for the purpose of showing fraud or some other ground for setting aside a transaction whereby a husband permitted property to be conveyed to his wife as her separate property, evidence that the husband did not intend that the property should become the wife's separate property is wholly inconsequential.

3. Husband and wife ⊂=265—Wife's funds deposited in community account took its character.

If husband and wife considered their bank account a community account, and the wife chose to deposit her separate funds in it, such funds took the character of the account.

4. Husband and wife ⊂=262(1)—Half interest taken by wife as separate estate, other half taken by husband as community property, in view of presumption under statute.

Where realty was purchased partly with the separate funds and estate of a wife and partly with community funds of herself and husband, and title was taken in the name of both the wife and her husband, the half interest which the conveyance on its face operated to convey to the wife was taken and held by her as her separate estate, and the other half was taken and held by the husband as community property, such being the presumption on the face of the deed under Civ. Code, § 164.

5. Deeds ⊂=61—Transaction whereby husband and wife made deeds to each other with survivorship understanding ineffective.

Where a husband and his wife some time before the wife's death each executed a deed to the other and placed them in their safe deposit box on the understanding that on the death of one the survivor would take all the property by the deed of the one dying, and the deed of the survivor would not take effect, the transaction was wholly ineffective.

6. Deeds ⊂=54—Undelivered deeds inoperative.

Deeds undelivered are inoperative.

7. Descent and distribution ⊂=72 — Daughter entitled to have release of claims on mother's estate set aside either for fraud or mistake.

Where a widower told his deceased wife's daughter that her mother had conveyed all her property to him and had left no estate, thereby inducing the daughter to execute a release of her claims on her mother's estate to him, and such statement was not in fact true, whether the widower knew the statement was false, or believed it to be true, either on the ground of fraud or mistake, within Civ. Code, § 1567 et seq., the daughter is entitled to have the release set aside.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Clara Miller against Adolph Brode. From judgment for defendant, plaintiff appeals. Reversed.

Ernest E. Nichols, of Los Angeles, Childers & Bruce, of El Centro, and Ray W. Bruce, of Los Angeles, for appellant.

Muhleman & Crump, of Los Angeles, for respondent.

OLNEY, J. From a judgment against her in an action to quiet title to an undivided one-half interest in certain real property, the plaintiff appeals.

The defendant is the surviving husband of one Eva Brode, deceased, and the plaintiff is Eva Brode's daughter by a former marriage. Eva Brode died intestate, leaving as her heirs only the plaintiff and the defendant. Her estate apparently was not administered upon. At the time of her death the record title to the property, which is the subject of the action, stood in the name of herself and her husband as tenants in common, having been conveyed by deed to them as joint grantees. The plaintiff claims that the property was in fact the separate property of her mother, so that she as her heir is the owner of a one-half interest therein. The defendant, on the other hand, claims that it was all community property, so that upon his wife's death he became the absolute owner. The issue so presented is the primary issue in the case.

There is also a secondary issue turning on the validity or invalidity of a release of all her interest in her mother's estate given by the plaintiff to the defendant shortly after her mother's death. The plaintiff claims that this release is invalid for fraud and want of consideration.

The court found against the plaintiff upon both issues, and the insufficiency of the evidence to sustain the findings is questioned.

[1, 2] The property in controversy was acquired by the decedent and her husband during marriage in trade for a ranch known as Lugo ranch. This ranch had been acquired shortly after the decedent's marriage to the defendant, and most, if not all, of the consideration given for it was property owned by her before marriage, and unquestionably her separate property. The testimony of the defendant is not entirely clear, but, according to it, some apparently, of the consideration was furnished by him. But however this may be, the deed by which the ranch was acquired conveyed it to the decedent as sole grantee, and described it as her separate property, and was so made with the consent of her husband, who participated in the transaction. This definitely establishes the character of the property as her separate property.

In McComb v. Spangler, 71 Cal. 418, 12 Pac. 347, it was held that where a third person conveys property to a wife as her separate property there is but a prima facie presumption that it is taken by her as such. This may be true where, as in that case, it does not appear that the deed was made with the husband's consent. But where, although the property is purchased with community funds, it is conveyed to the wife with the husband's consent by a deed expressly describing it as her separate estate, it is as if the husband himself had conveyed community property to her by deed expressing that she took it as her separate estate. Such a conveyance would be nothing more nor less than an express gift by the husband to the wife of community property. Swain v. Duane, 48 Cal. 358; Shanahan v. Crampton, 92 Cal. 9, 28 Pac. 50.

There is no impediment to a husband making such a gift if he desires, and if he does it the property at once becomes the wife's separate property, and the effect of the conveyance in this respect cannot be avoided except by avoiding the conveyance itself. This, of course, cannot be done except for fraud, mistake, or some similar ground. In the absence of some such ground for setting aside the transaction it is wholly immaterial that the property was community property before the husband conveyed it to the wife, or, in case it were conveyed to her by a third person, that the consideration given for it was community property. Its character is changed at once by the conveyance to the wife as her separate property either by the husband directly or by a third person with his consent.

Furthermore, except for the purpose of showing fraud or some other ground for setting aside the transaction, evidence that the husband did not intend that the property should become the wife's separate property is wholly inconsequential, since such evidence is but a denial of his intent as expressed in the deed, and that expression of intent is final. Such evidence, in fact, is nothing less than an attempt to avoid the legal consequences of what the husband actually did, but without setting aside what he did. As long as what he did stands, its legal consequences stand with it. In the present case no element of fraud or other ground for setting aside the act of the defendant in permitting the Lugo ranch to be conveyed to his wife as her separate property appears or is claimed, and it must therefore be taken that the decedent acquired and held the ranch as her separate property.

[3] We have stated that the property in controversy was acquired by exchange for the Lugo ranch. If this were all, the conclusion would be inevitable, from the fact that the latter was the decedent's separate property, that the former was such also. But the question is complicated by two additional circumstances. One is that with the consent of the decedent it was taken, not in her name alone, but in the name of herself and her husband; and the other is that the Lugo ranch was not the entire consideration given. A part of the consideration was the assumption of a mortgage on the property for $3,600, and this was paid off with funds from the joint bank account of the decedent and her husband. Into this bank account went funds which were undoubtedly separate funds of the decedent and also funds of her husband. The deposit card signed by both the parties and given to the bank when the account was opened specifies that the ac-

count is opened and held by the depositors in joint ownership, with full right of survivorship. The defendant also testified that such was the understanding in regard to the account between himself and his wife.

It is true that withdrawals from this account for the purpose of making payments on the mortgage followed closely in nearly every instance, if not in all, the deposit in the account of moneys which the decedent had received from an inheritance, and were therefore her separate property. But, even so, we do not see our way clear to hold that the implied finding of the trial court that this account and the moneys withdrawn from it and used to pay the mortgage mentioned were community property is not sustained by the evidence. The wife's separate funds were mingled in the account with community property, and possibly with separate property of the husband. The evidence justifies the conclusion that the parties looked upon the account as a common one. The inference cannot unfairly be drawn that they considered it as a community account. If they did, and the decedent chose to deposit her separate funds in it, those funds took the character of the account. The case is quite different from Denigan v. Hibernia, etc., Society, 127 Cal. 137, 59 Pac. 389, where an account in the joint names of a husband and wife was held to be the separate property of the latter it appearing that it was made up exclusively of her funds, and that there was no evidence whatever of any understanding that the account itself was not her separate property other than the fact that it was in the joint names of herself and her husband. In view, then, of the implied finding of the court, it must be taken that the mortgage on the property in controversy, which was assumed as part of the consideration given for it, was paid off with community funds; in other words, that the property was acquired in part with community funds.

[4] The final situation, then, is that the real estate in controversy was purchased partly with separate funds or estate of the decedent and partly with community funds, and was taken in the name of both the decedent and her husband. We can see but one conclusion that can be rationally drawn from these facts, and that is that the one-half interest which the conveyance on its face operated to convey to the decedent was taken and held by her as her separate estate, and that the other half was taken and held by her husband as community property. Such was the presumption on the face of the deed (section 164, Civ. Code; Pabst v. Shearer, 172 Cal. 239, 156 Pac. 466), and, assuming as we must, in view of the finding of the court, that the funds taken from the joint bank account to pay off the mortgage assumed as part of the purchase price were community funds, the presumption is borne out rather than contradicted by the evidence. Plaintiff's counsel claim that even the one-half interest appearing in the defendant on the face of the deed must be taken to have been the decedent's separate estate, relying in support of their position upon Shaw v. Bernal, 163 Cal. 262, 124 Pac. 1012. But in that case the property was purchased entirely with separate funds of the wife, and there were circumstances justifying the conclusion that the husband took the title as trustee for her. Nothing of this sort appears here. The finding of the trial court, then, that the property was entirely community property, is supported by the evidence as to the one-half interest acquired in the name of the defendant, and is not supported by the evidence as to the other half acquired in the name of the plaintiff's mother. On the contrary, the evidence shows affirmatively and unmistakably that this latter half was separate property.

The conclusion so reached necessitates a consideration of the second issue in the case, that as to the validity of the release given the defendant by the plaintiff of all her interest in her mother's estate. The release was executed shortly after the decedent's death, and states that in consideration of $10 paid her the plaintiff releases all claim in any estate of her mother. The actual fact of the matter is also, according to the defendant's testimony, that the plaintiff received at the time but $10. The defendant had previously given her $125, but apparently by way of gift. But whether the consideration was but the $10, or was the $10 plus the $125 previously given, it is perfectly evident that it was practically no consideration at all, if the plaintiff and defendant were aware of the fact that as her mother's heir she was the owner of at least a one-half interest in the one-half of the property which stood in her mother's name.

Assuming the defendant's story as to the consideration given to be correct, the transaction is yet explainable as a rational transaction only upon one or the other of three possibilities—either that the release was really intended as a gift, or that there was a dispute or question between the parties as to their respective rights which the plaintiff was willing to settle for a nominal consideration, or that it was made upon the supposition that the plaintiff had no rights in any of the property which formerly belonged to her mother, and the release was given merely by way of confirmation of the defendant's rights. The possibility that the release was intended as a gift is negatived by all the evidence, and no claim is made by the defendant that the release was so intended. As to the second possibility, it would, of course, be extremely unlikely that, if there had been any serious question as to the plaintiff having a substantial interest in the property, she would be willing to forego

that possible interest for a nominal consideration of $10, or, at most, $135. But, however this may be, the evidence of the defendant himself shows that the third possibility is the true explanation of the giving of the release, and that it was given upon the supposition that the plaintiff had no interest in any property of her mother, but that the defendant had acquired it all.

[5] It seems that the defendant and the decedent, some time before the latter's death, had each executed a deed to the other and placed it in their safe deposit box, upon the understanding that upon the death of one the survivor would take all the property by the deed of the one dying, and the deed of the survivor would not take effect. The transaction, in other words, was exactly that passed upon in Kenney v. Parks, 125 Cal. 146, 57 Pac. 772, and there held wholly ineffective. Upon the death of his wife, the defendant the next day obtained the deed by her and had it recorded. Thereafter, according to the defendant's testimony, the plaintiff asked him if her mother had left a will, and he replied "No," and that she had given him a deed to her property, and did not leave any property. Several days later the plaintiff and defendant had a further conversation, in which the defendant again made practically the same statement, and asked the plaintiff to sign an agreement in order that he might have no difficulty with his title. This she agreed to do, and the release was executed in accordance with the understanding so arrived at. It is plain enough from these facts, which appear from the testimony of the defendant himself, that the release was given in reliance upon his statement that the plaintiff's mother had conveyed all her property to him, and left nothing as a part of her estate.

[6] The plaintiff's account of the giving of the release is different from that of the defendant. It is that the $10 or the $135 which she received for it, as the case may be, was not the sole or even the moving consideration. The moving consideration, according to her statement, was the execution by the defendant of deeds in the plaintiff's favor, to be delivered to her upon his death in case he died before her. Such deeds were executed, that is, executed in the sense that they were signed and acknowledged by the defendant. They were not delivered, however, and were subsequently destroyed by the defendant. The deeds were, of course, wholly invalid for want of a delivery, and if they were in fact the moving consideration for the plaintiff's release there was such a failure of consideration for the release as would invalidate it.

The defendant denies that the deeds just mentioned were executed as the consideration for the release, and in view of the findings of the court we must take it that they were not. But if they were not, then the sole consideration for the release was either $10 or $135, as testified to by the defendant, and the only rational explanation of the transaction which can be discerned from the evidence is, as we have said, that the release was given in reliance upon the defendant's statement that the plaintiff's mother had conveyed all her property to him and had left no estate.

[7] This statement, in view of the findings against fraud, we must take to have been made by the defendant honestly and in the belief that it was true. But even so, the release was invalid. The statement was not true, and it went to a fact which, in the very nature of things, must have been the basis of the transaction between the parties. If the defendant knew the statement was false, there was gross fraud. If he believed it to be true, there was yet a mistake concurred in by him, as well as by the plaintiff, and affecting the fundamental basis upon which they were dealing. Such a mistake invalidates a transaction into which it enters, and the plaintiff was entitled to have the release set aside. Section 1567 et seq., Civ. Code. It follows that upon the merits of the case, construing the evidence in the light most favorable to the defendant, the plaintiff was yet the owner of one-half of the one-half interest which stood in her mother's name, and should have had judgment so declaring.

There is, however, a difficulty in reversing the judgment against her. It arises upon the pleadings. The plaintiff's complaint does not allege mistake; it does not even allege that the release was given in reliance upon the untrue statement of the defendant—either honestly or dishonestly made—that the decedent had conveyed her property to him, and left nothing. It alleges fraud and want of consideration, but the facts alleged as sustaining these allegations are that the release was given in consideration of the defendant's promise to execute deeds which would give the property to the plaintiff upon his death, and that this promise was both fraudulent and had been repudiated. These allegations were denied by the defendant's answer, and the court must be taken to have found them to be untrue. In other words, the situation is one wherein the plaintiff sought to set aside the release because of certain facts alleged by her to exist, where the defendant denied the existence of those facts, where the parties went to trial and the court found that the facts alleged by the plaintiff did not exist, but where the only evidence that they did not exist is the testimony of the defendant, which, while it showed a different state of facts from that alleged by the plaintiff, yet showed one upon which she was entitled to exactly the same relief.

If plaintiff's counsel, after the defendant testified, had asked leave to amend their pleadings by adding allegations in conformity with the defendant's story, they would have been entitled to it, and, had it been refused, there would be no difficulty in reversing the judgment. But this they did not do, and the result is that the complaint does not allege the facts upon which, and upon which alone, in view of the court's findings, she may set aside her release and have relief. On the other hand, the case was manifestly tried by both sides, and determined by the court upon the theory that there was a direct conflict between the stories of the plaintiff and the defendant—as there was—and according as this conflict was determined judgment should be given—as was not the case.

It is also to be said that the court's findings of want of fraud must have been based in large part upon its erroneous finding that none of the property was the separate property of the plaintiff's mother. If it had not been for this erroneous conclusion as to the character of the property, the issue as to the defendant's fraud in securing the release and the evidence bearing upon that issue would have presented themselves to the court in a very different aspect, and the findings as to want of fraud might have been quite different. There was little ground for questioning the release if the property were community property and the plaintiff had no interest in it. There was strong ground for questioning it if it were her mother's separate property, and she had an interest in it; ground so strong that it is hardly possible that the release would have been valid. We think it quite evident that the erroneous finding of the court that the property was community property was, in the final analysis of the case, the real foundation for the judgment against the plaintiff, and, in fact, the only foundation for it, and that because of it the judgment should be reversed.

Judgment reversed, with leave to the parties to amend their pleadings if they so desire.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

52 Cal. App. 594

HEVENER v. FRANKLIN et ux. (Civ. 3271.)

(District Court of Appeal, Second District, Division 2, California. May 11, 1921.)

1. Pleading ⟸35—Complaint for nondelivery held to allow recovery notwithstanding unsupported charge of fraud.

The complaint being otherwise sufficient as one for damages for breach of a contract of sale by failure to deliver part of the enumerated articles, right of recovery is not affected by the unnecessary charge of fraudulent misrepresentation unsupported by the evidence.

2. Pleading ⟸127(2)—Nondelivery of articles sold held shown by admissions of answer and evidence.

The bill of sale given by defendant to plaintiff enumerating among other things sold, "beds complete, 22; couches, 12; * * * blankets, 45," the complaint enumerating among other articles not delivered "22 beds complete" and "45 blankets," described as two separate and distinct items sold, the answer admitting sale to plaintiff of all the articles enumerated in the complaint, and defendant testifying that by "bed complete" was meant several articles, including two blankets, and that there were in the building, when turned over to plaintiff but 45 blankets and 20 beds, there was sufficient showing of sale of 89 blankets, and failure to deliver 44 of them.

3. Pleading ⟸377—Plaintiff not required to give proof of value alleged in verified complaint and not denied in answer.

The complaint for failure of defendant to deliver certain secondhand articles sold being duly verified, and alleging specifically in dollars and cents the reasonabe value of each article sold, and none of such allegations of value being denied by the answer, plaintiff was not required to offer any proof as to value.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by W. A. Hevener against J. R. Franklin and another. Judgment for defendants, and plaintiff appeals. Reversed.

A. K. Hancock, of Los Angeles, for appellant.

C. W. Hall, of Los Angeles, for respondents.

FINLAYSON, P. J. Defendants executed a bill of sale whereby they sold to plaintiff, for the sum of $4,250, certain personal property, the description of which in the bill of sale, in so far as is necessary to an understanding of this case, is as follows:

"That certain personal property situated and located in the building known and designated as No. 106 Magnolia avenue, Long Beach, Cal., and three cottages in the rear, described as follows: Beds complete, 22; sanitary couches, 12; * * * blankets, 45."

Claiming that defendants had failed to deliver all the articles itemized in the bill of sale (that instrument enumerates many more than those above set forth by us), plaintiff brought this action to recover the reasonable value of such of the articles as he claimed were not delivered. Judgment passed for defendants, and plaintiff appeals.

[1] Instead of simply suing to recover damages for breach of contract arising out of defendants' failure to deliver the goods as agreed, appellant, for some inscrutable re-

son, unnecessarily charged respondents with fraudulent misrepresentation, by alleging that the latter falsely and fraudulently represented to him that the furniture and furnishings situated in the apartment house and cottages included all the articles that were itemized in the bill of sale. There seems to have been no substantial basis for any charge of fraud, and the trial court very properly, we think, found against appellant's allegations of fraudulent misrepresentations. But though appellant was not justified in making fraud the basis of his right of recovery, he was entitled to recover damages for breach of contract, if, as the complaint alleges, respondents failed to deliver all of the articles as agreed. His complaint, though inartificially drawn, contains allegations which, if true, are sufficient to entitle him to recover the reasonable value of the undelivered articles, and the judgment must be reversed, unless, as respondents claim, appellant failed to prove certain allegations essential to a cause of action for breach of respondents' contract to deliver the missing articles. The claim is that appellant failed to show: (1) That all the property listed in the bill of sale was not delivered: and, (2) the value of any of the articles which it is claimed were not delivered.

[2] Among the articles enumerated in the bill of sale are, as we have pointed out, "beds complete, 22" and "blankets, 45." All the witnesses seem to have agreed that the words "beds complete" include two blankets on each bed, or, as one of the witnesses naively put it, "a 'bed complete' is just as you would go to bed in it, with two sheets, two blankets, two slips, two pillows, a spring, and a bedstead." The respondent J. R. Franklin, upon being asked what he meant and intended by a "bed complete" answered: "I intended two sheets, two slips, two blankets, two pillows, two pillowcases, a mattress, springs, and bedstead." His wife, the other defendant, testified that by the words "bed complete" is meant "the amount on the bed, * * * two sheets, two slips, two pillows, two blankets, mattress, bedstead, and springs." From this it follows that the two items listed in the bill of sale as "beds complete, 22," and "blankets, 45," call for an aggregate of 89 blankets. Respondent J. R. Franklin testified that there were in the cottages and apartment house when turned over to appellant but 45 blankets and 20 beds. This alone, without considering any of the other articles alleged to have been undelivered, suffices to show a failure to deliver all of the articles enumerated in the bill of sale.

Shortly after taking possession of the apartment house and cottages, appellant, according to the testimony of himself and wife, compared the furniture and furnishings then in the buildings with the listed articles enumerated in the bill of sale and made a memorandum of such of the articles described in the bill of sale as they were unable to find—a memorandum of "shortage," as they termed the missing or undelivered articles. At the trial they were unable to say just what articles had been actually delivered, and could only testify as to these "shortages." It is claimed by respondents that, since the construction of the bill of sale and particularly of the words "beds complete," was a matter solely for the court, appellant should have shown just what articles actually were delivered, and that it was for the court to conclude from such testimony what, if any, were the "shortages." But, as we already have shown, respondents' testimony leaves no room to doubt that there was a failure to deliver 2 beds and about 44 blankets, to say nothing of the other articles that appellant claims were not delivered. Moreover, appellant's complaint itemizes the various articles which he claims respondents sold to him, but failed to deliver. Among the articles that the complaint thus enumerates as among the undelivered are the items "22 beds complete" and "45 blankets"—described in the complaint as two separate and wholly distinct items sold, but not delivered. Respondents in their answer admit having sold to appellant all of the articles so enumerated by him in his complaint. If, therefore, a "bed complete" calls for two blankets on the bed, as testified to by respondents themselves, then it follows from the admissions in the pleadings that the bill of sale called for a total of 89 blankets, while but 45 in all were delivered to appellant, according to respondents' own testimony.

[3] Instead of proving the reasonable value of the missing articles as secondhand goods, appellant's witnesses testified what would be the cost of similar articles if purchased new. Because there is no direct evidence of the reasonable value of the articles as used or secondhand goods—they had been in use by respondents and their predecessors for a long time prior to the sale—respondents claim that appellant failed to sustain his allegation of damages, and that for that reason alone the judgment should be affirmed. But there was no issue as to the reasonable value of the undelivered articles. Appellant's complaint, duly verified, alleges specifically, in dollars and cents, the reasonable value of each missing article. None of these allegations of value is denied by the answer. Consequently appellant was not required to offer any proof as to value.

Judgment reversed.

We concur: WORKS, J.; CRAIG, J.

52 Cal. App. 655

NATIONAL CITY BANK v. CHUBB. (Civ. 3276.)

(District Court of Appeal, Second District, Division 2, California. May 19, 1921.)

Corporations ⇐268(1)—Date debt was incurred must be alleged in an action against a stockholder on corporate notes.

As Civ. Code, § 322, provides that the liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred, it is necessary, in an action against a stockholder on corporate notes, to allege the date on which the original indebtedness was incurred, for the action is not based on the notes, but on the debt itself, and the fact that the plaintiff was a bona fide holder for value is immaterial.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Action by the National City Bank, a corporation, against Mont P. Chubb. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Edgar G. Pratt and Janeway & Beach, all of Los Angeles, for appellant.

William J. Palmer, of Los Angeles, and Grant Holcomb, of San Bernardino, for respondent.

CRAIG, J. This is an action to enforce the liability of certain stockholders in the Mont P. Chubb Drug Company. A general demurrer was interposed by the defendant, Mont P. Chubb, which was overruled. Thereupon an answer was filed. On the trial, the defendant introduced no evidence. The appeal is based upon the judgment roll alone.

The action is upon two promissory notes. The complaint alleges that the plaintiff purchased them for a valuable consideration, and before maturity, and it states the date upon which the notes were made, but contains no allegation as to the date on which the original indebtedness was incurred. There is ample authority for the proposition that, in an action under section 322 of the Civil Code, it is necessary to allege the date upon which the debt or liability was incurred. J. J. Case Plow Works v. Montgomery, 115 Cal. 380, 47 Pac. 108; Winona Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077; Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87. Section 322 of the Civil Code provides that the—

"liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred."

In Hunt v. Ward, the action was on a promissory note, and was brought by the payee. The date of the making of the note was alleged, but not the date on which the original indebtedness was incurred. The court there pointed out that a promissory note might not represent the original debt or liability which might have been contracted before the defendant became a stockholder. In both of the other cases, supra (the respective notes were sued upon), the decisions are based upon Hunt v. Ward, supra, and its reasoning.

In the case at bar, the plaintiff is not the payee, but a bona fide holder in due course. Appellant insists that therefore, as to him, the note, being negotiable, is the primary obligation. This might be true as against the corporation, although it is not necessary for us to decide that point here, because the action is one against the defendants as stockholders. As such, they are not parties to the notes executed by the corporation and have no responsibility thereon. Winona Wagon Co. v. Bull, supra. Their liability exists only by reason of the statute. In order that the complaint may state a cause of action against the defendants under the statute, it must allege that the defendants were members of the corporation when the debt was incurred, for the stockholder's liability is upon the debt, and not upon the promise of the corporation as evidenced by the notes.

The judgment is reversed, and the superior court instructed to sustain the demurrer, with permission to plaintiff to amend the complaint.

We concur: FINLAYSON, P. J.; WORKS, J.

52 Cal. App. 494

BEEBE v. KISTLER. (Civ. 3373.)

(District Court of Appeal, Second District, Division 2, California. May 4, 1921. Hearing Denied by Supreme Court June 30, 1921.)

Brokers ⇐82(1)—Complaint for commissions must allege license.

Complaint in an action to recover a broker's commission for a sale of real property must allege that plaintiff was duly licensed at the time his cause of action arose, as required by St. 1919, p. 1259, § 20.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Bird V. Beebe against S. Kistler. Judgment for plaintiff, and defendant appeals. Reversed in the District Court of Appeals, and hearing denied in Supreme Court.

H. V. Weisel, of Anaheim, for appellant.

Tipton & Cailor, of Los Angeles, for respondent.

WORKS, J. This is an action to recover a broker's commission for a sale of real property. Judgment went for plaintiff, and the defendant appeals.

An act of the Legislature passed in 1919 (Stats. 1919, p. 1252) created a state real estate department, and provides for the issuance thereby of licenses to real estate brokers and real estate salesmen. Section 20 of the enactment denies to any broker or salesman the right to bring or maintain any action for the collection of commissions for sales of real property, without alleging that he was duly licensed under the law at the time his cause of action arose. The statute has been held constitutional. Riley v. Chambers, 181 Cal. 589, 185 Pac. 855, 8 A. L. R. 418.

The agreement under which respondent claims to have earned his commission from appellant was made two months after the statute went into effect; but his amended complaint, upon which the action was tried, does not contain the allegation required by section 20. Appellant contends for a reversal of the judgment on the ground that the pleading is defective in that respect.

The judgment is reversed, and, as it is apparent from his brief that respondent cannot truthfully aver the possession of the license required by the statute, the cause is remanded, with directions to the trial court to dismiss the action.

We concur: FINLAYSON, P. J.; CRAIG, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division Two, is denied.

In denying the application, however, we wish to note that no claim appears to have been made in the case, or in any of the briefs, that the provision of the act creating a state real estate department, and providing for the licensing of real estate brokers, etc. (Stats. 1919, p. 1252), relative to the form of pleading in an action by a broker or salesman for commissions and requiring him to allege in his claim that he was duly licensed, is invalid, in the light of the provision of our Constitution prohibiting special legislation regulating the practice of courts of justice. We therefore have not considered this constitutional question.

All concur.

52 Cal. App. 716

PICKWICK STAGES, NORTHERN DIVISION, v. PRICE. (Civ. 3620.)

(District Court of Appeal, Second District, Division 1, California. May 23, 1921.)

1. Appeal and error ⊂655(1)—Transcript not to be stricken because temporarily withdrawn for further certification.

It is not ground for striking the transcript from the files that after it was forwarded by the clerk of the trial court to the clerk of the reviewing court, and before it was filed in the office of the latter, it was by his permission withdrawn by appellant for purpose of further certification before filing, and a further certificate was added thereto.

2. Appeal and error ⊂655(1)—Documents in reporter's transcript to be stricken, in absence of certificate by judge that they were used.

Documents contained in the reporter's transcript will be stricken, the judge's certificate not showing that they were used in the proceedings to which they refer, except that appellant may, if he can, obtain a proper certificate.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by the Pickwick Stages, Northern Division, against J. E. Price, with cross-complaint by defendant against plaintiff. From an adverse judgment, cross-defendant appeals. Heard on motions to strike transcript and portions thereof.

Motion to strike portions granted conditionally.

Fogel & Beman, of Los Angeles, for appellant.

S. V. Wright, of San Luis Obispo, for respondent.

CONREY, P. J. [1] Respondent moves that the court strike from the files the transcript on appeal herein on the ground that it is not the transcript on appeal provided for by the Code of Civil Procedure, "and is not a transcript corrected as provided by the rules" of this court. The argument for this motion proceeds upon the circumstance that after the clerk's transcript and the reporter's transcript had been forwarded by the clerk of the superior court to the clerk of the Supreme Court, and before they were filed in the office of the clerk of the Supreme Court, where the appeal was then pending, the clerk of the Supreme Court permitted the attorneys for appellant to withdraw the transcripts for the purpose of having them further certified before filing. This was done two successive times before the transcripts were filed. It is not claimed that the transcripts were modified other than by the addition of further certificates. Sufficient grounds for a motion to strike the transcripts from the files do not appear.

[2] Alternative to the motion above noted, respondent further moves for an order striking from the transcript certain described portions thereof. This motion is made upon the ground that such portions of the record are not provided for or authorized by law, and are in violation of sections 953a and 953c of the Code of Civil Procedure, and of the rules of the Supreme Court. From the context of the statement as contained in the notice of motion, we assume that by "the transcript"

respondent refers to the "reporter's transcript."

The judgment described in the notice of appeal is a judgment based upon findings of fact pertinent to the plaintiff's alleged cause of action and upon plaintiff's default for not answering defendant's cross-complaint. Affirmative relief was granted to defendant upon his cross-complaint. From the minutes of the court, it appears that after the default of plaintiff for failure to appear after service upon him of the cross-complaint had been entered, the plaintiff on June 23, 1919, moved that said default be set aside, and that he be permitted to plead to said cross-complaint; and that on February 16, 1920, said motion was denied. The reporter's transcript consists of an original transcript, purporting to contain the proceedings at the trial, and to which is annexed a supplement the contents of which are noted on the cover thereof as being "all papers, records and files in the above-entitled action not included in the judgment roll therein." This reporter's transcript and supplement are indorsed "Filed by the clerk of the superior court October 25, 1920." The supplement contains pages numbered 1 to 76. On March 4, 1921, the judge certified the original transcript in due form as a true transcript of the proceedings at the trial, and further certified that the contents of the first 24 pages of the supplement were copies of certain writings offered in evidence at the trial. The pages thus specified are unrelated to the order refusing to set aside default. The proceedings which appellant seeks to have recognized as relating to the motion to set aside default are those contained on and following page 26 of the supplement. The only certificate of the judge which touches any of these proceedings is dated February 24, 1921, being now the last page of the supplement. Therein he certifies that on pages 31 to 59 (both pages inclusive) are set forth full and correct copies of certain documents which in the certificate are described by their titles. The certificate contains no statement that any of said documents were used or considered in connection with the motion to vacate and set aside default, or at all. The notice of motion itself is contained on pages 31 and 32. This notice, after stating the motion to be made and the grounds thereof, states that—

"Said motion will be based upon the notice of motion, the proposed demurrer, motion to strike and answer, upon the affidavits of N. C. Folsom, C. F. Wren, and upon oral and documentary evidence adduced at the hearing of said motion and upon the papers, pleadings and files in the above-entitled action."

The certificate of February 24, 1921, last above mentioned, is insufficient to authorize the inclusion in the transcript of any portion of said pages 31 to 59, except possibly pages 31 and 32, which contain the notice of motion. The affidavits which follow and the proposed answer to cross-complaint may or may not have been used on the presentation of the motion, and they may or may not have constituted all of the evidence produced at that hearing.

The burden is upon appellant to show that the decision of the court below was erroneous. "This can only be shown by the record of the proceedings which has been brought before us. An appellate tribunal cannot take judicial knowledge of proceedings in lower courts. It can only act upon the record of the proceedings authenticated in the mode required by law." Nash v. Harris, 57 Cal. 242.

In Waymire v. Calif. Trona Co., 176 Cal. 395, 398, 168 Pac. 563, 565, the Supreme Court said:

"It has long been settled, with regard to the affidavits used on a motion, that they must be identified and authenticated by the trial judge before they can be considered by this court. The certificate of the clerk cannot take the place of the authentication by the judge. * * * This rule is now so well established that any further discussion of it is unnecessary. The same rule must be applied in cases arising under section 953a of the Code of Civil Procedure."

It appearing, therefore, that the matters contained on pages 33 to 59, inclusive, of the supplement to reporter's transcript have not been so certified as to be entitled to place in the record, we are of the opinion that as to those pages, unless adequate correction can be made, the motion should be granted. The matters contained on pages 25 to 30, inclusive, and pages 60 to 76, of the supplement, being entirely excluded from the certificates made by the judge, should likewise be stricken from the transcript and supplement. Counsel for appellant have requested that, in the event that the court should consider the authentication of these documents incomplete, then appellant be authorized to withdraw the transcript for the purpose of securing further authentication (if it meet with the approval of the trial judge) as to the matter so held to be insufficiently authenticated. It is uncertain whether the defects in certification are due to inadvertence or design on the part of the trial judge. It is for him, by his certificate, to say, if he can, that the documents offered to him for certification were actually used in the proceedings to which they refer. Appellants are granted leave to withdraw the reporter's transcript and supplement from the files and to refile the same, with such additional certification as the trial judge may be willing to affix thereto. In the event of a failure to thus present, within 30 days, a proper record, conforming to the views herein expressed, those portions of the supplement of the reporter's transcript hereinabove specified as being in-

sufficiently certified will be, and without further order will be deemed to be, stricken therefrom.

We concur: SHAW, J.; JAMES, J.

52 Cal. App. 556

RICH et al. v. CONNELLY et al., Board of County Sup'rs. (Civ. 2297.)

(District Court of Appeal, Third District, California. May 7, 1921. As modified May 16, 1921.)

1. Waters and water courses ⟸225—Petition basis of proceedings for formation of irrigation district.

Under Irrigation Law, § 2, as it stood when the particular proceedings in issue were had, the petition for formation of an irrigation district constituted the basis of all proceedings, all else being merely evidentiary and procedural; the setting of the hearing on the report of the state engineer not being mandatory.

2. Waters and water courses ⟸225—Jurisdiction of formation of irrigation district unaffected by time of filing engineer's report.

Under Irrigation Law, § 2, on petition for formation of an irrigation district, recommendations contained in the state engineer's report, dated January 13, 1921, were not too late for consideration because not filed within 90 days after submission to him of the copy of the resolution adopted by the county board of supervisors October 4, 1920, particularly in view of section 3; such matter not affecting the right of the board to proceed.

Application for writ of prohibition, by Geary Rich and another against W. B. Connelly and others, being and constituting the Board of Supervisors of the County of Solano, State of California, to prevent the formation of an irrigation district. Writ denied.

McWilliams & Hatfield, L. A. Hilborn and Robbins, Elkins & Van Fleet, all of San Francisco, for petitioners.

Gregory & Goodell, of San Francisco, and Arthur Lindauer, of Vallejo, for respondents.

PLUMMER, Presiding Justice pro tem. Application for writ of prohibition. On the 4th day of October, 1920, a petition was filed with the board of supervisors of Solano county, having for its purpose the formation of an irrigation district to be known as Suisun irrigation district. On the same day the board of supervisors of said county passed its resolution, wherein and whereby it appears that the board found and determined that the petition for the formation of said district complied in all particulars with the law, had been properly advertised, and contained the requisite number of genuine signatures. On October 6 a copy of this resolution was forwarded to the state engineer. On November 24, 1920, the state engineer reported adversely to the board of supervisors, which report was received and filed by the clerk of said board on the 26th day of said month. On December 6, 1920, being the first regular meeting of the board of supervisors following the receipt of the state engineer's report, there was a general continuance of all matters pertaining to said petition until Monday, January 3, 1921. On January 3, 1921, there was another general continuance until January 17. In the meantime, and on the 13th day of January, 1921, the state engineer addressed a communication to the board of supervisors containing recommendations with respect to the boundaries of said district. On the 17th of January the board of supervisors met and adopted a resolution determining to modify the plans of the district to conform to the recommendations of the state engineer contained in his communication of January 13th, set the final hearing of the petition for the formation of the district for Friday, February 4, 1921, and directed notice thereof to be published as required by law. The matter went to final hearing before the board on February 4, and was continued to Monday, February 7, on which latter date it was again continued until February 9. On the 9th day of February, 1921, further proceedings were intercepted by an alternative writ of prohibition served herein. The petitioners herein contend that by reason of the fact that the board of supervisors did not at its meeting on the 6th day of December, 1920, set a time for the consideration of the adverse report submitted to it by the state engineer, jurisdiction to further proceed in the consideration of the petition for the formation of the district was thereby lost; that the provisions of section 2 of the irrigation law of this state (St. 1917, p. 754) in reference to consideration of such report are mandatory. The section, at the time the foregoing proceedings were being had, read as follows:

"'Upon receiving a copy of said resolution, the state engineer shall make or cause to be made such preliminary investigation as may be practicable, with a view to determining the feasibility of the project proposed to be undertaken. He shall report as soon as practicable, but at all events within ninety days, in writing, on the matter to the board of supervisors from which the copy of said resolution was received, and such board of supervisors at their next regular meeting following the receipt of said report, shall set a time for the consideration of said report; provided, that such time shall not be less than one week from such regular meeting of said board of supervisors; and provided, further, that notice of such time shall be given by registered mail to such party as shall have been designated for that purpose by the petitioners or by publication for at least three days in one daily newspaper published in

the county in which the lands within the proposed district, or the greater portion thereof, are situated. A failure to give such last-mentioned notice, however, shall not affect the validity of subsequent proceedings."

It is further provided in the same section that—

"If the state engineer shall report that the supply of water available for the use of the proposed district * * * is not sufficient or that the project is not feasible for any * * * reason, and if such report is filed with said board of supervisors before the expiration of ninety days, * * * the hearing of the petition shall again be continued for not more than two months and shall then be dismissed, unless the board of supervisors shall be petitioned in writing by three-fourths of the holders of title or evidence of title * * * within the proposed district."

It is also further provided that if the board of supervisors, "after receiving an adverse report from the state engineer," shall "decide to modify the plans as set forth in said petition or shall be requested in writing, by three-fourths in number of the holders of title" so to do, it may proceed to a final hearing of said matter.

The amended section dealing with the foregoing matters, but withheld by referendum and not in effect on the 6th day of December, 1920, omits all reference to setting a time for hearing the report of the state engineer. It does, however, contain all the requirements relating to a continuance of the hearing of the petition in the event of an adverse report.

It will be noted that section 2 of the act referred to is entirely silent on the subject of the board of supervisors making any finding or adopting any resolution determining the character of the report of the state engineer. This report, it would seem from a careful reading of the section, is for the purpose of guiding the board of supervisors and directing the final action that shall be taken. The board of supervisors apparently is not called upon or directed, even if the language of the section be held mandatory, to do anything more than set the report of the state engineer for hearing. If mandatory, the hearing must be for the protection of all property owners affected by the proposed district, and, if mandatory, then it would seem that notice of such hearing must be given to the parties interested; but the section provides that failure to give notice "shall not affect the validity of subsequent proceedings."

[1] The section also provides that if the board of supervisors shall determine that the petitioners have complied with the requirements hereinbefore set forth, they shall cause a copy of the resolution so declaring to be forwarded to the state engineer, and shall postpone further hearing of said petition until a report shall be received from the state engineer. The state engineer is then given 90 days to make a preliminary investigation and report. If his report is adverse, it is the hearing of the petition that must be continued for a period not exceeding two months. The foundation of the proceeding is the petition signed by the property owners of the district and filed with the board of supervisors. It is the hearing of the petition that must be continued in the event of an adverse report, and the final proceedings on the petition are to be determined by the character of the report and the subsequent action of the property owners. It does not appear that by the adoption of the section referred to the legislature intended that the report of the state engineer should constitute anything more than a piece of evidence, conclusive in its character, by which the board of supervisors should be governed in its action, and by which the landowners of the district might be governed in their action in relation to the boundaries of the district, and the subsequent granting or denial of the petition upon which the board of supervisors were called upon to act by the property owners in the first instance. In other words, it is the petition which constitutes the basis of all the proceedings. That is the substance; all else is evidentiary and procedural. If the Legislature intended that the setting of the hearing upon the report of the state engineer were mandatory, it is hardly probable that it would have provided also, in the event of a failure to give such notice, the validity of the proceedings would not be thereby affected.

[2] It is further contended that the recommendations contained in the state engineer's report bearing date January 13, 1921, were too late for consideration because not filed within 90 days after submission to him of the copy of the resolution adopted by the board on the 4th day of October previously. This, however, does not seem to affect the right of the board to proceed. The section in this particular reads as follows:

"If said board shall, after receiving an adverse report from the state engineer, as aforesaid, decide to modify the plans as set forth in said petition, or shall be requested, in writing, by three-fourths in number of the holders of title or evidence of title, etc., said board shall then proceed * * * to a final hearing of the matter."

The submission or nonsubmission of additional recommendations after making an adverse report does not appear to have any bearing upon the jurisdiction of the board of supervisors to proceed and modify the plans of the district, and there is nothing in the section which can be construed to prohibit the receiving by the board of supervisors of such recommendations in relation to the modification of the boundaries of the district as may to the state engineer seem wise or expedient.

That a hearing on the report of the state engineer is not a jurisdictional matter, that the report is evidentiary, further appears by section 3 of the same act, which upon this subject reads as follows:

"Upon the final hearing of said petition or said matter, the board of supervisors shall make an order reaffirming its conclusions as to the genuineness and sufficiency of the petition and notice hereinbefore provided for, reciting that a report regarding the proposed district has been made by the state engineer, and is on file with the other records of the board, and describing the boundaries of the proposed district as defined and established by said board. Said order shall be entered in full upon the minutes of said board."

It will be noted that this is the only action required by the board of supervisors in its final hearing in relation to the report; that it be referred to as a matter of record, not that the board of supervisors must consider the same and make and enter upon its record any finding as to whether the report of the state engineer is favorable or adverse. There is no such requirement in the irrigation law. After these proceedings have all been had and the board of supervisors has finally passed upon the petition for the formation of an irrigation district, the actual question of the formation of the district must be submitted to the qualified electors thereof.

Again, when it is proposed to raise the money for the acquiring of water, water rights, building canals, reservoirs, and carrying out the purposes of the district, an affirmative vote of the landowners of the district is again required.

It will also be noted that at the time section 2 was in force, in so far as it governed the proceedings hereinbefore referred to, an affirmative vote of two-thirds of the landowners of the district was required either to form the district or to subject it to any liabilities whatsoever. In this particular the irrigation law differs from street assessments, and many other provisions of the law by which a property owner may be called upon to pay taxes, without having the opportunity of himself deciding whether the liability shall or shall not be incurred. In the matter of forming irrigation districts and incurring liabilities, the property owner may not only protest, but he also has the deciding vote.

Section 2, as it now stands amended, eliminates all provision relating to a hearing on the report of the state engineer, indicating that the Legislature considered this matter not one of substance.

From what has been said, it does not seem necessary to review the decisions cited by petitioner, holding that in assessment cases where the property owner has no voice provisions of the law should be held mandatory, where in other cases they might properly be held directory. As sufficient has been stated to indicate that the petition filed by the property owners in the formation of an irrigation district is the basis of jurisdiction, and action thereon throughout the whole proceedings is the jurisdictional matter, and not either the favorable or adverse report of the state engineer further than such report may determine the final action that must be taken by the board of supervisors upon the petition, and not upon any other writing, communication, report, or instrument, we conclude that the petition for a writ of prohibition herein should be denied; and it is so ordered.

We concur: BURNETT, J.; HART, J.

52 Cal. App. 505

JANSEN v. BRYANT et al. (Civ. 3500.)

(District Court of Appeal, Second District, Division 1, California. May 4, 1921.)

1. Judgment ⊂⊃384 — Motion for leave to amend answer after judgment amounts to application to vacate.

Where judgment was given for plaintiff on the pleadings, and a motion to amend the answer was presented after judgment, it amounted to an application for relief under Code Civ. Proc. § 473 which provides that on proper cause a court may vacate a judgment.

2. Judgment ⊂⊃391—Affidavit of merits held insufficient.

An affidavit of merits by defendant's attorney on application to vacate judgment, averring that defendant has a good and just defense, but which does not state that the facts of the case have been stated to affiant by defendant, is insufficient.

3. Pleading ⊂⊃121(3)—As to matters within defendant's knowledge, an answer containing verified denial on information and belief is not sufficient.

In an action on verified complaint for goods sold and delivered, the facts alleged in the complaint being presumably within the knowledge of defendant, a verified answer, denying the sale on "information and belief," is not sufficient.

4. Appeal and error ⊂⊃936(1)—In absence of showing by the record, it will be presumed that allowance of costs was correct.

Where no cost bill and no ruling on a motion to strike an allowance of costs from the judgment appear in the record, it will be presumed that all things necessary were done to give the trial court authority to award costs to plaintiff.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by J. M. Jansen against James Bryant and W. C. Abbott, as partners and individually. From a judgment for plaintiff, defendant Bryant appeals. Affirmed.

Max B. Jamison, of Porterville, and J. A. Chase, of Visalia, for appellant.

Evans & Pearce and E. I. Feemster, of Visalia, for respondent.

JAMES, J. In this case the judgment was in favor of the plaintiff and against the defendant Bryant, and was given upon a motion based upon the insufficiency of the answer interposed by said defendant. By the complaint it was sought to charge the defendant and his codefendant, as copartners, for the reasonable value of merchandise alleged to have been sold and delivered to them. The complaint was verified. The appellant first answered with an unverified answer, making a general denial. He later filed an amended answer, which was verified. In this answer the only attempt at denial of any issue presented by the complaint was one upon information and belief as to the alleged copartnership relation existing between appellant and his codefendant Abbott.

[1] Upon the filing of this answer plaintiff gave notice of a motion for judgment on the pleadings. Several days later appellant gave notice to the plaintiff that he would apply to the court for leave to amend his answer. The latter motion was noticed for a day subsequent to the day set for the hearing on the motion for judgment on the pleadings. The motion last referred to came on for hearing, and was by the court granted. The motion for leave to amend the answer was later heard, and in support of it was presented an alleged affidavit of merits. Coming as it did after the granting of the motion for judgment on the pleadings, the notice of motion to amend the answer amounted to an application for relief under the provisions of section 473, Code of Civil Procedure.

[2] The affidavit of merits was wholly insufficient to authorize the court to grant the relief. This affidavit was made by the attorney for appellant, and he nowhere stated therein that the facts of the case had been stated to him by the appellant, but contented himself with the statement only "that defendant, James Bryant, has a good and just defense to plaintiff's complaint and cause of action."

[3] But had there been an affidavit of merits sufficient in form, still the amended answer offered to be made would not have been sufficient to raise an issue. By this amended answer appellant offered only to deny on "information and belief" that the merchandise mentioned in the complaint had been sold as alleged. This amendment would have been insufficient for precisely the same reason as justified the court in granting the motion for judgment on the pleadings. All of the matters sought to be so denied were matters which presumably were within the personal knowledge of the appellant, and in that case an answer upon information and belief will not do.

"It has been decided that an allegation of a verified complaint could not be controverted on information and belief when the alleged fact was presumably within the knowledge of the defendant, nor when the defendant had the means of ascertaining whether or not it was true." Mulcahy v. Buckley, 100 Cal. 484, 35 Pac. 144.

"Whether or not the plaintiff had sold and delivered to defendant, at the latter's special instance and request, the property mentioned in the complaint was a matter presumably within the knowledge of defendant, and under the authorities the denial, for want of knowledge or belief on the subject, was insufficient." Raphael Weill & Co. v. Crittenden, 139 Cal. 488, 73 Pac. 238.

[4] Appellant also complains that the court should have, on his motion, stricken from the judgment the allowance of $30.90 costs. He states in his argument that no memorandum of costs was served upon him. Counsel for respondent asserts that a memorandum of costs was served. In the record presented (and it appears to contain everything that counsel for appellant required to be made up and inserted therein) it does not appear whether a cost bill was or was not actually filed, nor whether any ruling was ever made upon the motion of said defendant to have the costs stricken out or the judgment modified in the respect referred to. In such a state of the record we must apply the presumption favoring the regularity of the judgment, and assume that all things were done as required to be done to give the court authority to include the amount of the costs in favor of the plaintiff, as the judgment shows them to be.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 491

PEOPLE v. RAMOS. (Cr. 951.)

(District Court of Appeal, First District, Division 2, California. May 4, 1921.)

1. Criminal law ⟹1153(6)—Whether diligence has been exercised to secure presence of witness justifying admission of evidence on preliminary examination is within trial court's discretion.

In a criminal prosecution, the question whether sufficient diligence was exercised to procure the attendance of the prosecuting witness, so as to make competent his testimony at the preliminary examination, is one left to the discretion of the trial court, based upon all the facts and circumstances, and it is only in case of abuse of such discretion that a conviction can be reversed for the admission of such evidence.

2. Criminal law ⟹543(2) — Evidence showing absent witness was probably at sea held to sustain admission of testimony at preliminary examination.

A showing by the prosecution that a police officer had made search for the prosecuting witness who could not be found, who was not known to have relatives from whom inquiries could be made, and who was a boat fireman and had stated he was going to sea, *held* to show that it was not an abuse of the trial court's discretion to receive in evidence the witness' testimony, given at the preliminary examination under the provisions of Pen. Code, § 686.

Appeal from Superior Court, City and County of San Francisco, Michael J. Roche, Judge.

Rosendo Ramos was convicted of grand larceny, and he appeals. Affirmed.

J. F. McDonald and W. Wallace Sheehan, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment upon a verdict of conviction of the crime of grand larceny. The motion of the defendant for a new trial was denied.

The point urged upon appeal is that the court erred in allowing the district attorney to read to the jury the transcript of the testimony of the prosecuting witness which was taken in the police court upon the preliminary examination. The respondent contends that the transcript of this testimony was admissible under the provisions of section 686, Penal Code, for the reason that the witness could not be found within the state. The objection by the appellant to the application of said section in the present case is that there was not sufficient showing of diligence on the part of the people to locate the witness and secure his attendance at the trial.

[1] Whether or not there has been due diligence is a question left to the discretion of the trial court based upon all the facts and circumstances, and "it is only in case of an abuse of such discretion that this court would be justified in reversing a criminal case where the judgment was otherwise correct. People v. Witty, 138 Cal. 576, 72 Pac. 177; Renton v. Monnier, 77 Cal. 450, 19 Pac. 820; People v. Melendrez, 4 Cal. App. 399, 88 Pac. 372." People v. Leavens, 12 Cal. App. 178, 106 Pac. 1103.

[2] In the present case, after the jury had been examined and sworn, the district attorney stated in substance that he had just learned that the complaining witness, Aranda, had not been supœnaed, and that he had been informed that he was probably across the bay, and asked that a recess be taken until 2 o'clock to see if this witness could be located. At 2 o'clock Aranda was not produced, but a police officer was placed on the stand, who testified, in effect, that a few days previously he had called at the hotel where Aranda had lived at the time of the commission of the crime, and had been told that he no longer lived there, and that the management of the hotel did not know his address. He then went to see Mr. Rubio, who had acted as interpreter at the preliminary hearing, and inquired of him the whereabouts of Aranda. He was told that Rubio thought Aranda was across the bay, but didn't know exactly where. The police officer also testified that he had been in the police court at the preliminary hearing, and had heard the court inquire of Aranda whether he would be present at the trial, and Aranda had said he was going away on a boat, and that he did not think he would be present at the time of the trial. The police officer also stated that during the recess of the court, he had called at the office of the Chilean consul, who told him that he thought Aranda had gone away on a boat, as he was a fireman and worked on boats, and that he (the Chilean consul) did not know where he was.

Rubio was also examined, and stated that he had gone with the police officer to the Chilean consul, and the consul had stated that Aranda had told him "that he was going on a boat, also that he got a job, but he didn't say where. He got a job on a boat." Rubio also testified that Aranda had stated at the preliminary examination that he wanted to take a trip around on a boat and didn't know how long he would be gone, perhaps five or six months. This witness also testified that he did not know of any relative or any person in any way connected with Aranda who could give any information about him.

It did not appear, therefore, that the police officer had any clue to follow which would lead to a discovery of the whereabouts of this missing witness. The trial court held

that the showing was sufficient to permit the reading of the testimony given at the preliminary examination. While the testimony in that transcript was no part of the showing made upon the question of due diligence, it may not be amiss to say that a perusal of it abundantly corroborates the position of the district attorney that Aranda was at sea at the time of the trial.

In the case of People v. Boyd, 16 Cal. App. 130, 133, 134, 116 Pac. 323, 324, the court said:

"As is said in Heintz v. Cooper, 104 Cal. 670, 38 Pac. 512: 'Diligence is a relative term incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phases and bearings, as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed.' See Jones v. Singleton, 45 Cal. 92; Baker v. Joseph, 16 Cal. 180; Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225; People v. Johnson, 13 Cal. App. 779, 110 Pac. 965."

Under all the circumstances of this case, we think there was no abuse of discretion by the trial court.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

52 Cal. App. 713

VAUGHN et al. v. CONDON et al.

(Civ. 3835.)

(District Court of Appeal, First District, Division 2. California. May 20, 1921.)

1. Execution ⟸22—General provisions do not apply to property of public corporations.

As a matter of public policy, general provisions making property subject to execution, etc., are construed to apply only to property of private persons and corporations, and not to that of public corporations or bodies politic, as municipalities, although Code Civ. Proc. § 710, prescribes the mode of seizing funds due a creditor of a municipal or public corporation.

2. Garnishment ⟸17—Remedy is inapplicable to funds from a municipality.

Garnishment, which is a purely statutory proceeding, is not applicable to funds due from a municipality.

3. Garnishment ⟸17—Funds due defendants from a municipality in a street opening proceeding are not subject to garnishment.

Funds due defendants from a municipality as a result of a street opening proceeding are not subject to garnishment, for the rule of public policy applies, despite the contention that the municipality held the funds as trustee.

4. Garnishment ⟸20—Municipal officers and agents cannot waive rule that property in the hands of municipality is not subject to garnishment.

As the rule that property in the hands of a municipality is not subject to garnishment is one of public policy, it cannot be waived by the failure of the officers of the municipality to object.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by J. W. Vaughn and others against George W. Condon and A. E. Davies, a copartnership. From an order dissolving an attachment and declaring a garnishment null and void, plaintiffs appeal. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellants.

E. V. Rosenkranz, of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal from an order dissolving an attachment and declaring a garnishment null and void.

Action was commenced by the plaintiffs against the defendants to recover $5,200 alleged to be due as rent of premises owned by plaintiffs and which were leased to the defendants. A writ of attachment was duly issued, and copies thereof served upon the city treasurer of the city of Los Angeles, and upon the clerk in the street opening department. It appears that the clerk was holding a warrant, payable to the defendants, which was to satisfy a judgment in their favor in a proceeding for opening a street, and that the city treasurer had funds applicable to the payment of such warrant.

The defendants answered the complaint, and made a motion for an order declaring the garnishment null and void, upon the ground that it was of funds due from a municipal corporation, and that the purported garnishment did not comply with the requirements of section 710, Code of Civil Procedure. The motion was granted, and the garnishment declared void.

[1, 2] As a matter of public policy, general provisions making property subject to execution, garnishment, or liens are construed to apply only to property of private persons and corporations, and not to that of public corporations or bodies politic. Skelly v. School District, 103 Cal. 652, 37 Pac. 643; Ruperich v. Baehr, 142 Cal. 193, 75 Pac. 782. This rule has been modified in this state in the case of executions by the provisions of section 710, Code of Civil Procedure, which prescribes that, in order to seize funds due a creditor of a municipal or public corporation, it is necessary to file a duly authenticated transcript of a judgment for money with the audi-

tor of said city. There is no Code provision changing the general rule of public policy in cases of garnishment. Garnishment is a statutory remedy, and the rule of public policy is that it shall not be applied to funds due from a municipality.

[3] Appellant argues that, as the money was due in a street proceeding, it was not primarily due from the city, but was held by the city as money in trust for the defendants, and that the general rule with reference to garnishments applies under such circumstances. We see no reason for a different rule in such a case, when we consider the reasons for the rule of public policy herein announced. The reason for that rule is well stated in the case of Skelly v. School District, supra, by the following quotation from an Illinois case:

"It must be decided as a question of public policy. These municipal corporations are in the exercise of governmental powers to a very large extent. They control pecuniary interests of great magnitude, and vast numbers of human beings who are more dependent on the municipality for the security of life and property than they are on either the state or the federal government. To permit the great public duties of this corporation to be imperfectly performed, in order that individuals may the better collect their private debts, would be to pervert the great objects of its creation. * * * We understand, however, the counsel for the appellant to concede that money due municipal officers, agents, or contractors is not liable to garnishment; but it is insisted, if the city had been required to answer, the alleged indebtedness in the present case would not have fallen in either of these classes. But, in our opinion, the city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation."

It would seem that these objections to applying to a municipality the general provisions of the garnishment statutes are equally potent, whether the city is the primary debtor or whether it holds the fund as agent for the property owners. But, however that may be, we are not called upon to decide that question in the present case, because, so far as the record shows, the money garnished constituted a direct obligation of the city to the respondent. The record does not disclose under what authority or circumstances the city of Los Angeles became indebted to respondent, or the character of that indebtedness. The case, therefore, falls within the general rule announced in the cases hereinbefore cited

[4] Appellants further contend that the municipality waived any objection to the garnishment by failing to object thereto, and that the creditor cannot urge this exemption. The rule of law herein applied, being founded upon considerations of public policy, for the protection of the best interests of the persons dependent upon the municipality for the security of life and property, we think it cannot be waived by the officers and agents of the municipality. This was expressly decided in the case of Porter v. Perdue, 105 Ala. 293, 16 South. 713, 53 Am. St. Rep. 124, in which it was said:

"Garnishment is a remedy or process of purely statutory creation and existence. There is no authority for a resort to it—courts are without jurisdiction to grant and effectuate it—except in cases and against parties which and who are within the terms of the statute. Public corporations, such as towns and cities, are not within the purview of the statute of garnishment in this state. They are held not to be subject to this process, unless included in unequivocal terms by the letter of the statute, on grounds of public policy, and our statute does not so include them. * * * But whether the nonliability of such corporations to this process be put upon the idea of exemption merely from the operation of a statute broad enough to embrace them, or upon the idea that they are not embraced at all in the terms of the statute, is of no practical consequence. If they are not within the statute at all, no court has, nor by consent can acquire, jurisdiction to proceed against them in this way; and if it is a mere matter of exemption, the same public policy which gives life to it is potent also to prevent the officers and agents for the time being of such corporations from waiving the exemption by appearing, without objection, and admitting indebtedness for the corporation."

The order appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

52 Cal. App. 499

PEOPLE v. LONGLAND. (Cr. 758.)

(District Court of Appeal, Second District, Division 1, California. May 4, 1921.)

1. Criminal law ⟸742(1)—Credibility of detective's testimony for the jury.

The credibility of the testimony of a detective in corroboration of a confessed accomplice is for the jury.

2. Witnesses ⟸340(3)—Testimony as to defendant's immoral conduct, without connection being shown with crime charged, held error.

In prosecution of a woman for arson, testimony as to frequent acts of intimacy between defendant and a confessed accomplice during a period of time commencing a long time prior to the commission of the act, without a showing of any connection between defendant's immoral acts and the commission of the crime of arson, *held* ground for reversal.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Criminal law ⚖811(5)—Instruction charging jury not to disregard testimony of detective objectionable.

Instruction, charging jurors not to disregard the testimony of detectives merely because they had been employed as such, *held* objectionable, in that it directed the special attention of the jury to the testimony of one particular witness.

4. Criminal law ⚖762(1) — Cautionary instruction against testimony of particular witness improper.

It is error for the judge in his instructions to single out a particular witness and to direct cautionary instructions against his testimony, since such an instruction tends to convey to the jury the impression that the particular witness is disbelieved by the judge.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Florence M. Longland was convicted of arson, and she appeals. Reversed.

Power & McFadzean and Bradley & Bradley, all of Visalia, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, and John W. Maltman, Deputy Attys. Gen., for the People.

SHAW, J. Defendant appeals from the judgment pronounced following her conviction of the crime of arson.

The subject of the arson was a dwelling house situated upon a ranch located in Tulare county, owned by defendant, and which was destroyed by fire on February 26, 1919, while defendant was absent therefrom in the state of Nevada.

[1] The evidence upon which she was convicted is that of a confessed accomplice, Henry Ingram, and James Duffy, a detective, whose corroborative testimony, notwithstanding its questionable character, the jury within its province accepted as true.

According to Ingram's testimony, his acquaintance with defendant began in 1908. Later, in 1918, a relation of intimate friendship ripened into an engagement of marriage, which existed at the time when he says that, acting at defendant's request and pursuant to an agreement made with her so to do, he, while she was in Nevada, set the fire whereby the dwelling house was destroyed; that her purpose, as repeatedly stated to him, in wishing the house burned, was to render it impossible for Mr. Willard, with whom she was involved in litigation as to the right to possession of the property, and who, with his mother, resided upon the premises against defendant's will, to continue his occupation of the same. The testimony of Duffy is that, pursuant to his employment as an investigator, he had a conversation with defendant, who, prior to such time, was an entire stranger to him, wherein she of her own accord stated that Ingram in committing the arson had acted at her request and under her direction, all of which evidence tending to implicate defendant in the commission of the crime which she strenuously denied.

[2] While no attack is made upon the sufficiency of the evidence to warrant the verdict, counsel for appellant directs attention to facts showing its inherent weakness, the purpose thereof being to illustrate the prejudicial effect of the ruling of the court in erroneously admitting a line of testimony given by Ingram to the effect that, commencing at a time long prior to the commission of the crime, and on a great number of occasions, he and defendant had indulged in acts of illicit intercourse. No purpose could be served by quoting the testimony touching these acts. Suffice it to say, that, over defendant's objection, Ingram was not only permitted to relate the minute and disgusting details of such acts, but also to repeat the shockingly vile and offensive language the use of which he attributed to defendant on some of such occasions. If true, the nature of his testimony was such as to establish the fact that defendant had reached a point in moral degredation comparable only with those of the most abandoned of her sex. While the Attorney General concedes that perhaps the indecent and disgusting character of the testimony adduced from the witness touching the acts and conduct of defendant was such as to unnecessarily accentuate them, nevertheless he insists the evidence was admissible for the purpose of proving the motive and intent of defendant, which acts, it is claimed, "furnish a clear and understandable motive for the commission of the crime." Counsel, however, fails to direct our attention to any evidence which tends in the slightest degree to support his assertion, or show any causal connection between defendant's immoral acts and the commission of the crime with which she was charged. In the absence of such showing, we are unable to perceive how or why the commission of such acts of illicit intercourse should have prompted defendant to commit the criminal offense with which she was charged, the motive for which act, according to the testimony of both Ingram and Duffy, was the fact that she desired to have Willard and his mother, who occupied the house, leave the ranch, and as a means of compelling them to do so she induced Ingram to destroy the house, thus rendering the premises uninhabitable; a further motive for which might be the fact, which is made to appear, that she held a policy of insurance upon the house. Since the testimony as to defendant's immoral conduct did not tend to establish a motive for committing the crime, its sole and only effect was to show that she was a most dissolute and degraded character, and thus excite in the minds of

the jurors a prejudice against her on account of matters which, if true, were in no wise connected with the crime for which she was being tried, and cause them to give less weight to her testimony than they otherwise would have done.

"The general rule is that the prosecution is not only forbidden to prove any other crime, but may not introduce evidence designed merely to degrade and prejudice the defendant before the jury." People v. Glass, 158 Cal. 655, 112 Pac. 281; People v. Smith, 9 Cal. App. 644, 99 Pac. 1111; People v. Wallace, 89 Cal. 158, 26 Pac. 650.

[3, 4] While the judgment must be reversed on account of the admission of the testimony referred to, we deem it worth while to consider appellant's attack upon the ruling of the court in instructing the jury, at the request of the prosecution, as follows:

"You are further instructed that you should not as jurors disregard the testimony of hired detectives solely and only for the reason that they have been thus employed. You should give to their testimony the same consideration as to any other testimony in the case, giving it such weight as, considering the nature of the same, the opportunities for knowing the facts to which they testify, and their appearance and demeanor upon the witness stand, and all the other elements which go to their credibility, including their interest and bias, and to give their testimony such weight as, under all the circumstances, the same is in your judgment entitled to receive."

As an abstract proposition of law, the instruction may not be erroneous. Nevertheless it is subject to the objection that, inasmuch as Duffy was the only detective who had testified, the effect thereof was to single him out for special attention. That the jury so understood it is apparent from the fact that after spending several hours in deliberating upon their verdict they returned into court, when one of their number said:

"Your Honor, we would like to hear your instructions * * * in regard to Mr. Duffy. I believe you had some instruction in regard to his testimony"

—to which the court replied:

"I had no instruction in regard to Mr. Duffy, but as to the detective.

"Juror: Well, as to the detective."

Whereupon the jurors returned to their deliberations, and shortly brought in the verdict.

"It is error for the judge in his instruction to the jury, to single out a particular witness and to direct such cautionary instructions against his testimony, as such a course would tend to convey to the jury the impression that that particular witness is disbelieved by the judge." Jones on Evidence, § 905; People v. Lonnen, 139 Cal. 634, 73 Pac. 586; People v. Blunkall, 31 Cal. App. 778, 161 Pac. 997; People v. Kilfoil, 27 Cal. App. 36, 148 Pac. 812.

While the instructions considered in the cases cited were cautionary in character, what is said is likewise applicable to laudatory instructions. In the one case the instruction is objectionable because it might indicate that the particular witness is disbelieved by the judge; in the other it is objectionable because of the added weight which the jury might attach to the testimony on account of what is said by the court. No occasion existed for so instructing the jury. The giving of it was error for the reason that it directed the jury's special attention to the testimony of one particular witness, by reason of which fact it might have attached greater weight to Duffy's testimony than it would have done under the general instructions given as applicable to the credibility of all the witnesses testifying in the case.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

52 Cal. App. 635

Ex parte DAYTON. (Cr. 797.)

(District Court of Appeal, Second District, Division 1, California. May 13, 1921.)

Health ⊂⊃24—Health authorities of city may quarantine one reasonably deemed certain to have an infectious disease.

A woman who was an inmate of a brothel and was reasonably suspected of having an infectious venereal disease may be quarantined by the health authorities of a city and pursuant thereto kept in custody by the chief of police.

In the matter of the application of Betty Dayton for a writ of habeas corpus, to be directed to the chief of police of the city of Los Angeles to secure a release of petitioner from quarantine. Writ denied.

Cooper, Collings & Shreve, of Los Angeles, for petitioner.

Erwin W. Widney, City Prosecutor, and Harry A. Mock, Deputy City Prosecutor, both of Los Angeles, for respondent.

PER CURIAM. By the petition herein it is shown that the chief of police of the city of Los Angeles, acting under instructions from the health department of said city, is depriving petitioner of her liberty and detaining her at the city jail; that such detention is being enforced by reason of a purported order of quarantine issued by the said health department, which order is based upon the alleged ground that the health authorities have reasonable and probable cause to believe that petitioner is affected with a contagious or infectious venereal disease. Peti-

tioner alleges further that said health department has demanded that petitioner submit herself for examination to determine the presence of such disease, and that she has refused to obey that order. Respondent justifies the detention of petitioner upon the ground that she is a lewd and dissolute person, and, in fact, a prostitute.

In a recent case this court has had occasion to consider a similar situation affecting the right of quarantine officers and has marked out a measure of that right. In re Arata, 198 Pac. 814. In that case it was held that the health department was authorized to enforce quarantine measures against persons where there was reasonable ground to believe that such persons were affected with the kind of disease referred to, and it was held that, in the case of a woman of ill fame, that fact in itself afforded sufficient ground for the inference that she might be affected with the disease. Evidence consisting of oral testimony of the witnesses and an affidavit were presented at the hearing, and from that evidence we have reached the conclusion that the house at which the petitioner was residing at the time of her arrest was a house of ill fame, and that she was one of the inmates thereof. All the circumstances shown in the evidence tend to support that conclusion. It is not essential that the particular acts indulged in in such houses be expressly shown. All of the surroundings, as the evidence illustrated them, the actions, conduct, and demeanor of the persons occupying the place, in the aggregate established to our minds quite clearly and beyond a probability merely that the house was a house of ill fame, and that the inmates belonged to the class mentioned.

Petitioner is remanded to the custody of respondent.

52 Cal. App. 711

LESURE v. HUTTON et al. (Civ. 3544.)

(District Court of Appeal, Second District, Division 2, California. May 20, 1921.)

Appeal and error ⊂⊃616(2)—Statement on motion for new trial is insufficient unless settled by the judge.

A statement on motion for new trial, like a bill of exceptions, is incomplete and ineffective until it has been allowed and settled by the judge (Code Civ. Proc. § 653), and the presence of counsel's certificate at the close of the transcript is merely for the authentication of the papers as they appear on file, and does not supply the lack of authentication by the judge.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by L. A. Lesure against George H. Hutton, Administrator of the Estate of Merrill B. Crabtree, deceased, and others. Judgment for plaintiff, and the defendants appeal. Affirmed.

W. J. Mossholder, of San Diego, for appellants.

A. T. Roark, of San Diego, for respondent.

WORKS, J. The defendants appeal from a judgment for plaintiff. Appellants complain of certain alleged errors of law occurring at the trial, but respondent contends that there is before us no properly authenticated record upon which we may base a consideration of the questions appellants seek to present. The appeal was taken under the original as distinguished from what is known as the alternative method of appeal.

The printed transcript on appeal contains a number of pages of matter under the heading, "Statement on Motion for a New Trial," but there is nothing in the record to show that the statement was ever settled by the trial judge. There is at the end of the transcript the usual certificate of counsel, taking the place of a certificate of the clerk, to the effect that "the foregoing transcript is correct and contains a true copy" of certain named documents, including the statement mentioned above, "all as the same are on file or of record in the office" of the clerk of the trial court, in the action.

A statement on motion for a new trial, like a bill of exceptions, is incomplete and ineffective until it has been allowed and settled by the judge. Code Civ. Proc. § 653; People v. Crane, 60 Cal. 279; Witter v. Andrews, 122 Cal. 1, 54 Pac. 276; Sauer v. Eagle Brewing Co., 3 Cal. App. 127, 84 Pac. 425. A bill of exceptions, so called, is not a bill of exceptions before settlement, nor is a document styled a statement on motion for a new trial really such a statement before settlement. The character of such documents is truly reflected in the parlance of the practice, for before settlement they are called respectively proposed bills of exceptions and proposed statements, and until settlement they are but the ex parte recitals of the parties proposing them. Appellants are not helped out of their plight by the presence of the certificate of counsel at the close of the transcript, for that certificate, being merely for the authentication of the papers as they appear on file, in no sense supplies the lack of an authentication by the judge, by way of settlement of a bill of exceptions or statement, of ocurrences at the trial. Fitzpatrick v. Fitch, 83 Cal. 490, 23 Pac. 531; Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685, 98 Pac. 1062; Knox v. Schrag, 18 Cal. App. 220, 122 Pac. 969.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

52 Cal. App. 617

WILEY v. COLE et al. (Civ. 3504.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1921.)

1. Highways ⟸184(1)—In action for damages in automobile collision, complaint held to state cause of action, and not uncertain.

A complaint, alleging that on a specified date defendants drove and operated their automobile in a southerly direction, on a specified highway approximately 1½ miles south of B., in such a careless, negligent, reckless, wrongful, and unlawful manner that it collided with plaintiff's automobile, then being driven in a northerly direction on such highway, thereby damaging plaintiff's automobile in the sum of $397.19, being the usual and reasonable charge for making repairs made necessary by the collision, stated a cause of action, and was not uncertain.

2. Negligence ⟸111(1)—Complaint, alleging acts were negligent, sufficient.

In an action for negligence it is sufficient to allege what was done by defendant, and that it was negligently done, without stating the particular omission which rendered the act negligent.

3. Highways ⟸184(1)—Complaint held to show negligent driving was proximate cause of damage in collision.

In an action for damages sustained in an automobile collision, a complaint, alleging that defendants drove their automobile in such a careless and negligent manner that it collided with plaintiff's automobile, sufficiently alleged that defendants' negligence was the proximate cause of the injury.

4. Pleading ⟸35—Allegations that driving of automobile was careless, reckless, wrongful, and unlawful held properly disregarded as surplusage.

In an action for damages sustained in an automobile collision, where the complaint alleged that defendant was operating his automobile in a negligent, "careless, reckless, wrongful, and unlawful" manner, the quoted words were no more than other expressions of the alleged act of negligence, and might be disregarded as surplusage, and did not require plaintiff to specify what law was violated, or wherein defendant's act was wrongful.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by H. C. Wiley against J. E. Cole and others. From a judgment for defendants on demurrer, plaintiff appeals. Reversed.

David R. Faries, Ivan Kelso, and John R. Berryman, Jr., all of Los Angeles, for appellant.

Eden & Koepsel, of Santa Ana, for respondents.

SHAW, J. In this action plaintiff sought to recover damages alleged to have been sustained as the result of defendants' negligence in operating an automobile.

The appeal is from a judgment in favor of defendants which was entered upon plaintiff's refusal to amend his complaint after an order made by the court sustaining a demurrer interposed upon the ground that the complaint not only failed to state a cause of action but was uncertain.

[1] The allegations of the complaint material to the discussion are: That on or about the 10th day of August, 1919, the defendants above named drove and operated their certain automobile in a southerly direction on that certain public highway known as Grand avenue, approximately 1½ miles south of Buena Park, Orange county, in such a careless, negligent, reckless, wrongful, and unlawful manner that the defendants' said automobile collided with the automobile of the plaintiff, which was then and there being driven in a northerly direction on said highway, thereby damaging plaintiff's automobile in the sum of $397.19, being the usual and reasonable charge for making repairs to plaintiff's automobile made necessary by said collision. In our opinion, the complaint is not obnoxious to the demurrer upon either ground specified therein.

[2, 3] The argument of respondents is that, while the complaint charges defendants with operating their car in a negligent manner, it is insufficient to state a cause of action, because it does not state the particular acts constituting the negligence imputed to defendants in the operation of the automobile; in other words, does not set out evidentiary matter. No principle seems to be better settled in this state than that—

> "Negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent." Smith v. Buttner, 90 Cal. 99, 27 Pac. 29; Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663; Bergen v. Tulare County Power Co., 173 Cal. 709, 161 Pac. 269.

Neither is the complaint defective in failing to allege facts showing that defendants' negligence was the proximate cause of the injury. It clearly appears from the allegation that defendants were operating their automobile in a negligent manner, and that by reason of such negligence their automobile collided with that of plaintiff and thereby caused the injury.

[4] Respondents also argue that, since plaintiff, in addition to the use of the word "negligent," alleged that defendants' operation of the automobile was wrongful and unlawful, he should have specified particularly what law was violated and wherein their act was wrongful. No authorities are cited in support of this contention, and we are unable to perceive any merit therein. Clearly, as

shown by the complaint, the action is based upon defendants' negligent act in operating their automobile, and the words "careless, reckless, wrongful, and unlawful" are nothing more than other expressions of the alleged act of negligence, and since their use neither adds to nor their omission detracts from the sufficiency of the complaint, they should, where used in this connection, be disregarded as surplusage. If defendants' act was negligent, it was likewise wrongful and unlawful, in that by such negligent act they, without right or warrant of law, caused damage to plaintiff.

The complaint, if true, shows that defendants were guilty of negligence in operating their automobile, and that as a result of such negligence they caused it to collide with that of plaintiff, which was the proximate cause of the injury complained of.

The court erred in sustaining the demurrer.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

52 Cal. App. 563

PEOPLE v. HEALEY. (Cr. 964.)

(District Court of Appeal, First District, Division 2, California. May 7, 1921.)

1. Infants ⊂⊃20—Failure to make outcry goes only to credibility of prosecutrix in prosecution for lewd acts committed on child.

In a prosecution for lewd and lascivious acts committed on a girl of 10, in violation of Pen. Code, § 288, failure to make outcry immediately after the commission of the act goes only to the question of the credibility of prosecutrix.

2. Criminal law ⊂⊃369(1)—Testimony of act of defendant with prosecuting witness and another girl inadmissible.

In a prosecution for lewd and lascivious acts committed on a girl of 10, in violation of Pen. Code, § 288, testimony as to some acts of indiscretion by defendant in relation to the prosecuting witness and another girl was inadmissible.

3. Criminal law ⊂⊃1171(2)—Statement of district attorney as to defendant's admission harmless.

In a prosecution for lewd and lascivious acts committed on a girl of 10, in violation of Pen. Code, § 288, reference by the district attorney in his opening statement to an alleged admission made by defendant in the presence of certain police officers of some act of indiscretion in reference to the prosecuting witness and another girl *held* harmless to defendant.

4. Criminal law ⊂⊃396(2)—Testimony of officer as to accusation by girl against defendant admissible in view of defendant's limitation of his denial.

In a prosecution for lewd and lascivious acts committed on a girl of 10, in violation of Pen. Code, § 288, where defendant in his cross-examination of a police officer brought out other statements which he made at the time of the denial to the officer explaining his conduct toward both of the girls involved, he in such way so limited the effect of his denial of the accusation by the girl as to render competent testimony of the officer as to what the girl said which would otherwise have been inadmissible in the face of defendant's denial.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

F. J. Healey was convicted of lewd and lascivious acts committed on a girl of 10 years, in violation of Penal Code, § 288, and he appeals. Judgment affirmed.

E. E. Gehring and Allen C. Cunha, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

NOURSE, J. Defendant appeals from a judgment and order denying his motion for a new trial after conviction on an information charging him with a violation of section 288 of the Penal Code. It is alleged in the information that the offense consisted of lewd and lascivious acts committed in relation to a girl of the age of 10 years.

Appellant has assigned three grounds for reversal: (1) Insufficiency of the evidence; (2) misconduct of the district attorney; and (3) error in the admission of certain evidence.

[1] The first ground assigned is based upon the improbability of the story of the complaining witness, the appearance that she had been coached in her story, and the fact that she failed to make an outcry. But a review of the record satisfactorily shows that, though the testimony of the complaining witness may not seem to be altogether convincing, it was sufficient to sustain the verdict if believed by the jury. The weight of the evidence is, of course, a matter for the jury, and not for this court. The failure to make an outcry immediately after the commission of the act goes only to the question of credibiliy of the prosecutrix.

[2, 3] 2. Misconduct on the part of the district attorney is assigned in his reference in his opening statement to an alleged admission made by the defendant in the presence of certain police officers of some act of indiscretion in relation to the prosecuting witness and another girl. When the offer to produce such testimony was made by the district attorney, defendant's counsel objected, and the district attorney confessed error and withdrew the remark. Thereupon the court instructed the jury to disregard it.

But when the witness Lilienthal was on the stand the district attorney endeavored to get similar testimony before the jury. That the testimony was not admissible reference need be made only to the recent opinion

of the Supreme Court in People v. Anthony, 196 Pac. 47. But defendant did not assign the error at the time or request the court to instruct the jury to disregard it. It is apparent from the entire record that no harm resulted from the error now criticized because the defendant in his own examination and in the cross-examination of the police officer brought before the jury the only testimony regarding the other girl which was at all incriminatory.

[4] 3. Over the objection of defendant the prosecution was permitted to introduce the testimony of a police officer regarding what was said by the prosecuting witness in defendant's presence soon after his arrest. The testimony covered statements made by the prosecuting witness which were accusatory in character. On his direct examination the officer testified that when the accusation was made the defendant merely said: "That is not the truth. The girl is mistaken." If the testimony had closed there, and if this answer should be treated as a complete and unqualified denial of the whole accusation, then the testimony of the officer relating to what was said by the prosecutrix was inadmissible. As said in People v. Teshara, 134 Cal. 542, 544, 66 Pac. 798, 799:

"It is not the accusation, but the conduct of the accused, that is evidence in such cases, and that the only reason for admitting the accusation is to explain the conduct. The district attorney should not have offered this evidence, knowing, as he did, that Teshara had not remained silent under the accusation, but had repelled it at the time it was made."

To the same effect is People v. Philbon, 138 Cal. 530, 532, 71 Pac. 650.

But the defendant, in his cross-examination of the officer, brought out other statements which he made at the time explaining his conduct toward both of the girls, and in this way so limited the effect of his denial of the accusation as to render competent the testimony which otherwise would have been inadmissible.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

52 Cal. App. 513

CALIFORNIA NAT. SUPPLY CO. v. DINSMORE et al. (Civ. 3670.)

(District Court of Appeal, First District, Division 1, California. May 5, 1921.)

1. Corporations ⊂=244(5) — Purchasers of stock issued for property overvalued liable if stock taken with notice, but not otherwise.

Where stock in an oil company was issued for an oil lease worth far less than the par value of the stock and the larger part of the stock was returned to the treasury and sold, purchasers of the stock were bound to make good the difference between the value of the property transferred and the par value of the stock to creditors extending credit without notice of the overvaluation if they took the stock with notice, but were not liable unless they participated in the original transaction or received the stock with knowledge thereof.

2. Corporations ⊂=232(3) — Creditors extending credit with knowledge of issuance of stock for property at overvaluation cannot hold stockholders liable.

One extending credit to a corporation with knowledge of the issuance of its stock for a greatly overvalued oil lease cannot recover in a court of equity on a creditors' bill against the owner of the stock.

3. Corporations ⊂=271—Finding that creditor did not know of issuance of stock as fully paid not overcome by other findings.

A finding that one extending credit to an oil company did not know of the issuance and sale of stock as fully paid and had no knowledge of the transactions respecting the sale and issuance of the stock was not overcome by other findings that the seller had for many years been engaged in selling tools, appliances, and supplies to persons and corporations drilling for oil, and was generally familiar with the practices and methods of acquiring and developing oil lands.

4. Corporations ⊂=232(3) — Stockholders of mining corporations liable to creditors for difference between par value and price paid.

The rule allowing creditors to recover against the stockholders of a defunct corporation the difference between the price paid for their stock and the par value and apply it to the satisfaction of a judgment against the defunct corporation applies to mining corporations.

5. Limitation of actions ⊂=58(4) — Forfeiture of charter does not start limitations running against stockholders' liability.

The dissolution of a corporation by operation of law for failure to pay its license tax does not mature its obligations so as to start the statute of limitations running against stockholders' liability.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the California National Supply Company against J. H. Dinsmore and another, in which Fronia May Dinsmore, administratrix, has been substituted for the defendant named. From a judgment in favor of plaintiff, defendants appeal. Reversed, with directions.

Haas & Dunnigan and J. J. Wilson, all of Los Angeles, for appellants.

Flint & Mackay, of Los Angeles, for respondent.

WASTE, P. J. The plaintiff, a judgment creditor of the Rex Midway Oil Company, now defunct, for failure to pay its state

license tax, brought this action against the defendants, J. H. and Fronia May Dinsmore, alleging them to be the holders of "watered stock" of the corporation. It seeks to recover from the defendants their proportionate share of the difference between the amount at which they purchased the stock, and its par value, and to have the amount applied in liquidation of its claim. Judgment was entered for the plaintiff, and the defendants appealed. The defendant J. H. Dinsmore died after the appeal was perfected, and on suggestion of his death it was ordered that the action be continued against his administratrix with the will annexed, in his place and stead.

The findings closely follow a written stipulation of facts which is brought here in the bill of exceptions. The Rex Midway Oil Company was incorporated April 21, 1910, with an authorized capital stock of $250,000, divided into 1,000,000 shares of the par value of 25 cents each. When organized it purchased from F. H. Lathrop a lease held by him of certain property in Kern county, supposed to be oil-bearing land. In payment, and by way of exchange for this lease, the company issued to Lathrop 999,980 shares of the capital stock, with an agreement on the part of Lathrop and the company that all of said stock was fully paid. Lathrop immediately returned to the company, and contributed to the treasury, 950,000 shares of such fully paid stock for the general use and benefit of the corporation, to be sold as its board of directors should deem expedient, and at such price as the board should determine. The only consideration received by the Rex Midway Oil Company for the issuance of the stock to Lathrop was the transfer by him of the leasehold interest, the actual and market value of which was never in excess of the sum of $2,000, a fact well known to each of the directors of the company. They had no reasonable ground for considering it worth any greater amount, but believed that the property might be developed and made valuable.

The corporation subsequently increased the amount of its capital stock to $1,000,000, divided into a like number of shares of the par value of $1 each. At the time of this increase the assets of the Rex Midway Oil Company were not worth more than $2,000, a fact well known to the directors. Some time later the defendants acquired their stock, the greater part of which was purchased directly from the company and was an original issue of a portion of the treasury stock returned to the corporation by Lathrop. The remaining shares were acquired by them from other parties who had purchased directly from the company, and were also a part of the retransferred treasury stock. The certificates of stock received by the defendants contained the statement that the authorized capital stock of the company was $1,000,000, having a par value of $1 per share. It does not appear, however, what price the defendants paid for the stock, or whether they took it as partially or wholly paid. After the defendants became stockholders in the corporation the plaintiff sold and delivered certain goods, wares, and merchandise to the Rex Midway Oil Company, for which it received a promissory note, dated April 23, 1913, for the sum of $3,074.03, due 60 days after date, with interest at the rate of 7 per cent. per annum from date until paid. On November 30, 1913, following the execution of the note, the Rex Midway Oil Company forfeited its charter to the state by reason of its failure to pay the license tax imposed upon it, which became due on July 1st of that year. The note not being paid, plaintiff commenced an action against the directors, as trustees of the corporation, to recover the amount due, and on May 11, 1915, a judgment was entered in its favor in the sum of $3,389.32. Execution was returned wholly unsatisfied on June 4, 1915, and no portion of the judgment has been paid except the sum of $75.18.

The present action was brought by the plaintiff against the defendants as two of the stockholders of the defunct corporation on their alleged liability on this unsatisfied judgment. After allowing defendants a credit of 24½ cents per share on the amount of their stock, by reason of the satisfaction of a judgment obtained against them and other stockholders in another action, the lower court found the defendants, and each of them, to be liable to plaintiff in the sum of 75 cents on each share of stock owned by them, not to exceed in the case of either of them the amount of the obligation here sued upon, together with interest. From the judgment entered in accordance with these findings, this appeal is prosecuted.

[1] The judgment must be reversed. The relationship, and the liability imposed upon corporation stockholders owning shares ostensibly fully paid, but not so in fact, have been so recently considered in, and we think definitely settled by, two recent decisions of the Supreme Court, handed down after the preparation and submission of this appeal, that we do not think it necessary or expedient to enter into a discussion of those interesting questions. Suffice it to say that under these decisions the stockholders who received this stock in exchange for the property and those subsequently taking the stock with notice of the original transaction were bound to make good the difference between the value of the property transferred and the par value of the stock, to creditors extending credit without notice of such overvaluation. Rhode v. Dock Hop Co. (Sup.), 194 Pac. 11; Sherman v. S. K. D. Oil Co. (Sup.) 197 Pac. 799. As we understand the rule established

by those opinions, there is no real distinction between one who takes stock, not fully paid, from the original holder, and one who acquires it by direct purchase from the company after it has vested in the treasury of the corporation. In either case, before the transferee can be held liable to the creditor, it must be shown that he participated in the original transaction or received his stock with knowledge thereof. In this case it is not alleged, stipulated as a fact, nor found that the defendants were parties to the original transaction, by which the entire capital stock of the Rex Midway Oil Company was issued for the greatly overvalued oil lease, or that as transferees they had any notice of, or became parties to, that proceeding. Consequently they cannot be compelled to make good the false representation as to the capital of the company which they had no part in making, and the responsibility for which they have done nothing to assume. The two decisions last noted so hold.

[2, 3] In view of the possibility of another trial we deem it proper to consider other points arising on this appeal. It is claimed by the appellants that the plaintiff extended its credit to the Rex Midway Oil Company with knowledge of the issuance of the stock at an overvaluation. If that were so the plaintiff may not recover in a court of equity on a creditors' bill. Rhode v. Dock Hop Co., supra; Sherman v. S. K. D. Oil Co., supra; Sherman v. Harley, 178 Cal. 584, 590, 174 Pac. 901, 7 A. L. R. 950. It was found by the trial court that neither prior to the time the plaintiff first dealt with the oil company, nor at any time while credit was being extended to it by plaintiff, was plaintiff informed, nor did it have any knowledge, that the oil company had issued and sold the shares to F. H. Lathrop as fully paid, and that it had no knowledge of the transactions of the oil company with respect to the sale and issuance of its capital stock. The impelling force of this finding, which is but a repetition of the stipulated fact, is not overcome by certain other findings from which it appears that the plaintiff had for many years prior to its dealings with the oil company been engaged in the business of selling tools, appliances, and supplies to persons and corporations engaged in drilling for oil in California, particularly those operating in Kern county, and was generally familiar with the practices and methods of acquiring and developing oil lands.

[4] Although engaged exclusively in the business of prospecting for oil, the Rex Midway Oil Company was incorporated in the manner and for the general purpose of mining. Appellants contend that the rule allowing creditors to recover against the stockholders of a defunct corporation the difference between the price paid by the stockholder for his stock and the par value thereof, and apply the same to the satisfaction of a judgment held by the creditor against the defunct corporation, does not apply to mining corporations. They cite a number of cases from other jurisdictions, and rely with much assurance upon the case of In re South Mountain Con. Min. Co. (C. C.) 14 Fed. 347, to support this contention. But our own Supreme Court, in a comparatively recent decision, held that the rule enunciated in Herron v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265, and in Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166, is a general rule, applicable to all classes of corporations, and that the decision in the South Mountain Mining Company Case no longer properly expresses the law in force in this state. Hasson v. Koeberle, 180 Cal. 359, 365, 181 Pac. 387.

[5] The Rex Midway Oil Company forfeited its charter on November 30, 1913. Appellants contend that the consequent dissolution of the corporation had the effect of maturing its obligations, and that recovery against them is for that reason barred by various provisions of the statute of limitations. This contention has been effectually disposed of by the very recent decision of the Supreme Court in Sherman v. S. K. D. Oil Co., supra, in which it was held that the dissolution of a corporation, by operation of law for failure to pay its license tax, does not have the effect of maturing its obligations. The original obligation of the Rex Midway Oil Company, the promissory note executed to plaintiff, was given April 23, 1913. Judgment against the trustees of the defunct corporation was entered May 11, 1915, and execution returned nulla bona June 4th of the same year. The present cause of action was, therefore, not barred by any of the provisions of the statute when the complaint was filed on December 20, 1916.

The judgment is reversed, and the lower court is directed to grant permission to the parties to amend their pleadings if so advised.

We concur: KERRIGAN, J.; RICHARDS, J.

52 Cal. App. 657

BOARD OF EDUCATION OF CITY OF SANTA ANA v. TALBERT, Chairman of Board of Sup'rs. (Civ. 3634.)

(District Court of Appeal, Second District, Division 1, California. May 19, 1921.)

1. Statutes ⊜225 — Where statutes dealing with the same subject are not repugnant, both should be given effect.

Where two statutes dealing with the same subject are not repugnant in their provisions, both should be given effect.

2. Schools and school districts ⊜97(1)—Act held to provide an alternative method for issuing bonds, so that district was not required to follow it.

Act March 20, 1909 (St. 1909, p. 528), applicable to issuance of bonds by districts in cities of the fifth class, etc., while providing for bonds bearing a higher rate of interest than prescribed by Pol. Code, § 1880 et seq., and varying therefrom in other respects, *held* to merely provide an alternative method of issuing bonds; hence an issue in accordance with the Code provisions is valid, and the chairman of the board of supervisors of the county may, by mandamus, be required to sign the bonds.

Petition by the Board of Education of the City of Santa Ana for a writ of mandate to be directed to T. D. Talbert, as Chairman of the Board of Supervisors of the County of Orange, to require the signing of certain bonds. Writ granted.

L. A. West, of Santa Ana, for petitioner.
O'Melveny, Millikin & Tuller, of Los Angeles, for respondent.

JAMES, J. In this proceeding petitioner asks for a writ of mandate to compel respondent chairman of the board of supervisors of Orange county to sign certain bonds in the amount of $75,000. On the 9th day of February, 1921, petitioner, as the governing board of the Santa Ana school district (the city of Santa Ana being a city of the fifth class), adopted a resolution calling an election for the purpose of having submitted to the electors of said district the question as to whether bonds in the amount mentioned should be issued. Due notice was given of said election, the election was held, a favorable vote was obtained on the proposition to issue the bonds, and return made to the board of supervisors of the various steps taken and proceedings had. All of such proceedings were had and taken in strict compliance with the provisions of section 1880 et seq., Political Code. The petition fully set out the facts and the exhibits attached thereto substantiated the statements made in the petition. Respondent, in answer to the prayer for the writ, makes return admitting the facts and raising the issue of law that petitioner, upon the case made by the petition, is not entitled to the writ.

It is admitted that by the sections of the Political Code a complete scheme is provided under which bonds of school districts may be issued, but respondent contends that the act of the Legislature approved March 20, 1909 (Statutes of 1909, p. 528), which act is entitled "An act to regulate the issue of bonds of school districts in cities of the fifth class, and school districts partly within and partly without such cities of the fifth class," is controlling, and that in so far as such districts are concerned the general law, as embodied in the Political Code sections, can have no application. In the first place, it is contended that the act of 1909 is exclusive because the scheme therein outlined is inconsistent in material respects with the general plan provided for in the Political Code. It is true that there are some differences between the statutes. The general requirements as to the calling of the election, the giving of notice, and the holding of the election are the same. While the Political Code sections fix the maximum rate of interest which bonds are entitled to bear at 6 per cent., the act of 1909 provides that they may bear as much as 8 per cent. Section 1885 of the Political Code declares that if the notice calling the election shall have provided that the bonds and interest be payable in gold coin of the United States, the bonds when issued shall be made so payable, but if no such expression shall be used in the notice, the bonds may be payable in "gold coin" or "lawful money," as the board of supervisors shall order. In the act of 1909 it is provided that the bonds shall be payable "in gold coin." The purposes for which bonds may be issued by a school district, as the same are specified in section 1880 of the Political Code, are precisely the same as those enumerated in the act of 1909, except that in the latter act the words "for insuring school buildings" are omitted. Petitioner insists that the plan adopted by the Santa Ana school district under the Code sections is fully authorized for two reasons: First, because the provisions of the act of 1909 are not repugnant to provisions of the Political Code, hence the latter act provides not an exclusive scheme but an alternative one; second, that, if such repugnancy exists, then the act of 1909 should be held to be unconstitutional because it is special legislation. If the conditions imposed by the act of 1909 were more restrictive than those expressed in the provisions of the Political Code, it might well be concluded that it was the intention to make the former, in its application to school districts in cities of the fifth class, exclusive. As has already been suggested, no such restrictive features are shown in the act of 1909, except that the alternative to make the bonds payable in "law-

ful money" instead of "gold coin" is not allowed, and the item that among the authorized purposes the act of 1909 omits to mention "for insuring school buildings." In its general import the act of 1909 seems to have been intended to extend the privileges of the school districts included within the class mentioned rather than to restrict the power given in any substantial sense. This is particularly evidenced by the provision permitting bonds to be authorized carrying an 8 per cent. interest charge, where, under the Political Code, a maximum of 6 per cent. is all that is allowed.

[1] It is a uniform rule of statutory construction that, where two statutes dealing with the same subject are not repugnant in their provisions, both shall be given effect. In harmony with this rule is the case of the City of Oakland v. Thompson, 151 Cal. 572, 91 Pac. 387. In that case there were considered two acts of the Legslature; one, general in its terms, designed to enable cities and counties and towns "to acquire, maintain, and improve public parks and boulevards"; the second and later one being "an act authorizing the incurring of indebtedness by cities, towns, and municipal corporations for municipal improvements, and regulating the acquisition, construction, and completion thereof." The city of Oakland proposed to issue bonds to purchase lands for park and boulevard purposes and proceeded under the act of 1901 (St. 1901, p. 27). It was argued in the case that the act of 1889 (St. 1889, p. 361), referring particularly to the improvement of public parks and boulevards, was exclusive in its application, and that the bonds could not be legally issued under the second act. The court said:

"Thus, if it shall be determined that the act of 1901 is in its scope broad enough to include the acquisition of lands for park and boulevard purposes, there is no constitutional inhibition forbidding the Legislature from providing two independent schemes, to either of which a municipality may have resort as it shall deem expedient. Indeed, the essential difference between the act of 1889 and that of 1901 is in the life of the bonds, the act of 1889 providing for 20-year bonds, and that of 1901 for 40-year bonds. One city might consider it to be more to its advantage to use the longer-term bonds, while another might be of contrary opinion, and, as we have said, there is no constitutional or other objection which prevents the Legislature from giving cities their option and choice in this matter."

[2] So, here, under the several statutes considered, we have two plans, in general essentials alike, but one having the effect of extending the power granted by the first; both in their nature being applicable to school districts which include cities of the fifth class. We do not regard the failure in the act of 1909 to provide for "the insuring of buildings" and the failure to provide that the bonds might, as an alternative matter, be made payable "in lawful money," to be so material as to make it evident that the Legislature designed to impose special restrictions on the bond-issuing privilege of the school districts referred to. We have given no particular attention to the suggestion that the fund out of which the interest and installments on the principal of the bonds is to be paid is given a different name by the act of 1909 from that assigned to it by the Political Code sections. In either case the fund is made up of money derived under tax levied particularly for the purpose of paying the bond debt, and it can only be used in discharge of that indebtedness. With these conclusions in mind, it is not necessary to give consideration to the argument of respective counsel upon the question as to whether the act of 1909 is unconstitutional as being special legislation. The school district in this case did not attempt to proceed under that act, and all of the steps taken, as the petition shows them to have been, answer strictly to the requirements of sections of the Political Code, which apply generally to all the school districts in the state.

In the discussion of the question here involved we have not overlooked the case of Santa Ana School District v. Talbert, 19 Cal. App. 104, 124 Pac. 872. That was a case wherein was concerned the question of the regularity of school bonds proposed to be issued under the statute of 1909, and appellant calls attention to expressions used in the decison as indicating the view of the court that the act of 1909 furnished an exclusive plan and scheme for the issuance of school district bonds in districts comprising cities of the fifth class. The language made use of and to which attention is directed was as follows:

"This act, being a complete revision of the subject to which earlier statutes related, is manifestly intended as a substitute for the former legislation, and such prior acts in relation to the subject must be considered as repealed."

The expression is dictum, because there was not in that case involved the question as to whether the act of 1909 was exclusive in furnishing the mode and method for the issuance of school bonds. The procedure was there had under the act of 1909, and the only question with which the court was concerned was as to the applicability of that act in the situation presented. The case cited following the expression above quoted, to wit, Mack v. Jastro, 126 Cal. 130, 58 Pac. 372, furnishes no aid in the solution of the question which we have here considered. That case involved a consideration and comparison of two county government acts, each covering the same subject, and the question was as to whether the later act repealed the former. The court there merely reannounced the elementary rule that, as between two acts of the Legislature, each completely covering the

same subject, the one later in date would be deemed to have repealed the first.

Peremptory writ is ordered to be issued, as prayed for in the petition.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 460

GUIDERA v. LAPIANA. (Civ. 2301.)

(District Court of Appeal, Third District, California. May 3, 1921, as Modified May 27, 1921.)

1. Death ⊜49(1)—Administrator's complaint held not demurrable for uncertainty as to parties.

In action for wrongful death under Code Civ. Proc. § 377, demurrer to the complaint for uncertainty in that it did not show whether plaintiff was suing as one of the heirs or as administrator, or whether the parties named as heirs were all the heirs, was properly overruled where the complaint indicated that suit was brought by plaintiff, as administrator, in behalf of the heirs, and named "the heirs" of deceased, of whom it might be assumed that he was one, as a person of his name was mentioned as one of the heirs; naming "the heirs" being equivalent to an allegation that the persons named were "all the heirs."

2. Death ⊜49(1)—Complaint must show existence of heirs.

Since an action based upon Code Civ. Proc. § 377, was intended by the Legislature to inure exclusively to the benefit of the heirs of a person whose death has been wrongfully caused, in the pleading of such an action by deceased's administrator or executor it is necessary to show that there are heirs.

3. Death ⊜49(1)—Complaint need not state heirs named are all the heirs.

While it is well directly to state in the complaint in an action for wrongful death by the representative of deceased that the heirs named therein are all the heirs of the deceased, a complaint is sufficient in that particular where it at least discloses the fact that there are heirs of the deceased, naming them, without specifically stating whether those so named constitute all the heirs.

4. Pleading ⊜406(9)—Defect in complaint for wrongful death held cured by evidence.

Assuming that complaint for wrongful death was defective in failing to state that the persons named as heirs were all the heirs of deceased, such defect was cured by the unobjected to testimony of plaintiff administrator that deceased's heirs at the time of his death consisted of his mother, brother, and himself, who were the persons named in the complaint as heirs.

5. Evidence ⊜471(24)—Wife's testimony that she saw defendant "shoot and kill" her husband not conclusion.

Testimony of deceased's wife, in action for wrongful death, that she saw defendant "shoot and kill" her husband, was not objectionable as a conclusion, especially where followed by testimony showing in what manner defendant shot or killed her husband, such as evidence that deceased died of gunshot wounds, that defendant was present at the time, and immediately thereafter fled.

6. Death ⊜75—Evidence of shooting held sufficient.

In action for wrongful death, evidence that defendant shot deceased *held* sufficient to support judgment for plaintiff, notwithstanding the presumption of innocence of wrongdoing.

7. Evidence ⊜60—Presumption of innocence prevails in civil as well as criminal cases.

The presumption of innocence prevails, not only in criminal cases, but also in a civil case, where a party is charged with crime.

8. Appeal and error ⊜909(1)—Presumption of innocence inapplicable on appeal.

The presumption of innocence is applicable rather in the trial below than on appeal, for, on appeal, where there is evidence to support the verdict or findings, the question whether the presumption of innocence has been overcome by the requisite degree of proof is foreclosed by the decision below or the verdict, it being presumed in such case that the court below was guided by all the tests whereby the weight and evidentiary force of testimony must be determined.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Joseph Guidera, as administrator of the estate of Victor Guidera, also known as V. Guidera, deceased, against Rosario Lapiana, also known as Sam Lapiana. From judgment for plaintiff, defendant appeals. Affirmed.

S. Luke Howe and J. J. Bauer, both of Sacramento, for appellant.

Dunn & Brand and Seymour & Downey, all of Sacramento, for respondent.

HART, J. This action is by the administrator of the estate of the above-named deceased against the defendant, for damages in the sum of $50,000 for causing wrongfully the death of said deceased. Code Civ. Proc. § 377. The case was tried by the court, without a jury, and findings and judgment were in favor of the plaintff in the sum of $15,000. The appeal is by the defendant from said judgment.

The points urged against the legal integrity of the judgment are: (1) That there was error in the order overruling the demurrer to the complaint on the ground of uncertainty, in that it cannot be ascertained from said pleading whether the plaintiff is suing as one of the heirs of deceased or as the administrator of his estate, and further that it cannot be determined therefrom whether the parties named therein as heirs at law of deceased are all the heirs of said deceased;

(2) that the overruling of the objection to certain testimony given by a witness for the plaintiff was error, and prejudicial to the rights of the defendant; (3) that the evidence is insufficient to support the findings and the judgment.

[1] 1. The complaint is not obnoxious to the objection urged against it. A reasonable view of the complaint in its entirety can lead to no other conclusion than that plaintiff, as administrator of the estate of the deceased, instituted the action for and on behalf of the heirs of the deceased. This is shown by the naming in the complaint of the heirs of the deceased, of whom it is safe to assume he is one, since a person of his name is also mentioned in the complaint as one of such heirs.

[2] The objection that the complaint does not specifically state that the parties named therein as heirs of the deceased are all the heirs of the deceased is devoid of substantial merit. It is true that an action based upon section 377 of the Code of Civil Procedure was intended by the Legislature to inure exclusively to the benefit of the heirs of a person whose death has been caused by the wrongful or negligent act of another, and, consequently, in the pleading of such an action by the administrator or executor of the estate or will of the deceased, it is necessary to show that there are heirs of the deceased; otherwise such personal representative, who in such a case is only the statutory trustee to recover damages for the benefit of the heirs, has no right of action. Webster v. Norwegian Mining Co., 137 Cal. 399, 400, 70 Pac. 276, 92 Am. St. Rep. 181; Jones v. Leonardt, 10 Cal. App. 284, 286, 101 Pac. 811; Munro v. Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 188, 192, 128 Pac. 330; Hirsch v. James S. Remick Co., 38 Cal. App. 764, 177 Pac. 876.

[3] While we think it would be well enough directly to state in the complaint in such an action by the representative of deceased that the heirs named therein are all the heirs of the deceased, still we think a complaint is sufficient in that particular where, as here, it at least discloses the fact that there are heirs of the deceased, naming them, without specifically stating whether those so named constitute all the heirs. But, if it were necessary in such a case as this that all the heirs of the deceased should be named or shown by the complaint, it is clear that, grammatically construed, the averment in the complaint here as to the heirs shows that those named therein are all the heirs of deceased, since the averment is introduced by the definite article "the," thus: "The heirs of the said Victor Guidera are," naming them, thus limiting the number of the heirs of deceased to the number named in the averment, and necessarily implying that all his heirs are so named. Obviously, the averment is radically different in meaning (viewing it from a grammatical standpoint) from what it would be if it were to read: "Annie Guidera, Frank Guidera, and Joseph Guidera are heirs of the deceased."

[4] There is, however, another reason against the reversal of the judgment because of the action of the court in overruling the demurrer, assuming that the complaint is defective in the respect in which we are now considering it, and that is that the asserted defect was cured by the evidence. The plaintiff, as a witness, was asked who the surviving heirs of the deceased were at the time of his death, to which question he replied: "Why, my mother, my brother Frank, and myself." From this testimony, to which no objection was interposed, as legitimately none could be, it is clear that, since he named those only who are mentioned in the complaint as such heirs, there are or were at the time referred to no other heirs than those named in said pleading.

2. The two remaining assignments relate to the evidentiary competency and effect of the testimony given by the widow of deceased of the circumstances leading to the death of her husband, and may be considered together.

It appears that the deceased, at about 7 o'clock of the evening of September 22, 1917, was called from his home in the city of Sacramento, by some one, and that on stepping out of his house and to the sidewalk fronting the same, he was shot and killed. That the death of Guidera was produced by a gun-shot wound is conclusively shown by the autopsy record of the coroner of Sacramento county, admitted in evidence on the express stipulation of the attorneys of the respective parties, and which record contains the result of the autoptical examination of the body of the deceased by Dr. C. B. Jones, physician, and surgeon to the coroner. This record discloses that two shots were fired into the body of deceased viz.: One through the lower jaw, and one below the right angle of the mouth—

"direction slightly downward and backward. Bullet removed from between 4 and 5 cervical vertebræ; cause of death, bullet wound through neck and vetebræ, injuring spinal cord and carotid artery."

The only witness to the shooting causing the death of deceased who testified in this case was the widow of deceased. Being unable to speak English or our language so that she could be plainly understood, she gave her testimony through an interpreter, who, it seems, was also deficient to some extent in ability to speak the English language, although sufficiently familiar with the use of that language to enable him to translate the witness' testimony so that it could be understood.

Mrs. Guidera, in substance, testified (and we are taking this statement from both her direct and cross examination) that, early in the evening of September 21, 1917 (stated in the complaint as the 22d day of September, 1917), some voice called out from the outside for her husband; that, hearing the call, the deceased immediately started to go outside, and that she followed him and saw the defendant outside, near the door. She stated that she was acquainted with the defendant. She proceeded to testify on direct:

"I hear shooting; I only saw him (her husband) lay down on the floor; I only hear shooting, then I went out, find my husband lying down on the floor."

"The Court: Did you see this Lapiana (referring to defendant) shoot the gun—what kind of an instrument did he have, a pistol, rifle, or a shotgun? A. I saw him, but I did not see what he had in his hand.

"Q. Was it some kind of a gun? A. I don't know; I didn't see it.

"Q. Did you see him shoot anything? A. I just saw him shooting, and my husband drop on the floor.

"Q. Did you see Rosaria Lapiana shoot your husband? A. I see it.

"Q. What did you see? A. I saw him shooting, go away.

"Q. What happened to your husband after the shooting? A. He died."

On cross-examination, the witness stated that both she and her husband were in the kitchen of their house when they heard a voice outside calling for the deceased; that her husband started out, opening the front door, and stepping outside, and leaving the door open, and that she immediately followed him outside.

"Q. When was the first time you saw Mr. Lapiana? A. Just at the time he killed my husband."

Continuing (on cross-examination), she said that Lapiana was on the sidewalk on the outside of their yard; that her husband passed through the gate to the outside, and she remained within the yard, near the gate; that defendant was standing near a tree, only a few feet from the gate, and that her husband went to where defendant was standing; that almost immediately she heard three pistol shots, likewise followed by the falling of her husband to the ground; that thereupon the defendant, with two other men, one of them a brother of defendant, whom she did not observe until the shots were fired, ran away.

In addition to the testimony thus referred to, it was shown by circumstances that the defendant fled from the city, or, at any rate, had not, down to the date of the trial of this action, been apprehended or captured. The service of the summons in this action was, so it appears from the record, by publication.

[5] The witness, Mrs. Guidera, it will be observed, testified that she saw the defendant shoot and kill her husband. The defendant, by his counsel, moved to strike out the testimony on the ground that it involved the conclusion of the witness. The court denied the motion, and it is here claimed, as above intimated, that the action of the court on said motion was erroneous, and that the testimony to which the motion was addressed operated prejudicially against the vital rights of the defendant in the trial and decision of the case. We think the motion was properly denied. If, in the prosecution of either a civil case for damages or a criminal case directly growing out of a battery committed by the defendant, a witness should testify that he saw the defendant strike the complainant and knock him to the ground, we do not think it would be for an instant claimed that such testimony would involve the mere conclusion of the witness so testifying, or anything less than the statement of a probative fact.

We can perceive no distinction, in character or quality, between the statement of the witness in this case that she saw the defendant "shoot and kill" her husband and the statement of the witness in the supposititious case that he saw the defendant "strike and knock down" the complainant. But it is conceded by counsel for the defendant that the statement complained of may constitute the statement of a fact "if followed by testimony showing in what manner defendant shot her husband or killed her husband." While the witness was unable to state what character of weapon was used in the slaying of her husband, she did testify, as we have seen, that she heard shots, and that her husband fell to the ground immediately following such shots.

The autopsy physician, as shown, testified that he found two wounds in the body of the deceased, and that the latter's death was caused by those wounds, or one of them. These circumstances clearly showed that the plaintiff's intestate was killed by gunshot wounds inflicted upon his body, and the fact that defendant was present when the shots were fired into the body of the deceased, the further fact that he was the only person seen near the deceased when the shots were fired, and the additional fact that he immediately fled after the shots were fired and the deceased fell to the ground, are circumstances from which the trial court could reasonably and justly infer and conclude that the defendant was the slayer of the deceased. Thus it is manifest that the statement of the witness that she saw the defendant "shoot and kill her husband" was followed by testimony "showing in what manner defendant shot and killed her husband"—that is, that the slaying was committed by the defendant by means of a loaded firearm, the particular nature of which the witness was not able to say.

[6, 7] The above consideration of the evidence, although for the purpose of reviewing the order of the court denying defendant's motion to strike out the testimony adverted to, constitutes a sufficient answer to the point that the findings and the judgment find no evidential support in the record. But there is another circumstance to which, in the present connection, reference should be made. Mrs. Guidera testified that, when her husband approached the defendant after he (deceased) stepped through the gate leading to and from his premises to the sidewalk, and was near the defendant, she observed, before the first shot was fired, that the defendant held a coat on his right arm. While there is no evidence that defendant fired the weapon with his right hand, and, in fact, no evidence as to which of his two hands he used for that purpose, it may be assumed and the court below had the right to assume, from the general and customary, and, indeed, natural manner in which such acts are done, that the defendant used his right hand when discharging the weapon into the body of deceased; and from the circumstance that the defendant held over or on his right arm and hand a coat of some description, the trial court was authorized to infer that the defendant had the weapon with which he did the shooting concealed under the said coat when the deceased approached near enough to him to have observed the weapon if it had been exposed to view in his unconcealed hand. And, if drawing that inference, the court could justly have further drawn the inference that the purpose the defendant had in so concealing the weapon was to keep the deceased in ignorance of the purpose of his (defendant's) presence there until such purpose had been accomplished.

But it is contended by counsel for defendant that the evidence, even though it may tend in a degree to establish the allegation of the complaint, does not measure up to the requirement of the rule in cases such as this in which the issue involves a charge of moral turpitude. The rule referred to is stated by Mr. Jones, in his work on Evidence, vol. 2, § 195, as follows:

"The presumption of innocence obtains in civil as well as in criminal cases; hence, when in a civil action a party is charged with crime, the evidence should be sufficient to overcome the presumption of innocence; that for this purpose more evidence may be necessary than in ordinary cases. * * * To create a preponderance of evidence, the evidence must be sufficient to overcome the presumption of innocence."

[8] The rule, as stated, is undoubtedly sound, but, as a general proposition, it is one that has particular application in the trial of the case in the trial court, and not in the consideration of the case on appeal. Where, either in a civil or criminal case, there is credible evidence, or evidence not inherently improbable, which, to a reviewing court, appears to have justified the verdict or findings, then the question as to the side upon which the preponderance of the evidence lies, or whether the presumption of innocence has been overcome by the requisite degree of proof in such case, is foreclosed by the decision below or the verdict. In other words, where the evidence as disclosed by the record on appeal is such that a reviewing court is legally justified in holding that it is sufficient to support the findings or the verdict, as the case may be, then it must be assumed that as to a civil case the trial court or the jury found upon the question of the preponderance of the evidence in favor of the victorious party, or, as to a criminal case, found that by such evidence the presumption of the innocence of the defendant was dispelled, and his guilt satisfactorily established. The proposition thus stated necessarily follows from the different viewpoints from which questions of fact must be reviewed and determined at nisi prius and by courts of appeal. The latter, in the very nature of things, cannot pass upon the question of the credibility of witnesses, and consequently upon the weight of testimony. That is essentially the sole function of the jury or the trial court.

The books are replete with cases in which the records on appeal show that the evidence upon which the findings and the verdicts are predicated is apparently very slight, and yet such findings and verdicts have been upheld by the appeal courts, because, for the reason stated, it is not within either the province or the power of such courts to determine upon which side in a civil case the evidence preponderates, or whether, in a criminal case, the evidence is such as justly to have persuaded in the minds of the jury the conviction of the defendant's guilt beyond a reasonable doubt. In such a case, therefore, as stated, courts of review must leave the question of preponderance or the question of guilt where the court or jury has placed it. So, in the instant case, there being sufficient evidence to support the findings of the trial court, it must be assumed and, indeed, presumed, that, in reaching its decision, as crystallized in its findings the court below was guided by all the tests whereby the weight and evidentiary force of testimony must be determined, and was persuaded to its conclusion by the degree of proof essential in such a case, and which appears to be amply afforded by the evidence.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

52 Cal. App. 535

PEOPLE v. DEAN. (Cr. 768.)

(District Court of Appeal, Second District, Division 1, California. May 6, 1921. Hearing Denied by Supreme Court July 5, 1921.)

1. Criminal law ⊂=448(16)—Conclusion of defrauded party as to whether she parted with title to money inadmissible, but admission not prejudicial.

In a prosecution for obtaining money by false pretenses from a relative, though it was error for the court to allow complainant to answer the question, "Did you at any time part with the title to that money?" such error was harmless to defendant, there being no conflict in the evidence as to the facts by which the defrauded party was induced to part with her money, which clearly showed that she did not part with title.

2. False pretenses ⊂=12—Complainant held not to have parted with title to money.

Where complainant was induced through the trickery of confidence operators, defendant, her relative, and another to deliver into their possession $30,000 of her money, which they were to use in securing back the "identification ticket" of the associate of complainant's relative issued by a certain "Stock Exchange," when in fact there was no such Stock Exchange, and hence no such valid ticket, complainant did not part with title to the money, and defendant, her relative, and his associate were guilty of obtaining money by false pretenses.

3. Criminal law ⊂=1172(7)—Defendant cannot complain of instruction favorable to him.

Where the instructions given by the court fully covered the law of the case, and were even more favorable than defendant was entitled to ask, defendant cannot complain.

4. Criminal law ⊂=424(6)—Evidence as to flight of defendant's companion in crime of false pretenses competent.

In a prosecution for obtaining money by false pretenses, defendant's requested instruction, advising the jury that the flight of defendant's companion in the crime, if shown, was not to be considered in weighing the case against defendant, *held* properly refused, defendant and his companion having worked in concert, complainant's testimony being competent in so far as showing that defendant's companion made an excuse and left the train while on the way to an appointed meeting place.

5. Criminal law ⊂=1186(4)—Evidence of statement by complainant to defendant in jail not reversible error.

In a prosecution for obtaining money by false pretenses, evidence of the statement of complainant, made to defendant when she talked with him in jail, that if the matter was settled and he got out he would perhaps get $15,000 from his companion in the crime, and go right on with him doing the same thing they had been doing, *held* harmless error, and not reversible under Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

William W. Dean was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Clare W. Woolwine and H. L. Giesler, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

JAMES, J. Appeal from a judgment of imprisonment and from an order denying to defendant a new trial. Appellant was found guilty under an indictment charging him with having feloniously stolen and carried away $30,000 lawful money of the United States and the property of Ethel L. Hupp. The evidence in the case tells the very familiar story of the credulity of a confiding victim and the baseness of a class of men who may be catalogued in general as "bunco artists." We may preface our statement of the evidence with the assertion, advisedly made, that the proof was abundant to show a determined and premeditated design, carefully planned and executed, to unlawfully deprive the complainant of a large sum of money.

Early in the year 1919 Mrs. Hupp came to Los Angeles from the city of Dallas, Tex. She was possessed of considerable means in the way of ready money. Dean was her first cousin, Dean's mother being a sister of the mother of Mrs. Hupp. Soon after arriving in Los Angeles the latter settled herself in a home. Dean made his appearance in Los Angeles shortly after Mrs. Hupp's arrival, and presented himself to her, was received into the family circle, and extended the hospitality of the Hupp home. Mrs. Hupp made free to discuss business matters with her cousin, and it was from her that he learned that she had sold her residence property in Dallas for the sum of $48,000, and that she had at least that much money in cash. Being established thoroughly in the confidence of Mrs. Hupp, Dean proceeded, as the evidence shows, to execute with considerable rapidity his plan to fleece his relative. To carry out this design he needed a second party; hence the appearance of a man called Dorchester upon the scene as one of the actors in the scheme of fraud. The preliminary foundation for the introduction of Dorchester was shrewdly laid. Dean one evening at the Hupp house told Mrs. Hupp that he would not accept an offer to accompany the family that evening, because he wanted to go down town, as he had that day caught sight of a Salt Lake friend whom he very much desired to renew acquaintance with; that he had been unable to overtake that friend when he had observed him, so he wished to go to the large hotel that evening and search for him. During the

next day or two Dean expressed a desire to meet Mrs. Hupp at the automobile license bureau, where she intended to go, and the time was fixed when he would meet her there. Dean was on hand when Mrs. Hupp arrived at the place designated, and remained outside while she attended to the license business. As she returned, and before the two had started away, Dean suddenly announced that his friend was approaching, and called the man Dorchester over and introduced him to Mrs. Hupp. The three chatted together, Dorchester talking familiarly to Dean about the stock market or stock transactions, and referred to a well-known man of Salt Lake City. Mrs. Hupp testified that Dorchester appeared to be in a hurry, but before leaving he inquired of Dean where he could find the latter, and Dean gave Dorchester Mrs. Hupp's address and telephone number. On the same evening Dean was at the Hupp house, and was about to have dinner with the family and some guests when Dorchester "dropped in." Dorchester drove to the house in a limousine, was attired in evening clothes, and made altogether, according to Mrs. Hupp's description, quite a splendid and impressive appearance. He was still a very busy man and in much of a hurry to keep an evening engagement, so remained but a short while. During the time that Dorchester spent at this appearance, he and Dean talked about stock and stock matters, from which Mrs. Hupp became advised that Dorchester was the representative of a stockbroking firm doing business under the alleged name of "Sheppard & Co." She also heard Dorchester tell Dean that he had worked at the business for many years, and had never taken any one into his confidence, intimating that he possessed some valuable information regarding the stock market; that he was very closely in touch, also, with the wealthy Salt Lake man. The stage had now been well set for the climax, which was arranged to follow, and in which Mrs. Hupp evidently fulfilled all of the expectations of the conspirators as to the manner in which her part should be played. On the following day Dean accompanied Mrs. Hupp downtown; Dorchester happened to meet them while they were in the automobile, and he stopped and chatted with them. The inevitable subject of Dorchester's business and investments in stocks was talked of between Dean and Dorchester, although the two were careful to avoid any suggestion to Mrs. Hupp that she use any of her means to purchase stock. It was to Dean that the valuable advice was given by Dorchester, with the intent, of course, that none of the conversation should be missed by Mrs. Hupp. Dorchester there exhibited to Dean a card which he said was an identification card admitting him to a stock exchange which was afterwards referred to as the "International." The identification ticket, as observed by Mrs. Hupp, had upon it a picture of Dorchester and the latter's name and designation as representative of "Sheppard & Co." After telling Dean about some stock investment that his firm had directed be made, he allowed Dean to take the admittance ticket and go away with it, telling him that he could take it down to the Stock Exchange and get in on it. Dean took the card and came back in about 25 minutes, and then Dorchester told him to go down and make a similar buy to "this," showing him a pink ticket, whereupon Dean went away on his mission to the "Stock Exchange," and later came back. When he returned Dorchester examined the pink ticket in Dean's hand, and simulated great excitement and anger because the identification ticket was not returned. Dean told him that he had done just as Dorchester had advised; that he had left the ticket on the counter; that the man had taken it up and brought back the pink ticket, whereupon Dorchester replied, "I just gave you that ticket to go and buy; I didn't give it to you to give to the man." Thereupon Dorchester evidenced all the outward signs of great anger toward Dean, told him that he, Dorchester, was put in a bad position by involving his firm in the matter, that in order to take up the ticket he would have to get together $40,000; that that would have to be done in a hurry, as the auditor of "Sheppard & Co." (naming a well-known Los Angeles banker, who it is perhaps needless to here state was shown later to have no knowledge of Dorchester or his alleged employers) must have a report on his operations. Dorchester finally said he would wire the Salt Lake gentleman, where he was sure that he could get money, and for them not to worry. Mrs. Hupp thereupon left the two. Later in the day Dean came out to the house and was greatly exercised; said that he had tried to get money to help Dorchester; that Dorchester would lose his position on his, Dean's account, and altogether presented a very excited and worried appearance. To use Mrs. Hupp's language in describing the condition of Dean, that witness said:

> "Yes, he was terribly upset. He said it would be his fault, it was such a bone-headed trick of his doing that, that Mr. Dorchester would lose his position, and he was very much excited and very much worried. He said he didn't know what Dorchester might do to him. Dorchester might kill him. He was very much upset about what might happen to him."

Matters soon progressed to the point where Dean asked Mrs. Hupp if she could not raise the money to help Dorchester out. Dean at that time said that Dorchester had only been able to raise $10,000 in Salt Lake. Again the three met together, and, according to the testimony of Mrs. Hupp, she was told that if she could get $30,000—

"all they needed it for was to go down to this exchange, and it wouldn't take 15 minutes to take it up, to take up this ticket, and he would bring it right back to me; bring my money back. * * * and I should stay in the car until he came back. Dorchester was sitting in the car with him."

And so it was that Mrs. Hupp went to her bank, procured $30,000 in cash, and met Dean and Dorchester. She gave Dean the $30,000, and Dorchester handed to Dean what was pretended at least to be the $10,000 to make up the $40,000. Mrs. Hupp remembered hearing Dorchester say to Dean, which was evidently a part of the stage play, "When you get your money, sell Alaska Gold"; that Dorchester said that he would write it down, and he took out a paper and wrote something on it and gave it to Dean, then told Dean to go through the entrance of a large hotel to the exchange, and shortly thereafter Dean came back. Dorchester asked him if he got the money, and Dean replied, "Yes, I got the money, but they took it away from me again when I bought that Alaska Gold," whereupon Dorchester again assumed an appearance of great wrath and excitement. He had been sitting in the automobile, and he leaped over the side without opening the door, shook Dean and upbraided him for having lost the money. He then took the ticket out of Dean's hand and ran around the corner of the street, while Dean wrung his hands and "cried," saying: "What have I done now? What did I do wrong?" Dorchester soon came back in a disheveled condition, with his collar unbuttoned. As Mrs. Hupp testified:

"He was just raving; and he said he had lost every dollar and that he had lost his firm's money and that he had lost everything he had, and carried on something terrible and acted as though he was going to take Dean's life, and it was just a terrible commotion."

But after this extravaganza had run its course, a way out of the difficulty was thought of. That way, surprising as it may seem, involved the further looting of Mrs. Hupp's strong box, and included the ambitious scheme to get $50,000 more of the latter's money. In short, Dorchester knew of a pending deal in Colorado which required $75,000 to turn; if Mrs. Hupp would produce $50,000 more, the deal could be handled and ample funds received to immediately reimburse her for all the outlay, Dorchester's standing with his firm would be preserved, and the ignominy under which Dean had fallen would be at once relieved. While Mrs. Hupp gave a qualified assent to the plan, she was wise enough not to take the money with her on the trip to Colorado, where she arranged to go together with Dean and Dorchester. Dorchester, while on the train, said that it was necessary for him to stop off at one of the way stations to attend to some matters, but that he would follow on the next train and meet Mrs. Hupp with Dean at a time and place agreed upon in Colorado. After Dorchester had left in this manner, Mrs. Hupp for the first time expressed misgivings as to the honesty of Dorchester, and Dean appeared to give some credit to her impressions along that line. She further took occasion to say to Dean that if she was called upon to use the $50,000 in Colorado, she proposed to stay with the money and see just how and where it was disposed of. Evidently Dean considered the prospect of further mulcting his cousin as having less promise from that point, for he decided that he had better get off at a station ahead and wait for Dorchester and see that he came through all right. Mrs. Hupp agreed. It is almost needless to say that neither Dorchester nor Dean appeared in Colorado at the time appointed. The next meeting between Mrs. Hupp and her cousin Dean occurred in February, 1920, at the Columbus, Ohio, jail, where Dean was being held after arrest on the charge contained in the indictment already referred to herein. A conversation occurred between Mrs. Hupp, Dean, and Dean's mother, in which the mother offered to mortgage a farm for $15,000, and Dean told Mrs. Hupp that if she would take that and let him go "he would sign any sort of notes or agreement, and he would go down on the farm and stay there and work until it was all paid back." Mrs. Hupp responded that she "wouldn't accept money from his mother losing her farm"; that he, Dean, would, if he got free, go right on doing the same thing. It was shown in evidence that comprehensive search had been prosecuted in Los Angeles and New York City to find whether any such exchange existed as the "International," or any such brokerage firm as "Sheppard & Co." None were found to exist in either city. The officer of the bank whose name had been used by Dorchester testified that he did not know Dorchester, and had never heard of "Sheppard & Co.," and had no connection with any such brokerage concern. Throughout the whole operation Mrs. Hupp had been cautioned by the men to keep the matter strictly secret, so that Dorchester's employers might not learn of his "dereliction."

The evidence was sufficient in its every feature to establish the guilt of defendant. The details as already narrated plainly delineate a complete scheme of fraud so bold and palpable as to make it a matter of wonder that a person of reasonable understanding could be deceived thereby. And it is fairly inferable that Mrs. Hupp would not have been despoiled of her money had it not been that Dean was able to bring to bear the weight of his relationship. Complainant was mainly influenced by a desire to relieve her cousin Dean from the embarrassment of having "unwittingly" placed his "friend" in a position of great difficulty. Dean's relationship se-

cured him that degree of confidence of his victim necessary to the execution of the plan.

[1] It was error for the court to allow Mrs. Hupp to answer the question, Did you at any time part with the title to that money?" But the error was not prejudicial; this because there was no conflict in the evidence as to the facts under which the complainant was induced to part with her money. Under those facts it was clear that she did not part with title. She was induced through the trickery of the confidence operators to deliver into their possession the $30,000 which they were to use in securing back Dorchester's "identification ticket" issued by the "stock exchange." There was no such stock exchange; hence no such valid ticket. The conditions did not exist under which the money was to be used. The atmosphere of fraud enveloped the whole transaction. Similar cases are not wanting in the books, for in truth it may be agreed that prospective victims are born every minute. We refer first to In re Clark and Lyons, 34 Cal. App. 440, 167 Pac. 1143, where the court held against the contention that the complainant had parted with title to his property, and so could not prosecute the petitioners for larceny. The further contention there was, as here made, that the money was delivered as a loan. The court in narrating the facts and announcing its conclusions said:

"The case involves the oft-told story of a bucolic and guileless individual, who, while waiting for a train at the Sacramento Railroad station to convey him to his home in a northern town, after a brief sojourn in the central portion of the state, accommodatingly handed over to a brace of oily-tongued strangers $120 of his available cash, as a loan, after the latter had insidiously crept into and gained his confidence and were suddenly awakened to a realization that the freightage on certain freight which they represented that one of them had previously put on board of a freight train had to be prepaid, and that they were without sufficient funds to pay the bill. * * * We are satisfied that the inference is fairly and reasonably justified by the evidence taken before the magistrate that the petitioners, acting in confederation for that purpose, designedly and deliberately, by the artful and crafty methods in which so-called 'confidence men' are adepts, obtained possession of the money of the prosecuting witness, upon the pretext that it was to be a mere loan, with the intent to steal the same. The owner of the money not having parted with the title thereto, the crime, if any, is larceny. People v. Rae, 66 Cal. 423, 56 Am. Rep. 102, 6 Pac. 1; People v. Delbos, 146 Cal. 737, 81 Pac. 131; People v. Arnold, 17 Cal. App. 68, 118 Pac. 729; People v. Schenone, 19 Cal. App. 280, 282, 125 Pac. 758; People v. Ballo, 19 Cal. App. 370, 125 Pac. 1081."

The case of People v. Delbos, 146 Cal. 734, 81 Pac. 131, makes clear the distinction between cases of larceny and those where property is obtained by false pretenses. The decision in People v. Rial, 23 Cal. App. 713, 139 Pac. 661, is also in point, both as to similarity of evidence and character of contentions made. There the victim delivered money to the confidence operators to be bet on a horserace, in a pretended pool room. The pool room was accoutred with all the usual paraphernalia commonly employed by concerns selling pools, including telegraph instruments, which were in apparent operation. All of these accessories were "faked." In considering the appeal in that connection the court said:

"He may have intended that his property should abide the hazard of the races, but the conditions under which he intended in that event to part with his property were not present. Therefore, it cannot be said that he parted with both the possession and title to his property when he intrusted it to the charge of a confidence operator. The decision in the case of Miller v. Commonwealth, 78 Ky. 15, 39 Am. Rep. 194, rested upon facts of a kind similar to those which the evidence illustrates here, and what is there said is particularly applicable to this case."

See, also, People v. Mills Sing, 183 Pac. 865.

[3, 4] The court advised the jury with much care that it must acquit the defendant in the event it found the complainant had parted with title to the $30,000 or made a loan to defendant. It would have been altogether proper for the court to have advised the jury that parting with the possession of money in the manner disclosed, with intent that it be used for the purpose represented, would not in law show a parting with title, where the money never was so used nor intended by the defendant to be so used. Such an instruction would be directly in line with what was said in the opinion in the case last cited. Altogether, the instructions as given by the court were even more favorable than the defendant was entitled to ask. They fully covered the law of the case. The instruction, asked for and refused by the court, which was to advise the jury that the flight of defendant's companion in crime, if such were shown by the evidence, was not to be considered in weighing the case against the defendant, we do not think was a proper one to give to the jury. The men were companions in crime, and they worked in concert. The testimony was certainly competent as given by the complainant showing that Dorchester, after all had been agreed upon a meeting place in Colorado, made an excuse and left the train while on the way, and that neither he nor Dean appeared at the meeting place. All of these circumstances were undoubtedly proper evidence, as showing the complete falsity of the series of acts and various representations made by Dean and Dorchester.

[5] Attention is directed to some other al-

leged errors as to which it may be said that none are sufficient under the provisions of section 4½, article 6, of the Constitution to warrant the court in reversing the judgment. One of these errors pointed to by appellant is the statement of the complainant as made to appellant when she talked with him at the jail in Ohio. The conversation as narrated by her, in so far as it showed Dean's statements made in the presence of his mother when the latter offered to mortgage her farm and pay $15,000, was altogether proper evidence. The witness, after stating that she there declared that she would not accept "money from his mother losing her farm," added that she had told him that as soon as he got free "he would perhaps get $15,000 from Dorchester, and they would go right on doing the same thing that they had been doing." This latter statement might well have been stricken out in response to the motion of appellant, as it was not shown how Dean received the remark, or whether he made any reply to it. The court, in our opinion, did not unduly restrict appellant in his cross-examination of the witnesses. Upon a careful examination of the entire record we are well satisfied that defendant had a fair trial, and that he was properly convicted of the crime charged in the information.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

52 Cal. App. 412

PEOPLE v. WOODCOCK. (Cr. 930.)

(District Court of Appeal, First District, Division 2, California. April 30, 1921. Hearing Denied by Supreme Court June 27, 1921.)

1. Perjury ⟸34(5)—Character of corroboration necessary.

In a perjury case, where prosecution relies upon direct testimony of one witness and corroborating circumstances, the character of corroboration necessary is like that in the case of an accomplice under Pen. Code, § 1111, and the corroborating circumstances must be more than evidence tending to prove that the testimony was given, and that it may or may not be false, under Pen. Code, §§ 118, 123, 1103a; Code Civ. Proc. § 1844.

2. Criminal law ⟸511(2)—Character of circumstances necessary to support testimony of accomplice.

It is necessary that evidence corroborating an accomplice shall connect, or tend to connect, the defendant with the commission of the crime, and corroborative evidence is insufficient, where it merely casts a grave suspicion upon the accused, and it must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it; and, where the circumstances when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and conviction thereon will be set aside.

3. Perjury ⟸12—Facts and testimony of defendant held not inconsistent.

Testimony of defendant and facts as alleged in an indictment for perjury *held* not inconsistent.

4. Perjury ⟸12—Testimony and facts held not inconsistent.

In a prosecution for perjury, alleged false testimony of defendant that her husband told her that he and a third person were going to a certain place, and that they would accompany her to the library, was not inconsistent with testimony of the third person to the effect that nothing was said to him or to the husband by the defendant with reference to such witness and the husband going to the place in question.

5. Perjury ⟸33(1)—Held insufficient to sustain conviction.

In a prosecution for perjury, evidence *held* insufficient to sustain conviction.

6. Perjury ⟸12—Testimony and statement held not inconsistent.

In a prosecution for perjury, testimony of defendant that when she came out of the library she was surprised to find her husband was waiting for her was not inconsistent with a statement made to a police officer: "I went into the library. I was not in the library over 15 minutes. As I came out I met my husband and walked down L. street."

7. Perjury ⟸34(6)—Evidence of witness held not sufficiently corroborated.

In a prosecution for perjury, testimony of witness that defendant was not threatened at the time she made a written statement concerning a homicide in which her husband was involved, and that the statement was voluntary, was not sufficiently corroborated by an assertion in the statement itself that it was made voluntarily and without threat or promise.

8. Perjury ⟸26(1)—Indictment must allege testimony to be false.

An indictment for perjury, alleging that defendant knew the testimony was false, was insufficient where it did not allege that it was in fact false.

9. Criminal law ⟸761(2)—Charge assuming that a certain fact existed held erroneous.

Language in an instruction carrying the inference to the jury that a certain fact existed was erroneous, in view of Const. art. 6, § 19.

10. Perjury ⟸37(1)—Instruction held erroneous.

In a prosecution for perjury, instruction *held* erroneous as in effect telling the jury that, if they found that the defendant had testified falsely to something with which she was not charged in the indictment, it should find her guilty.

On Application for Hearing in Supreme Court.

11. Perjury ⊜37(4)—Instruction as to corroboration held erroneous.

In a prosecution for perjury, court improperly refused defendant's request to instruct: "No ground of corroboration will be sufficient to justify the conviction of one accused of perjury, where the testimony of the witness to be corroborated is uncertain in negativing the alleged perjurious testimony of the accused. If the testimony of a single witness produced to prove perjury does not prove with certainty and without doubt that a contrary state of facts existed than that shown by the alleged perjurious testimony, the accused must be found not guilty."

12. Criminal law ⊜768(1)—Instruction as to sympathy held proper.

In a prosecution for perjury, the court did not err in charging the jury: "You are further instructed that, although as men you may sympathize with those who suffer, yet, as honest men, bound by your oaths to administer judgment according to the law and the evidence, you should not act upon your sympathies and in contravention of the proof. Mercy does not belong to you. No question of mercy, sentiment, sympathy, compassion, or anything else resides with you," etc.

Lawlor, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Alice Woodcock was convicted of perjury and appeals. Reversed in the District Court of Appeal and Hearing Denied in the Supreme Court.

Connick & Kehoe and James F. Brennan, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

NOURSE, J. Defendant appeals from a judgment of conviction upon nine separate counts charging her with perjury alleged to have been committed by her in the course of her testimony in the trial of her husband upon a charge of murder. The facts of the case are: On the 18th day of September, 1919, the defendant and her husband, Edgar Woodcock, and a friend named Cooper, were walking along Market street in the city and county of San Francisco, in a westerly direction, the defendant walking about 20 feet in advance of her companions. After they had crossed Van Ness avenue, still going west, the defendant was approached by one Kelly, who, she testified, rattled some money in his pocket and endeavored to make her acquaintance, whereupon she turned to her companions, who rushed up to her, and in the altercation which ensued Edgar Woodcock shot and killed Kelly. Edgar Woodcock was thereupon arrested and charged with murder. Defendant immediately went to her home, which was across the street from the place where the shooting occurred. Shortly thereafter three police officers called at her apartment and obtained an oral statement from her. She was thereupon taken to the Hall of Justice, and in the presence of one of these officers signed a written statement, which was prepared by him. From these statements the prosecution, in the case of her husband charged with the murder of Kelly, developed the theory that in accordance with a prearranged plan between the defendant, her husband, and Cooper, the three set out on the streets of San Francisco with the understanding that the defendant should precede her two companions, and that, if she were approached by any strange man, she was to signal to her companions, and they would thereupon come to her assistance and chastise the offending party.

In the course of her examination in the murder case the defendant testified that on the Tuesday preceding the Thursday when the shooting occurred she had told her husband that she had been annoyed by different men as she went to the public library for books in the evening; that her husband scoffed at the idea, and said that if she would go out with him that evening he would satisfy her that such things would not occur; that on the evening of September 18th her husband came home and told her that it would be necessary for him to work that night at the State Mining Bureau in the Ferry building, in the city and county of San Francisco, where he was employed, and that Cooper was going there with him to help him pack an exhibit; that at about 8 o'clock that evening Cooper called at their home at the Crockett apartments on the south side of Market street, and after some conversation about books and authors defendant's husband asked her to get a certain book from the public library at Larkin and McAllister streets; that she objected to going out that evening because, as she said, she was not feeling well, and that her husband urged her to go to the library, saying that he and Cooper would walk over as far as the library with her on the way to the mining bureau; that the three left the apartment, walked across Market street to the north side, and thence easterly along Market street to Larkin, and thence up Larkin street to the public library; that during their walk that evening she went on ahead of her husband and Cooper, who walked together a short distance behind her; that as she passed along Larkin street towards the library a strange man drove an automobile to the curb and invited her to ride with him; that when she got to the intersection of Fulton and Larkin streets he turned his automobile into Fulton street close to the sidewalk, and again asked her to

take a ride; that thereupon she turned around to her husband, and on his approaching her she told him that the stranger had spoken to her; that the husband thereupon went to the automobile and slapped the stranger, while she continued on to the library and obtained the book; that on coming out she was surprised to find her husband and Cooper waiting for her, and after some conversation they started home, she preceding her two companions as before and continuing out Market street to the juncture of Market, Haight, and Gough streets, a point about opposite the place where she lived; that she there gave the book which she had procured at the library to her husband, and purchased a magazine at the news stand, and after some conversation relative to the absence of a policeman upon the beat the three determined to walk down Market street again as far as Larkin to see if by any chance any policeman might be upon that beat. This same question had been discussed between the defendant and her husband in their conversation on the Tuesday preceding the day of the shooting, at which time, as the defendant testified, she had told her husband that in all her walks to the library she had never seen a policeman on that beat. The defendant further testified that the three walked down Market street in an easterly direction to Larkin street, where she stopped to look in the window of a store, and when she saw the reflection of her companions she turned and walked back on Market street toward her home; that in the middle of the block between Van Ness avenue and Franklin street the deceased, who was a stranger to her, approached the second time that evening and spoke to her, and that she turned and called to her husband, whereupon he and Cooper ran up to Kelly, and in the encounter between her husband and Kelly the shooting occurred.

The trial of Edgar Woodcock on the charge of murder resulted in a verdict of "not guilty" on December 19, 1919. On the 31st of October, 1919, the defendant, Alice Woodcock, was also accused of the crime of murder growing out of the same state of facts, but was not brought to trial upon that charge. The trial of Edgar Woodcock was followed by indictments charging both Edgar Woodcock and the defendant with perjury committed in the course of the murder trial. Cooper, the other party to the occurrence of September 18th, having left the state immediately after the shooting, was indicted for murder, and returned to the state for the purpose of testifying in an investigation concerning the alleged perjury of the two Woodcocks. He was the principal witness before the grand jury on this investigation and, with a few exceptions which will be hereafter noted, was the only witness at the trial of the defendant on whose testimony the prosecution depended to prove the perjury of the defendant.

As in the murder case, the prosecution in the perjury case proceeded upon the theory that the two Woodcocks and Cooper had entered into a conspiracy whereby they should walk upon the streets of San Francisco, the defendant to precede her two companions so that if she were accosted by any stranger they would take the law in their own hands and chastise the offending party. In support of this theory of conspiracy it was alleged in the indictment that during the course of the trial of Edgar Woodcock for murder it became material to know whether on the evening of the 18th of September, 1919, or prior thereto, there was an arrangement, agreement or understanding between the defendant and her husband or between the defendant, her husband, and Cooper, or between defendant's husband and Cooper, to the effect that the three should go upon the streets of San Francisco, walking in the manner in which they walked that evening, in order that the defendant's companions might chastise any stranger who should accost or offend her. The indictment is divided into 11 counts, each of which it is claimed relates to one charge of perjury. The defendant went to trial before a jury, and was acquitted on the fourth and ninth counts and found guilty on the remaining nine counts of the indictment. The motion for a new trial having been denied, she prosecutes this appeal from the judgment following the verdict.

Before discussing the various counts of the indictment, it is well to advert to the general rules of law relating to perjury and the testimony necessary to convict one of that offense. Section 118 of the Penal Code provides:

"Every person who, having taken an oath that he will testify * * * truly * * * willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

Section 1103a, of the same Code provides that—

"Perjury must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances."

Section 1844, Code of Civil Procedure, provides that—

"The direct evidence of one witness who is entitled to full credit is sufficient proof of any fact, except perjury and treason."

Section 123 of the Penal Code provides that—

"It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that

it was material, and might have been used to affect such proceeding."

[1, 2] Where, as in this case, the prosecution relies upon the direct testimony of one witness and corroborating circumstances to prove the perjury, the character of corroboration necessary is like that in the case of an accomplice arising under section 1111, Penal Code. In other words, the corroborating circumstances used to support the testimony of a single witness must be more than evidence tending to prove that the testimony was given, and that it may or may not be false. The rule as to the character of corroborating circumstances necessary to support the testimony of an accomplice is well stated in 12 Cyc. at page 456, quoted with approval by the Supreme Court in People v. Robbins, 171 Cal. 466, 470, 154 Pac. 317, 319, as follows:

"'It is necessary that the evidence corroborating an accomplice shall connect or tend to connect the defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused. It must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it. * * * But where the circumstances when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction thereon will be set aside.'"

And in the same case the court said (171 Cal. 471, 154 Pac. 319):

"The corroborative evidence required to convict the defendant in addition to that of the accomplice is not sufficient if it merely tends to raise a suspicion of the guilt of the accused. * * * *Mere suspicion, as has been shown, will not suffice as corroborative evidence;* and where the evidence relied upon as corroborative of the accomplice is, as in the present case, only such as to raise a suspicion of the guilt of the defendant, the verdict must be set aside."

Then again (171 Cal. 476, 154 Pac. 321):

"The proofs of mere suspicious circumstances and of opportunity to commit a crime are never sufficient to justify a conviction upon the testimony of an accomplice. People v. Thompson, 50 Cal. 480; People v. Smith, 98 Cal. 218 [33 Pac. 58]; People v. Koening, 99 Cal. 574, 576 [34 Pac. 238]; State v. Willis, 9 Iowa, 582; People v. Morton, 139 Cal. 725 [73 Pac. 609]." (Emphasis added here.)

In People v. Morton, 139 Cal. 719 at page 724, 73 Pac. 609 at page 611, the Supreme Court quoted with approval from Welden v. State, 10 Tex. App. 400, as follows:

"'We suggest this mode as a proper test: Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; *if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him.*'"

And again, on the same page, the court said:

"In New York, under the same code provision (Code Crim. Proc. § 399), it was said: 'The corroboration, however strong in all other respects, must point to the connection of the defendant with the commission of the crime to be of any avail.' People v. Ryland, 28 Hun, 568, 570." (Emphasis added here.)

There is no essential difference between the provisions of section 1103a of the Penal Code and section 1111 in so far as the law requires that the corroborating evidence "shall tend to connect the defendant with the commission of the offense." Where, as in the present case, the corroborating circumstances are made to take the place of the direct testimony of a second witness, evidence of such corroborating circumstances must, like the testimony of such witness, tend to connect the defendant with the commission of the offense; otherwise the perjury is not proved. Hence the rule of People v. Compton, 123 Cal. 403, 411, 56 Pac. 44, 47, approved in People v. Morton, 139 Cal. 719, 725, 73 Pac. 609, is applicable to a case of this kind. In that case the court had instructed the jury that—

"It is sufficient if such corroborative evidence tends in any way to connect the defendant with the commission of the crime charged."

In rejecting the instruction the Supreme Court said:

"This instruction fails to take account of the essential character necessary to the corroborative evidence, which is that, standing alone, or, as it is phrased in the Code, 'without the aid of the testimony of the accomplice,' it must tend to connect the defendant with the commission of the crime. Here the jury was told that it is sufficient if such corroborative evidence tends in any way to connect the defendant with the commission of the crime. Such is not the law. It could tend to connect him with the crime by considering it with the testimony of the accomplice; yet, if it is necessary so to consider, it would not be legally sufficient. It is legally sufficient only if, standing alone, it tends so to connect him."

First Count.

[3] Two objections are made to the judgment of guilty upon this count: First that the indictment fails to state a public offense: and, second, that the evidence is insufficient to sustain the verdict. Both objections are good.

(1) It is alleged in the indictment that during the course of the trial of Edgar Woodcock for murder it became "material to know" whether on the evening of September 18th and prior to the shooting there was

any arrangement, agreement, or understanding between the said defendant Alice Woodcock and the said Edgar Woodcock, or between the said defendant said Edgar Woodcock and Cooper, or between the said Edgar Woodcock and Cooper, to the effect that the said Edgar Woodcock and Cooper, or either of them, were going, or intended to go, to the state mining bureau that night. Also that it became "material to know" whether on that evening and before the shooting anything was said between the said defendant Alice Woodcock *and* said Edgar Woodcock *and* said Warren G. Cooper *or in the presence of said Warren G. Cooper* to the effect that they intended to go to said mining bureau. It is then alleged that after having been sworn as a witness in said trial the defendant Alice Woodcock testified that her husband came home from the mining bureau for dinner, and that *when he came in* he said:

"Dearie, I will have to go back to the bureau to-night; I have an exhibit to get out for some county fair. * * * Warren Cooper is going down with me to the bureau to-night to help pack the exhibit, because it must be gotten off early in the morning."

She then testified that they were just finishing dinner when Cooper came in, and that "after talking a few minutes with the boys" her husband asked her if she would go to the library to get him a book; that she replied that she did not feel well, and would get the book the next day, but that her husband answered that if she had a headache it was well to go out and take a little walk, and that "Warren and I will walk over as far as the library with you on the way to the bureau." It is then alleged that in truth and in fact there was no arrangement or understanding between the defendant Alice Woodcock *and* Edgar Woodcock *and* said Cooper, nor between said Edgar Woodcock *and* Cooper to the effect that Woodcock and Cooper were going, or intended to go, to the mining bureau on that night, and that in truth and in fact nothing was said between the said defendant and the said Edgar Woodcock *and* said Cooper to the effect that Woodcock and Cooper intended to go to the bureau, and that nothing was said "between the said defendant Alice Woodcock and said Edgar Woodcock *in the presence of said Warren G. Cooper* to the effect that the said Edgar Woodcock and said Cooper" intended to go to the bureau that night.

If all that is alleged in the indictment and all that was testified to by the defendant at the trial should be true, there is not a particle of testimony referred to in the indictment which even tends to intimate that Edgar Woodcock and Cooper had "any arrangement, agreement, or understanding" to go to the mining bureau that night. All that the defendant is alleged to have testified to at the trial was that *her husband had told her* that they would do so. There is therefore no conflict between this portion of the testimony and the state of facts which the indictment alleges was true.

As to the second portion of the testimony alleged to be false, relating to the statement of Edgar Woodcock to his wife that he and Cooper would walk over to the library with her on the way to the bureau, there is no inconsistency between the testimony complained of and the facts alleged to be true. It is not alleged that the defendant testified that this statement was made to her by her husband in the presence of Cooper, or that she at any time testified that there was any arrangement, agreement, or understanding among the three that Cooper and her husband should go to the mining bureau that night. Her testimony was merely that her husband had made that statement to her, and, so far as the indictment is concerned (and this is supported by all the evidence), it was made outside of the presence and hearing of Cooper.

The indictment alleges that nothing was said between the said defendant Alice Woodcock and said Edgar Woodcock *in the presence of said Warren G. Cooper* to the effect that Cooper and Woodcock intended to go to the mining bureau that night. As at no stage of her testimony did the defendant testify that anything was said between herself and husband in the presence of Cooper regarding their intention to go to the mining bureau, and as the indictment does not even attempt to allege that she did so testify, or endeavor to create that impression, this portion of the count, like those preceding it, fails to allege the commission of any offense.

[4, 5] (2) The evidence presented in support of the allegations of this count is wholly insufficient to sustain the verdict. The evidence upon which the prosecution relied is the testimony of Cooper to the effect that nothing was said to him or to Mr. Woodcock *by* Mrs. Woodcock with reference to going to the mining bureau that night, and that there was no arrangement between him and Woodcock in reference thereto, and that nothing was said to Mrs. Woodcock in reference thereto *in his presence.* All this testimony might be true, but it does not falsify any of the testimony of defendant assigned as untrue.

In addition to this, if any portion of the testimony of Cooper could be taken as even remotely falsifying the testimony of the defendant assigned as perjurious in this count, there is not a particle of corroboration of that testimony. All that respondent urges in this behalf is: (a) That Woodcock carried a gun that night when they went on the street; (b) that he and Cooper did not go to the mining bureau; and (c) the fact that

they paraded up and down Market street. Taking the test announced in People v. Morton, 139 Cal. 719, 724, 73 Pac. 609, and eliminating from the case the testimony of Cooper—the only witness offered in support of the allegations of the indictment—the question arises, taking these three facts as true, would they tend to connect the defendant with the commission of the offense charged? That is to say, do they tend to prove that she testified falsely when she detailed the conversation between her husband and herself. As to Woodcock's carrying a gun, it was shown that he was a deputy sheriff and entitled to carry one, and that frequently when going out upon the streets at night he first strapped on a gun, and that particularly just a few nights previous to this occasion, when he and Cooper went out for a walk, *at a time when the defendant did not accompany them*, both Cooper and Woodcock had strapped on guns before they left the apartment. As to the second corroborating fact, it is plain that, no matter what intentions they might have had, the reason that Cooper and Woodcock did not go to the mining bureau that night was that immediately following the shooting they were both taken to the police station and placed under confinement. As to the third alleged corroborating fact—that they paraded up and down Market street—the evidence in this connection could show nothing more than the possible change of plans (if such a plan had been made) following the assault upon the young man in the automobile at Fulton and Larkin streets, which occurred on the first trip from the apartment to the library, a trip upon which both witnesses testified that both Cooper and Woodcock agreed to accompany defendant before they left the apartment.

Second Count.

The portion of the indictment relating to the second count alleges that during the course of the trial of Edgar Woodcock for murder it became material to know whether on the evening the shooting occurred there was an agreement between the three parties to go out upon the public streets on a joint enterprise or undertaking. It is then alleged that defendant testified that, after the defendant left Woodcock and Cooper at the corner of Fulton and Larkin streets, where the assault upon the young man in the automobile occurred, she walked on to and into the public library, and that when she came out of the library she "was surprised to find that Edgar was there waiting for me." It is not alleged that the testimony complained of was material to the subject-matter of the inquiry, or that it might have affected such proceeding.

[6] Assuming, for the time, that the testimony of a witness as to his or her state of mind can be made the basis of an indictment for perjury, the same rules of evidence referred to in the discussion of the first count are applicable here. The defendant testified that when she came out of the library she was surprised to find that her husband was waiting for her. The prosecution claims that this testimony was false, but not a particle of evidence was offered tending to prove its falsity. Even if the evidence of the circumstances be taken as falsifying her testimony of surprise, the prosecution failed to meet the demands of the statute that the direct testimony of one witness at least is necessary to prove perjury. The only defense of the verdict upon this count urged by respondent on this appeal is that the statement of the defendant, made to a police officer immediately following the shooting, is incompatible with the testimony given at the time of her husband's trial. The portion of the statement relied on is:

"I went into the library. I was not in the library over 15 minutes. As I came out I met my husband and I walked down Larkin street."

There is nothing inculpatory in the statement, and nothing therein inconsistent with the testimony assigned in the indictment as perjurious. The allegations of this count went to the jury without any proof.

Third Count.

In the third count of the indictment it is alleged that during the course of the trial of Edgar Woodcock it became material to know what were the reasons which prompted the defendant to walk down Market street the second time after she had purchased a magazine in a store at the corner of Gough and Market streets, and whether the three walked down Market street at that time for the purpose of finding a policeman. The testimony set out in the indictment, and which is alleged to have been false, was to the effect that after the defendant had purchased a magazine in a store at the corner of Gough and Market streets her husband asked if either she or Cooper had seen a policeman during their walk that evening, and that when she told him that she had not he suggested that they walk down Market street again as far as Larkin to see if a policeman was on the beat. It is then alleged: (1) That they did not walk down Market street at that time for the purpose of looking for or finding a policeman; (2) that they did thus walk down Market street in pursuance of a joint enterprise entered into between them previously; (3) that defendant's husband did not ask her or Cooper or either of them whether they had seen a policeman that night; and (4) that defendant's husband did not say to Cooper or defendant or either of them that they should walk back on Market street a second time for the purpose of finding a policeman.

The trial court instructed the jury that though each count contained considerable testimony given by the defendant while she was a witness in the murder case, it was necessary for the prosecution to prove only such parts or portions of the testimony set forth in each count of the indictment as is by each count alleged to be false or untrue. The case was tried upon this theory, yet the indictment does not, as to the third count, allege that any particular portion of the testimony of the defendant was untrue. In order to prove its case under that count it was necessary for the prosecution to show that the three walked down Market street the second time in pursuance of a former understanding, and not for the purpose of looking for a policeman, and that the defendant's husband said nothing to her at that time, either inquiring whether she had seen a policeman or suggesting that they walk down Market street a second time for the purpose of finding a policeman.

The only testimony in support of the allegations in this count is that of Cooper, which attacked the truth of the defendant's testimony only to the extent that he did not hear anything said to the defendant by Woodcock at that time in reference to finding a policeman. This testimony, meager though it is, is weakened by his explanation that as the three stood on the corner something was said about mailing a letter, and that he took the letter across the street and mailed it, and that there was other conversation between Woodcock and the defendant which he did not hear, in fact, that he did not hear *most* of the conversation between Woodcock and defendant at that time.

As to the assignments relating to the purposes directing their second walk down Market street and the statements made by Woodcock to the defendant beyond the presence and hearing of Cooper, there is no direct evidence to support the allegations of the indictment.

Fifth Count.

[7] In the fifth count it is alleged that during the course of the murder trial it became material to know the reasons why defendant had signed a statement in the presence of a police officer, and whether or not the said statement was substantially true or false. The testimony of the defendant assigned as false was given in answer to a question as to what she had said in that statement. It is as follows:

"Well, that statement appears in this statement of mine, and I was told that unless I made the statement to the police or the detective department that I could not see my husband."

It is then alleged that the said statement had been voluntarily made by the defendant, and that she was not told by a police officer that if she refused to make or sign the statement she would not be allowed to see her husband.

The only witness called to prove the falsity of defendant's testimony was Police Officer Hippely. The only evidence he gave bearing on the subject-matter of the inquiry was in answer to the following question:

"Did you threaten her, or did anybody threaten her, that if she did not sign that statement that she could not see her husband?"

To which he answered, "No, sir." Two other police officers were called to the stand by the prosecution to answer clearly irrelevant, incompetent, and immaterial questions relating to the personal appearance and conduct of the defendant following her husband's arrest, but their attention was not directed to the material inquiry relating to the allegations of this count.

Respondent's only answer to the attack upon this count of the indictment is that the testimony of Officer Hippely was corroborated by that of Dorman and Kennedy and by defendant's own assertion, found in the concluding sentence of her written statement to the effect that it was true and voluntary and made without fear, threat, or promise of reward. As to the testimony of the two police officers, the record clearly shows that they did not and could not corroborate Officer Hippely because they were not present at any time during the taking or signing of the statement. As to the assertion in the statement itself, assuming for the time the correctness of respondent's argument that the statutory demand for two witnesses in a perjury case can be met by balancing the unsworn statement of the defendant against the sworn testimony alleged to be false, a court and jury would be without the common knowledge of men if they held that a statement of this nature demanded by the police from a person in custody was in all cases made voluntarily and without fear, threat, or promise of reward, because it is well known that all persons making a statement to the police while under surveillance are compelled, above all other things, to include that assertion in their statement. People v. Quan Gim Gow, 23 Cal. App. 507, 38 Pac. 918.

Sixth Count.

In this count the indictment alleges that during the course of the murder trial it became material to know the reasons why, on the evening of September 18th, the defendant walked upon the public streets of San Francisco in advance of her husband and Cooper, and whether this manner of walking was not followed in pursuance of an arrangement theretofore had between the defendant and her husband and said Cooper. The indictment contains several pages of testimony

alleged to have been given by the defendant during the course of that trial, but does not assign any particular portion of it as false. The nearest approach to an assignment of perjury seems to be that portion of the indictment wherein it is alleged that the defendant testified as follows:

"Q. The three of you [referring to the defendant Alice Woodcock, said Edgar Woodcock, and said Warren G. Cooper] started together; how long did you remain together? A. As I told you yesterday afternoon, Warren Cooper and my husband were having a confidential chat, and rather than obtrude upon the two men I stepped just ahead of them."

It is then alleged that the three did in fact walk upon the public streets that evening in pursuance of an arrangement theretofore had between them that the defendant should walk in advance of her husband and Cooper. It is also alleged that it was not true that they walked in that manner because defendant's husband and Cooper were talking confidentially or because they were talking.

There was no testimony, either direct or circumstantial, in support of the allegations of the indictment contained in this count. The only witness called for the purpose of impeaching the defendant on this issue was Cooper. He testified that as the three came out of the apartment Woodcock told the defendant to go on ahead, and that he and Cooper would follow; *that there was no plan relating to the manner of walking organized that he knew of;* that nothing was said relating to the manner of walking in the presence of the defendant at any time so far as he knew; and that as they came out of the library Woodcock told his wife to go on as before. There is no possible inference from any portion of Cooper's testimony contradicting the direct testimony of the defendant to the effect that the reason that she walked on ahead of the other two was that they were talking confidentially, and she did not want to interfere with their conversation. There was no evidence tending to prove that she took part in any agreement which the other two might have made relating to their manner of walking that evening, or that Cooper and Woodcock were not in fact talking confidentially, and gave her to understand that that was the reason she was requested to walk ahead. When defendant's counsel, on cross-examination of the witness Cooper, asked the witness if it were true that he and Woodcock were in fact engaged in confidential conversation at that time, the trial court, upon the objection of the district attorney, refused to permit him to answer.

The only evidence cited by respondent as tending to prove the issues upon this count is the assertion found in defendant's written statement, given on the night of her husband's arrest, to the effect that her husband instructed her to go to the library and get a book for him; that he would be right behind her; and that "if any one spoke to me or annoyed me to turn around." But there is nothing inculpatory or inconsistent in this statement of the defendant. It is entirely consistent with the testimony of Cooper that as they reached the street in front of their apartment Woodcock told the defendant to walk on ahead, and that they would follow, but that there was no prearranged plan at any time relating to the particular manner in which they should proceed that night. Outside of the possible inconsistencies appearing in the written statement which the defendant gave to the police, there is neither direct nor circumstantial evidence tending to prove the allegations of this count.

Seventh Count.

In the seventh count of the indictment it is alleged that during the course of the trial of Edgar Woodcock for murder it became material to know whether, on the evening of September 18th, at the time said Edgar Woodcock assaulted a certain young man driving an automobile at Larkin and Grove streets, the said defendant said anything to her husband. The indictment details a portion of the testimony of the defendant, given in the course of the murder trial, to the effect that she did not know how many times her husband struck the young man, but that after he struck him she went on to the library without approaching or speaking to her husband. It is alleged that this testimony was untrue because the defendant did approach her husband, and told him that the young man had been sufficiently punished. It is a fertile imagination indeed that can see any materiality in this testimony affecting the subject-matter at issue in the murder trial. But, passing this, the testimony offered in support of the allegations of this count of the indictment not only fails to falsify this portion of defendant's testimony, but, if anything, proves its truth. Two witnesses were called to falsify the testimony of defendant. The first witness, Cooper, testified that after Woodcock had struck the young man several blows Mrs. Woodcock came up near the crowd of people who had gathered there, and said that she thought the young man had had enough, but that he did not know whether she said that to Woodcock or to himself as she did not come close; that she then turned and went into the library, while he and Woodcock put the young fellow into the machine. He also testified that though the machine was probably 50 or 75 feet east of Larkin on Fulton street he did not see the defendant leave the corner of Larkin and Fulton. The other witness whose testimony respondent cites as corroborating that of Cooper and going to prove the falsity of

defendant's testimony was a man by the name of Head. The only portion of his testimony which relates to the allegations of this count is that when he approached the point where the assault was taking place he noticed a woman resembling Mrs. Woodcock standing on the corner of Larkin and Fulton streets, some 50 or 75 feet from where her husband stood, that she *did not approach* her husband *or speak* to *him*, and that after the fracas was over he saw that she was gone. The allegations of this count of the indictment went to the jury without a shred of evidence to sustain them.

Eighth Count.

In the eighth count of the indictment it is alleged that during the course of the trial of Edgar Woodcock it became material to know why the defendant knew that on the evening of September 18th her husband and Cooper were following behind her as they walked along the streets, and whether or not there was any arrangement, agreement, or understanding between them that they should so walk that evening. Testimony of the defendant given at that trial is set forth in this count to the effect that the defendant knew that Cooper and her husband were behind her without turning around from time to time to see whether they followed. Without assigning any of this testimony as false or material, the indictment alleges that Edgar Woodcock instructed the defendant that she should go forth upon the streets, apparently unattended and alone, and that he and Cooper would walk behind and following her, and that an arrangement, agreement, and understanding had been entered into between defendant, her husband, and Cooper to that effect. Though the trial court instructed the jury that only certain portions of the testimony set out in this count were assigned as perjury, the jury was not instructed as to what these certain portions were, and it is impossible to determine that from any analysis of the pleading.

Passing the imperfections of the indictment, it is clear that there is no evidence to support the allegations of this count. Cooper was the only witness called. The only portion of his testimony bearing upon the allegations of this count was that as the three came out of the apartment Woodcock told the defendant to go ahead, and that he and Cooper would follow, but he further testified that "there was no plan organized (as to the manner of their walking) that he knew of." Furthermore, his testimony is uncorroborated.

Tenth Count.

In the tenth count of the indictment it is alleged that during the course of the trial of Edgar Woodcock it became material to know why the defendant, with Cooper and her husband, walked down easterly on Market street the second time on the evening of September 18th, and whether the reason for said walk was for the purpose of finding a policeman. The indictment details a portion of the testimony of the defendant given at that trial to the effect that when they stopped at the corner of Market and Gough streets on their first trip west on Market street they spoke of not having noticed a police officer on the previous trip to the library, and that they then turned and walked east on Market street to see if there were any police officers on the street.

The allegations of this count are practically a duplication of those found in the third count, and the same testimony is relied on by the prosecution to prove the falsity of the testimony of defendant set forth in this count. What has been said in the discussion of the third count concerning the form of the indictment and the testimony of Cooper and the want of corroboration applies equally to the testimony in support of the allegations of this count. Outside of Cooper's testimony that nothing was said in his presence relating to their walking down Market street a second time to see if they could find a police officer, there is neither direct nor circumstantial evidence to sustain the verdict on this count.

Eleventh Count.

[8] In the eleventh count of the indictment it is alleged that in the course of the trial of Edgar Woodcock it became material to know whether or not when defendant approached and stepped off the curb at the corner of Van Ness avenue and Market street on the evening of September 18th she either turned around or looked back or smiled at any man or men. The only portion of the testimony given by the defendant at that trial which is set forth in this count follows:

"Q. Now, did you as you stepped off the curb at the corner of Van Ness avenue and Market street, turn around and look back and smile at any one? A. No, Mr. Brennan; I did not."

Though it is alleged that the defendant knew that this testimony was false, the indictment does not allege that it was in fact false. On the other hand, it is alleged that as the defendant approached the curb at the corner of Van Ness avenue and Market street *or* approached approximately the said neighborhood *or* locality, *or* as she stepped off the curb at the corner of Van Ness avenue and Market street *or* was in approximately that neighborhood or locality she did turn around and look at men, and smiled at several men.

The record shows beyond doubt that the question and answer assigned in this count were a part of the direct examination of

the defendant giving a detailed account of the course taken by the defendant, her husband, and Cooper on the night of September 18th. During this inquiry questions were asked and answers given taking the defendant over the course from the time she left her apartments across Market street, down Market in an easterly direction to Larkin, thence over Larkin to the library, back Larkin to Market, thence west on Market to Gough, thence east again on Market to Larkin, and thence west on Market to the place where the shooting occurred. The question and answer assigned related to the second or last trip west on Market and immediately preceding the shooting.

The witness McLellan, called by the prosecution, testified that he saw the defendant on her *first* trip west a little after 8 o'clock, and that as two men passed her she was smiling and turned around a little bit. He also testified that about 9 o'clock of the same evening he again saw her going west on Market street, and that while she had a smile on her face *she was looking straight ahead.* Another witness, Amner, called by the prosecution, testified that either on her *first trip east* on Market or on her *first trip west* on Market he saw the defendant smile as she passed the witness McLellan, and that that was the only time he saw her smile that evening. The witness Abbott testified that, while he was standing at the corner of Van Ness avenue and Market street near the water hydrant with the witness McLellan, Edgar Woodcock approached him and asked if they were discussing "that lady"; that he then noticed the defendant some 20 feet in advance as she approached the monument in the center of Van Ness avenue; that as she was passing the monument she looked back, and he could see that there was a smile on her face. Notwithstanding the fact that he had previously testified that he did not see the defendant until after Edgar Woodcock approached and spoke to him while he was standing near the curb, and that she was then some 20 feet in advance of Woodcock, he testified that he saw her just as she left the curb, and that she then had a smile on her face. But, in any event, he was detailing what he saw on the *first* trip west. The witness Gilger testified that he saw the defendant smile as she passed the cigar store at the corner of Van Ness and Market on her *first* trip west that evening, and that as she approached the monument in the middle of Van Ness avenue he saw her turn around and look back. The witness Cooper placed the incident of Edgar Woodcock speaking to a street car man as occurring on the first trip west on Market street. In point of time this preceded by about a half hour or more the time concerning which the defendant was testifying in that portion of her examination which is attacked in this count. There is therefore no testimony tending to prove that the defendant, on her *second* trip west on Market street, as she stepped off the curb at the corner of Van Ness avenue and Market street, turned around and looked back and smiled at any one. The only testimony offered by the prosecution as to what occurred at the time concerning which the defendant testified is the testimony of the witness McLellan to the effect that the second time that the defendant walked west on Market street that evening she was looking straight ahead.

Respondent argues that "perjury consists in the misrepresentation on the witness stand as to facts, by whatever language these facts may be conveyed." On this basis it is contended in effect that when the defendant answered the question relating to her conduct on her second trip west on Market street she was guilty of perjury because she did not go on to explain what had occurred on her first trip, a half hour earlier. But if her testimony was wanted on such fact, the proper course was to ask for it. It was not for the witness to volunteer.

[9] The indictment fails to state sufficient facts in this count and the evidence does not prove the falsity of the testimony assigned.

Appellant assigns numerous errors relating to the instructions to the jury and matters occurring during the course of the trial. Particular criticism is made of the error of the trial court in assuming facts as proved which were not supported by the evidence. For instance, throughout the instructions the court referred to an arrangement, agreement, or understanding between the defendant and Edgar Woodcock and Cooper to the effect that the three should go upon the public streets of San Francisco on a joint enterprise or undertaking on the night of September 18th. This, of course, was the theory of the prosecution in the murder case, but no evidence was offered in support of this theory in the present case. The nearest approach to evidence of that character was the inadmissible testimony of Cooper to the effect that on the afternoon of the 18th of September *he* and *Edgar Woodcock* had entered into some arrangement between themselves, but no evidence was offered tending to connect the defendant with any such agreement, arrangement, or understanding. This language in the instructions carried the inference to the jury that the court believed that the existence of such an agreement, arrangement, or understanding had been proved by the prosecution. This was error in view of section 19, article 6, of the Constitution, which provides that judges shall not charge juries with respect to matters of fact. People v. Messersmith, 61 Cal. 246, 248; People v. Williams, 17 Cal. 142, 147; People v. Choynski, 95 Cal. 640, 643, 30 Pac. 791. That prejudice resulted from this instruction is too plain

to question, because if the prosecution was unable to prove this theory, its main case fell. With the intimation on the part of the trial court that the facts supporting the prosecution's theory did in fact exist, the inferences which the law permits the jury to draw from the testimony were drawn by the court itself and embodied in the instructions in such a way that the jury must necessarily have assumed that the theory was a fact proved.

[10] Criticism is also made of the instruction to the jury to the effect that if it found that the defendant testified in the murder case in substance and effect that there was an arrangement, agreement, or understanding on the evening of September 18th between Cooper, her husband, and herself, to the effect that Cooper and her husband were going to the mining bureau that evening, and that something was said to that effect between the three, and that if the jury further found that in truth and in fact there was no such arrangement between them, and nothing was said between defendant and her husband in the presence of Cooper relating to their going to the mining bureau that night, then the jury should find the defendant guilty as charged in the first count. The vice of this instruction is that the indictment did not charge the defendant with having testified that there was any arrangement or agreement between the three of them to the effect that Cooper and her husband should go to the mining bureau that night, and did not charge her with having testified that anything was said in regard thereto in Cooper's presence. The court thus instructed the jury that if they found that the defendant had testified falsely to something with which she was not charged in the indictment, it should find her guilty upon this count.

Appellant complains of the special instruction given to the jury in relation to the eleventh count, to the effect that, if the jury found as the defendant approached the curb at the corner of Van Ness avenue and Market street or was in approximately the neighborhood or locality, and that, before the said Edward C. Kelly was shot and killed, she turned around and looked back at a man or men, or smiled at a man or men, the jury should find her guilty. This instruction, like the one first discussed, invades the province of the jury to pass upon the evidence. The defense to this count was that the testimony assigned as perjurious related solely to the second or last trip west on Market street. The testimony offered at the trial of this case related to the first trip west on Market street. It was therefore the province of the jury to determine whether the testimony of the defendant assigned as perjurious did relate to the second trip only, and whether she did in fact on that second trip, while stepping off the curb at the corner of Van Ness avenue and Market street, turn around, look back, and smile at any man. By the court's instructions the jury was told that, if it found that the defendant while in the neighborhood or locality of Van Ness avenue and Market street turned around and smiled at a man or men (not necessarily on her last trip west on Market street or even at any time on the night in question), that fact would prove the falsity of her testimony, and the jury should accordingly find her guilty.

Similar criticism is made of the special instructions relating to the eighth count, wherein the court assumed that the jury could find that there was an arrangement, agreement, and understanding between the three parties to the effect that the defendant should go forth upon the street of San Francisco that night apparently unattended and alone, and that her husband and Cooper would walk behind her, and that the entire course of their walk that evening was in pursuance of that agreement and understanding, though no evidence of such an agreement was presented to the jury. The only evidence offered on this subject was that of Cooper, who in answer to an inquiry as to the arrangement for their manner of walking that evening said "there was no plan organized that he knew of."

Error is assigned in the refusal of the court to give certain instructions requested by the defendant. Some of the matters included in these rejected instructions appeared in the general instructions given by the court. Other matters of importance to the defendant appearing in these instructions were not given to the jury. It would serve no purpose at this time to discuss these various instructions. The trial court apparently did not accept defendant's view of the law as to the quantum of proof necessary in a case of this kind, and as a result the instructions given to the jury are confusing and conflicting upon this subject. Thus the court refused to give to the jury the following instruction requested by defendant:

"No amount of corroboration will be sufficient to justify the conviction of one accused of perjury, where the testimony of the witness to be corroborated is uncertain in negativing the alleged perjurious testimony of the accused. If the testimony of a single witness produced to prove perjury does not prove with certainty and without doubt that a contrary state of facts existed than that shown by the alleged perjurious testimony, the accused must be found not guilty."

This correctly stated the law, and should have been given. 30 Cyc. p. 1455; People v. Smith, 3 Cal. App. 68, 84 Pac. 452.

Criticism is also made of the following instruction:

"You are further instructed that although as men you may sympathize with those who suf-

fer, yet as *honest* men, bound by your oaths to administer judgment according to the law and the evidence, you should not act upon your sympathies and in contravention of the proof. Mercy does not belong to you. No question of mercy, sentiment, sympathy, compassion, or anything else resides with you. * * *"

This instruction, it is argued, had a prejudicial effect on the minds of the jury. The defendant being the only one on trial, it was for her alone that sympathy or mercy might be expected. To instruct the jury that "mercy does not belong to you" necessarily carried to the jury the impression that the court, believing the defendant guilty and expecting the jury to convict her, could alone extend sympathy or mercy to the defendant.

It is said in argument that these instructions are taken from the cases of People v. Bojorquez, 35 Cal. App. 350, 169 Pac. 922, and People v. Hawes, 98 Cal. 648, 33 Pac. 791. It is true that the latter instruction appears in the decision of the Bojorquez Case, but a reference to the decision would plainly show that the appellate court did not approve it.

Numerous other objections are made to the rulings of the court in sustaining or overruling objections to particular questions, and to the manner assumed by the court in making such rulings as being prejudicial to the appellant. It is unnecessary to consider these objections, as it is not likely that they will again occur.

The defendant here is charged with having given false testimony, certain portions of her testimony being assigned by the prosecution as constituting perjury. Nothing that is said herein should be construed as implying that the testimony which she gave was in fact true. All that is held is that she was not legally convicted.

The judgment is reversed, with instructions to the trial court to grant the defendant a new trial on counts numbered second, third, fifth, and tenth, and to dismiss the indictment as to counts numbered first, sixth, seventh, eighth, and eleventh.

We concur: LANGDON, P. J.; STURTEVANT, J.

Opinion of Supreme Court, in Bank, Denying Hearing.

PER CURIAM. [11, 12] The denial of the application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division Two, is not to be taken as indicating that this court concurs in the view of the District Court of Appeal that the trial court erred in refusing the requested instruction quoted in the opinion. This proposed instruction was erroneous, and was properly refused. Nor does this court believe that the giving of the instruction last discussed in the opinion constituted error.

The application for a hearing in this court is denied.

ANGELLOTTI, C. J., and SHAW, WILBUR, LENNON, OLNEY, and SLOANE, JJ., concur.

LAWLOR, J. I dissent. None of the points relied upon by the District Court of Appeal for the reversal of the judgment has any substantial merit. The decision is opposed to the well-settled law of this state on questions of pleading, quantum of proof, and instructions in cases of perjury, and is certain to prove a mischievous precedent. It furnishes another instance of purely technical reasoning, which the rule of decision in the Constitution was intended to obviate, totally defeating the ends of justice, for we have before us the statement of the Attorney General that because of the death of Warren Cooper, the principal witness for the state, and of Lester Dorman, the officer in the case, the denial of the petition will end the prosecution.

The petition should be granted.

52 Cal. App. 631

Ex parte DAVIS. (Cr. 561.)

(District Court of Appeal, Third District, California. May 13, 1921.)

Perjury ⇐11(2)—Testimony of witness in criminal case held material.

Where one had pleaded guilty of murder and sought to withdraw his plea and enter a plea of not guilty on the ground of coercion, threats, etc., alleging in his affidavit that he had been assaulted by a deputy district attorney, false testimony by another witness that a party acting under the sheriff as an armed guard struck such prisoner with his fist was material testimony, since the issue was whether the defendant reasonably feared violence at the hands of such attorney or a mob as alleged, rendering the witness guilty of perjury.

Application of Charles H. Braynard in behalf of George Dewey Davis for writ of habeas corpus to be directed to the sheriff of Shasta county to secure petitioner's release from custody upon a commitment charging perjury. Writ denied.

Martin I. Welsh, of Sacramento, James T. Matlock, of Red Bluff, and C. H. Braynard, of Redding, for petitioner.

U. S. Webb, Atty. Gen., J. Chas. Jones, Deputy Atty. Gen., and Jesse W. Carter, Dist. Atty., of Redding, for respondent.

FINCH, P. J. This is an application of George Dewey Davis for a writ of habeas corpus.

The petitioner is in custody under a commitment from the justice's court holding him to answer on a charge of perjury.

The alleged false testimony is as follows:

"That Leland Gipson, on or about the 12th day of January, 1921, at Kennett, in the county of Shasta, state of California, while Arthur Owen Davis was handcuffed, [did] strike said Arthur Owen Davis in the face with his fist, and that said George Dewey Davis was standing by the side of said Gipson at the time and saw said blow struck by said Gipson."

It is admitted that there was sufficient evidence of the falsity of the testimony, and the ground urged in support of the application is that such testimony was not material to the matter before the court wherein it was given. To arrive at an intelligent understanding of the objection made, it is necessary to recite briefly the events leading up to the proceeding before the court.

One Arthur Owen Davis was arrested in Shasta county on a charge of murder, alleged to have been committed therein. On his arraignment in the superior court of that county he entered a plea of guilty and was by the court sentenced to be hanged. Thereafter, through his attorney, the defendant gave notice that he would move the court to set aside the judgment rendered against him and to permit him to withdraw his plea of guilty and to enter a plea of not guilty. The notice specified that the motion would be based upon the grounds, among others, that his plea of guilty was induced by "coercion, threats, fear, misapprehension, persuasion, promises, assurances," etc., and that at the hearing the defendant would rely upon his affidavit annexed to the notice, the record in the case, and upon oral evidence to be produced at the hearing. In his affidavit the defendant states, among other things, that he was induced to enter his plea of guilty by "coercion, fear, misapprehension, persuasion, promises, assurances, inadvertence, ignorance," etc., "in the manner following, to wit." The defendant then proceeds to state that he was arrested and taken to the town of Kennett on January 12, 1921; that while there in a room and handcuffed L. E. Smith, a deputy district attorney of the county, called the defendant a vile name and threatened to shoot his head off if he did not plead guilty; that at that time Smith exhibited a gun, handed the defendant a bullet, placed his right hand toward his hip pocket, and assumed a threatening attitude towards the defendant and said, "I will give you your choice, you can plead guilty and we will take you down the road and give you protection or we will turn you over to the mob"; that Smith then hit defendant in the face with his fists, violently pulled him to and fro by his clothes, and said, "I will give you two minutes to plead guilty"; that Smith then looked at his watch and said, "I will give you a minute and a half; now you have just one minute;" that the defendant, fearing he would be injured by Smith and turned over to the mob, said, "Yes; I am the man that shot Reives, and that is my gun;" that Smith then said to defendant, "If you don't plead guilty in court, I am going to sit behind you and am going to blow your head off;" that the defendant was taken to the county jail at Red Bluff, where Smith told him that a mob was coming from Redding and he was then taken to Oroville and from there to Sacramento; that the defendant was arraigned in the superior court of Shasta county on the 20th day of January; and that during arraignment Smith appeared in court.

The Leland Gipson referred to in the testimony alleged to be false seems to have been acting under the sheriff, though not a sworn deputy. He was armed and apparently acting as a guard. The petitioner in his testimony given on the hearing of the motion in the murder case stated that Gipson struck Arthur Owen Davis after the latter had confessed to the murder, but it was eight days before the arraignment and plea of guilty in the superior court.

Was the testimony material? The notice and affidavit tendered the issue that at the very time of his arraignment he believed and had reasonable cause to believe that he would suffer violence at the hands of Smith or of a mob if he did not plead guilty. The notice and affidavit constituted the defendant's pleading. They shaped the issues and limited the inquiry to the issues so framed. The affidavit further, and not improperly, stated facts in support of the issue tendered, facts which are, some of them at least, evidentiary. Such affidavits not only form a part of the defendant's pleading, but are admissible as evidence in support of his motion. In so far as the affidavit states merely evidentiary matter it does not limit the scope of the inquiry. The issue was whether the defendant reasonably feared violence at the hands of Smith or a mob. All the facts and circumstances tending to throw light on that subject, were admissible in evidence. The question was whether such facts and circumstances, when considered together, formed a basis for such reasonable apprehension of violence as to force from the defendant an involuntary plea of guilty. Alexander v. State, 20 Wyo. 241, 123 Pac. 71, Ann. Cas. 1915A, 1282. The state of his mind at the time he entered his plea was the fact to be ascertained. Was he probably influenced by the alleged conduct and threats of Smith? The question must be determined from his treatment at the hands of the officers and others and the protection or lack of protection thrown around him. A threat against a prisoner in the hands of officers faithfully discharging their duty of protecting him would not have the significance of the same threat against him where the officers were faithless to such duty. If, after striking and threatening a handcuffed prison-

er, a sworn officer of the law willingly permits another, in his presence, to attack the prisoner, such conduct would reasonably tend to prove that there was danger of the threats being carried into execution. The testimony of the petitioner was clearly material to the matter under investigation by the court.

"The matter sworn to need not be directly and immediately material. It is sufficient if it be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact by giving weight or probability to the testimony of a witness testifying thereto, or otherwise." 22 Am. & Eng. Ency. of Law, 687; People v. Senegram, 27 Cal. App. 303, 149 Pac. 786; People v. Metzler, 21 Cal. App. 82, 130 Pac. 1192; People v. Barry, 63 Cal. 63; 21 R. C. L. 259; State v. Sargood, 80 Vt. 415, 68 Atl. 49, 130 Am. St. Rep. 995, 13 Ann. Cas. 367.

"The ordinary test of materiality is whether the testimony given could have probably influenced the tribunal before whom the case was being tried, upon the issue involved therein. If it tended so to do, it was material, and the degree of materiality is of no importance. * * * It may be laid down as a general rule that any testimony which is relevant in the trial of a given case is so far material to the issue as to render a witness who knowingly and willfully falsifies in giving it guilty of the crime of perjury." State v. Miller, 26 R. I. 282, 58 Atl. 884, 3 Ann. Cas. 943; State v. Moran, 216 Mo. 550, 115 S. W. 1130; Ex parte Metcalf, 8 Okl. Cr. 605, 129 Pac. 680, 44 L. R. A. (N. S.) 513; Coleman v. State, 6 Okl. Cr. 252, 118 Pac. 594.

In the petitioner's closing brief, filed herein May 11th, it is suggested that the complaint does not allege that the testimony given was material. It cannot be said that the complaint wholly fails to allege facts showing that the testimony set out was material and this proceeding cannot serve the office of a demurrer or appeal. In re Johnson, 6 Cal. App. 734, 93 Pac. 199; Ex parte Kaster, 198 Pac. 1031.

The prayer of the petition is denied, and the writ is discharged.

We concur: HART, J.; BURNETT, J.

52 Cal. App. 798

Ex parte CALLAHAN. (Cr. 562.)

(District Court of Appeal, Third District, California. May 13, 1921.)

Application of Charles H. Braynard in behalf of Gerald Callahan for a writ of habeas corpus prayed to be directed to the sheriff of Shasta county to secure petitioner's release from custody upon commitment charging perjury. Writ denied.

Martin I. Welsh, of Sacramento, James T. Matlock, of Red Bluff, and C. H. Braynard, of Redding, for petitioner.

U. S. Webb, Atty. Gen., J. Chas. Jones, Deputy Atty. Gen., and Jesse W. Carter, Dist. Atty., of Redding, for respondent.

PER CURIAM. It is conceded that the same question is involved in this application as that in Ex parte Davis (No. 561) 199 Pac. 576, this day decided. For the reasons stated in the opinion filed in that case, the prayer of the petition herein is denied, and the writ discharged.

186 Cal. 389

GRAY et al. v. BEKINS et ux. (S. F. 7637.)

(Supreme Court of California. June 29, 1921.)

1. Contracts ⊜324(1)—When party who has not fully performed contract can sue thereon.

Under Civ. Code, §§ 1511, 1512, 1514, a party who has contracted to perform an act for an agreed consideration can maintain an action upon the contract even though he himself has failed to fully perform it, if performance on his part was prevented by operation of law, the act of the other party to the contract, the act of God, or the public enemy.

2. Work and labor ⊜14(1)—Party not prevented by other party from performing may not sue on contract, but for reasonable value.

If one party to the contract has not actually prevented performance, but has merely committed a breach of the contract, the other party, where he has not fully performed, cannot maintain a suit upon the contract, but may treat the contract as terminated, and sue for the reasonable value of that which he furnished under the contract.

3. Work and labor ⊜24(1)—Building contractors suing for value of labor and materials not required to prove performance or acts rendering performance impossible.

Where building contractors, on owner's breach of contract, treated the contract as rescinded and sued for the reasonable value of labor performed and materials furnished, it was unnecessary to allege or prove full performance on their part, or acts which rendered performance impossible.

4. Contracts ⊜303(4) — Covenants entitling contractor to proceed with work without interference by owner implied in absence of express covenants.

Covenants that contractor shall be permitted to proceed with the construction of the building in accordance with the terms of the contract, without interference by the owner, and shall be given such possession as will enable him to adequately carry on the construction and complete the work, will be necessarily implied from the building contract, in the absence of express covenants.

5. Contracts ⊜303(5)—Provision for apportionment of loss in event of partial destruction by earthquake did not relieve contractor from performing contract in such event.

Provision of building contract for an apportionment of the loss between owner and contractor in the event of a partial destruction by earthquake did not relieve the contractor from performing the contract in such event.

6. Contracts ⊜306(3)—Provision authorizing owner to supply contractor with men and material did not authorize him to take charge of work.

Provision of building contract authorizing owner to supply contractor with men and material necessary to complete the work in the time required by the contract, if contractor failed to make adequate provisions after specified notice by the owner, did not authorize the owner to take charge of the work himself on the contractor's failure to provide the necessary men and material, but merely permitted the owner to furnish the men and material for the contractor's use.

7. Contracts ⊜317—Owner's notice to contractor to furnish labor and material given after owner's violation of contract ineffectual.

Owner's notice to contractor to provide adequate men and material, under provision of the contract authorizing the owner to furnish men and material on contractor's failure to make adequate provisions after three days' notice by owner, was ineffectual where prior to giving such notice the owner had violated the contract by taking possession of the building and assuming charge of the work.

8. Work and labor ⊜14(1) — On owner's breach contractor may treat contract as terminated, and sue for value.

Action of owner in taking charge of the completion of a partly constructed building, in the absence of an abandonment of the work by the contractor, and in occupying the portion of the building completed, without the contractor's consent, was a breach of the contract entitling the contractor to treat the contract as terminated, and to sue for the value of the labor and material furnished.

9. Appeal and error ⊜1071(6)—Failure to find on issues not affecting plaintiff's rights immaterial.

In contractor's action for value of labor and material furnished, following the owner's breach of the contract prior to completion of the building, court's failure to find on issues as to the acts and expenditures of the owner subsequent to his breach of the contract *held* immaterial, since such acts and expenditures could have had no effect upon the contractor's right to recover the reasonable value of things furnished prior to the breach.

10. Work and labor ⊜27(3)—Provisions of contract immaterial in contractor's action for value of labor and material furnished prior to owner's breach.

Where contractor's action, following owner's breach of the contract prior to completion of the building, was not based upon the contract, but was an action for the value of labor and material furnished prior to owner's breach, it was immaterial that the contract entitled the contractors to only three-fourths of the value of the work performed by them prior to the completion of the building, and provided that the contractors and owners were to share the expenses of repairing damages caused by earthquake.

11. Evidence ⊜471(24) — Testimony as to whether owner's occupancy of partially constructed building interfered with work of contractors held admissible.

In contractors' action against owner for value of labor and material furnished prior to completion of building, in which it was claimed that the owner violated the contract by occupying a portion of the building completed, testimony of a witness as to whether the occu-

pancy of the building by the owner interfered with the contractors in the erection of the building *held* admissible, as against contention that it called for a conclusion, the element of observation entering into the testimony sufficiently to dispel objections to the element of inference.

12. Work and labor ⊂=27(1) — Exclusion of testimony whether owner's occupancy of partially constructed building interfered with work of men employed by owner held not error.

In contractor's action for value of labor and material furnished, against owner who was claimed to have violated the contract by occupying the building when partially constructed, and by taking charge of completion thereof, exclusion of testimony as to whether owner's occupancy interfered with the work of the men employed by the owner *held* not reversible error, in absence of showing that the men were working under the same conditions or performing the same work that would have been required of contractors under the contract.

13. Appeal and error ⊂=1058(2)—Exclusion of testimony subsequently admitted harmless.

Exclusion of testimony subsequently given by the witnesses *held* harmless.

14. Interest ⊂=45 — Allowed from time sum becomes due if it is certain or can be made certain by calculation.

Generally, interest is allowed from the time the sum becomes due if the amount is certain or can be made certain by mere calculation, under Civ. Code, § 3302.

15. Work and labor ⊂=29(1)—Interest is recoverable from time when amount was due, where amount was known and admitted.

Interest is due from the time when the amount in suit becomes due, where exact amount was known to and admitted by defendants, even though the action is one in quantum meruit.

16. Work and labor ⊂=29(1)—Contractors entitled to interest on amount due for labor and material from date of filing of answer admitting value.

In contractors' action for value of labor and material furnished, in which the owners admitted in their answer that the contractors had furnished labor and material in the value of amount subsequently allowed contractors by the judgment, but denied liability therefor, the contractors were entitled to interest on such amount from the date of the filing of the answer.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by G. F. Gray and H. N. Gray, copartners doing business under the firm name and style of Gray Bros., against Martin Bekins and wife. Judgment for plaintiffs, and from the whole thereof defendants appeal, and from that portion which allowed plaintiffs interest on the amount of the judgment only from the date of entry of judgment, plaintiffs appeal. This judgment was reversed by the District Court of Appeal, and on hearing in the Supreme Court the judgment of the superior court was affirmed, and cause remanded, with instructions to allow plaintiffs interest from date of filing of answer.

J. E. Manning and Ames & Manning, all of San Francisco, for appellants.

Wm. H. Chapman and Edwin L. Forster, both of San Francisco, for respondents.

LENNON, J. The partial destruction of an unfinished building by an earthquake on April 18, 1906, engendered the controversy which culminated in the present action. Plaintiffs had constructed the first and second stories of a six-story brick and concrete warehouse, which they had contracted to build for defendants, when the portions erected were damaged by earthquake on the date above mentioned. When plaintiff H. N. Gray, defendant Martin Bekins, the architect, and brick contractor met at the building a few weeks after the earthquake, and examined the structure to ascertain the damages, it was decided that some repairing was necessary. The exact amount of repairing was not determined, but there is testimony that it was decided that, before any further work was performed by plaintiffs, the building inspector of the board of public works of San Francisco should pass upon the extent of repairing to be done, so that any subsequent controversy with the board might be avoided.

Plaintiff H. N. Gray testified that it was agreed that, before plaintiffs proceeded with the work, the examination by the building inspector should be procured by defendants, and that the latter should inform plaintiffs of the result. The next information plaintiffs received after the meeting of the parties at the building above referred to was in the following month of June, when plaintiff H. N. Gray drove to the building, and for the first time discovered men taking down the brickwork and cleaning the brick, although plaintiffs had not authorized any one to tear down or demolish any portion of the building. Plaintiffs thereupon wrote a letter to the architect, dated June 29, 1906, containing a notification that, by tearing down portions of the brick work without plaintiffs' consent, defendant had broken and terminated the contract with plaintiffs. The architect delivered this letter to defendants. The next word received by plaintiffs was a communication from defendants, dated August 14, 1906, notifying plaintiffs that, unless they immediately repaired the damages caused by the earthquake, defendants would make the repairs and charge plaintiffs with a proportionate share thereof. After the receipt of

this letter, plaintiff H. N. Gray again went to the building, and, finding that a considerable amount of repairing had already been performed by defendants, declined to proceed under the contract. It also appears from the testimony that, continuously after the earthquake, the first floor of the building was occupied by the "Bekins Van & Storage Company"; an office for the company had been established in the building, a sign bearing the name of the company was on the front of the building, and several van loads of furniture were stored in the building. Neither plaintiffs nor the brick contractor gave permission to any one to occupy any portion of the structure.

In August, 1906, plaintiffs instituted the present action for the recovery of $6,242.03, the difference between $13,742.03, the value of the work performed on the building by plaintiffs up to April 18, 1906, and $7,500, the sum alleged by plaintiffs to have been paid by defendants. The complaint contains three causes of action. In the first cause of action it is alleged that defendants prevented the performance of the contract by the acts above set forth. The second and third counts omit all reference to the contract and are respectively in indebitatus assumpsit and quantum meruit. Defendants' answer denies that performance of the contract was prevented by defendants, admits the value of the work performed by plaintiffs was $13,742.03, and alleges that $10,485 of this sum has been paid, alleging, by way of a special defense and counterclaim, that the contract provides that the sum paid should at no time during the progress of the work exceed three-fourths of the value of the work done and therefore the sum paid by defendants to plaintiffs was in excess of the amount due, and that, by the terms of the contract, plaintiffs are liable to defendants for a proportionate share of the sum expended by defendants in repairs. Defendants seek to recover a judgment against plaintiffs for $654.75.

The trial court found, among other things, that defendants rendered it impracticable and impossible for plaintiffs to proceed with the construction of the building by taking possession of and occupying the unfinished building as a warehouse and by tearing down and demolishing large portions of the unfinished warehouse, all without authority or consent from plaintiffs. The court further found that $13,742.03 was the value of labor and material furnished by plaintiffs in the construction of the warehouse, of which sum $10,485 had been paid plaintiffs by defendants, and rendered judgment in favor of plaintiffs for the sum of $3,257.03. Defendants appeal from the whole of the judgment, and plaintiffs appeal from that portion which allows plaintiff interest on the amount of the judgment only from the date of the entry of the judgment.

[1, 2] The main point advanced by defendants is that plaintiffs failed to allege or prove full performance or facts excusing performance by plaintiffs. A party who has contracted to perform an act for an agreed consideration can maintain an action upon the contract even though he himself has failed to fully perform if performance on his part was prevented by operation of law, the act of the other party to the contract, the act of God, or of the public enemy. Civ. Code, §§ 1511, 1512, 1514. If the other party to the contract has not actually prevented performance but has merely committed a breach of the contract, the party who has not fully performed the act agreed upon cannot maintain a suit upon the contract, but may treat the contract as terminated and sue for the reasonable value of that which he furnished under the contract. Cox v. McLaughlin, 76 Cal. 70, 18 Pac. 100, 9 Am. St. Rep. 164; Carlson v. Sheehan, 157 Cal. 692, 696, 109 Pac. 29; Connell v. Higgins, 170 Cal. 541, 150 Pac. 769.

[3] In the instant case plaintiffs have treated the contract as rescinded, and are suing for the reasonable value of labor performed and materials furnished, and it was therefore unnecessary to allege or prove full performance on their part or acts which rendered performance impossible. If defendants violated the contract by the commission of the acts alleged, plaintiffs can recover the reasonable value of the work performed and materials furnished by them, less any sums already paid by defendants.

[4] In every building contract which contains no express covenants on the subjects there are implied covenants to the effect that the contractor shall be permitted to proceed with the construction of the building in accordance with the other terms of the contract without interference by the owner, and that he shall be given such possession of the premises as will enable him to adequately carry on the construction and complete the work agreed upon. Such terms are necessarily implied from the very nature of the contract, and a failure to observe them, not consented to by the contractor, constitutes a breach of contract on the part of the owner entitling the contractor to rescind, although it may not amount to a technical prevention of performance.

[5-7] In the instant case the contract provided for an apportionment of loss between owner and contractor in the event of a partial destruction by earthquake, but the contractor was not thereby relieved from performing the contract, nor did the contract require or authorize the owner to take possession of the building and repair the same in the event of a partial destruction. There was a provision in the contract authorizing the owner to supply the contractor with the men and material necessary to complete the work in the time required by the contract

if the contractor failed to make adequate provisions along these lines after three days' notice by the owner. However, the effect of this provision was to permit the owner to furnish men and material for the contractor's use only; it did not authorize the owner to take charge of the work himself. American-Hawaiian Eng., etc., Co. v. Butler, 165 Cal. 497, 133 Pac. 280, Ann. Cas. 1916C, 44. Moreover, the only notice from defendants to plaintiffs was the notice of August 14, 1906, which was ineffectual for any purpose in view of the fact that, long before this notice, defendants had taken possession of the building and assumed charge of the work. The contractor was under the same obligation to continue and complete the building after the partial destruction as before, and the right to proceed with the construction free from interference by the owner likewise continued.

As previously stated, there is testimony to the effect that plaintiffs never at any time authorized defendants to assume charge of the repairing, but that it was agreed that work should cease until defendants had obtained an inspection of the building and notified plaintiffs of the result. Plaintiffs were never notified of the report of the building inspector, nor were they informed that defendants desired plaintiffs to proceed, notwithstanding the agreement. Without notifying plaintiffs in any way whatsoever, or obtaining consent in any form, defendants proceeded to demolish portions of the structure, and, by thus ignoring the contractor's right to continue with the construction of the building and by undertaking to perform the acts due from the contractor, in the absence of an abandonment of the work by the contractor, defendants violated the contract.

[8] Likewise the occupancy of the building by defendants as a warehouse, without plaintiffs' consent was a breach of plaintiffs' rights under the contract. By reason of these violations, plaintiffs were entitled to treat the contract as terminated and sue for the value of what they had furnished. Adams v. Burbank, 103 Cal. 646, 37 Pac. 640.

Defendants next attack certain findings of the trial court. It may be stated that the evidence upon the question of the extent of the occupancy of the building by defendants subsequent to April 18, 1906, as well as the evidence upon the question of plaintiffs' consent to defendants' acts, was conflicting. Upon these issues we have merely set forth the evidence in favor of plaintiffs upon which the findings were based, for that part of the conflicting testimony credited by the trial court constitutes the facts of the case for the purpose of this appeal.

The findings of the trial court are to the effect that defendants, without plaintiffs' consent, took possession of the building about April 25, 1906, occupied the same as a warehouse and have ever since continued to so occupy it; that they demolished portions of the said building without authority or consent from plaintiffs, and that, until these acts of defendants, plaintiffs performed all conditions of the contract upon their part. These findings, together with findings of the value of the work performed and material furnished and the amount thereof remaining unpaid, were sufficient to support a judgment in favor of plaintiffs for the latter sum. The finding that the acts in question prevented performance by plaintiffs, complained of by defendants, is immaterial, and may be regarded as surplusage, for, upon the theory on which the action was brought, plaintiffs were not required to prove performance was rendered impossible.

[9] Defendants claim that the decision is against law, in that the court failed to find on certain issues raised by defendants' special defense. From what has been said it is evident that the findings in effect sufficiently cover the allegations of the defendants' special defense that plaintiffs refused to complete the contract, although defendants had performed all the conditions required of them by the contract. Those allegations of the defense which are not covered by the findings are allegations with reference to defendants' demand upon plaintiffs in August and October, 1906, to complete the warehouse, and allegations concerning the expenditures of defendants in repairing the building. The judgment cannot be disturbed for failure to find on these issues. Mission Brewing Co. v. Rickert, 39 Cal. App. 668–672, 179 Pac. 720. Findings upon these issues, even if in defendants' favor, would not alter the result, for the acts and expenditures of defendants subsequent to their breach of the contract can have no effect upon plaintiffs' right to recover the reasonable value of things furnished by them prior to the breach.

[10] The facts that under the terms of the contract plaintiffs could demand only three-fourths of the value of the work performed by them until the building was completed, and that they were to share the expenses of repairing damages caused by earthquake can have no effect upon the judgment in this case. The plaintiffs have not sued upon the contract and the provisions of the contract do not control, for defendants cannot ignore their own obligations under the contract and, at the same time, seek to hold plaintiffs to its terms. Adams v. Burbank, 103 Cal. 646, 650, 37 Pac. 640; Keeling v. Schastey, 18 Cal. App. 764, 768, 124 Pac. 445; Tubbs v. Delillo, 19 Cal. App. 612, 127 Pac. 514.

[11] A witness called in behalf of plaintiffs was asked if the occupancy of the property by defendants in the manner described was such as to interfere with the contractors in the erection of the building. An objection upon the ground that the question called for a conclusion of the witness was overruled, and the ruling is assigned as error by defendants. The question does not require a

pure conclusion, but a combination of observation and inference on the part of the witness, and the element of observation enters into the testimony called for to a sufficient degree to dispel the objections to the element of inference. 22 C. J. § 611; McCormick Mach. Co. v. Burandt, 136 Ill. 170, 26 N. E. 588.

[12, 13] Two witnesses for defendants were asked on direct examination whether defendants' occupancy interfered with the work of the men employed by defendants to repair the structure. Defendants complain because an objection to the question was sustained. The ruling does not constitute reversible error. As stated in the objection, it was irrelevant whether the men employed by defendants were interfered with or not, for it does not appear that these men were working under the same conditions or performing the same work that would have been required of plaintiffs under the contract. A witness for defendants was asked whether or not, at the meeting of the parties at the building, shortly after the earthquake, he heard plaintiff H. N. Gray say anything with reference to taking down or rebuilding any portion of the building or in regard to completing the building. Objections to the questions on the ground that they were leading were sustained. Even if the sustaining of the objections was erroneous, defendants were not prejudiced thereby, for it appears that the witness subsequently gave the testimony called for by the questions.

As previously stated, plaintiffs also appeal from the judgment, and that appeal is grounded in the contention that, inasmuch as there was not at any time any dispute as to the value of the work performed and materials furnished by the plaintiffs, the sum to which the plaintiffs are entitled was liquidated and certain, and that therefore the plaintiffs should have been allowed interest on the amount of the judgment from the date of the commencement of the action.

The value of the labor performed and materials furnished by plaintiffs in the construction of the warehouse was expressly admitted in the answer of the defendants to be the sum of $13,742.03, as pleaded in the plaintiffs' complaint. Plaintiffs' complaint alleged that only $7,500 had been paid for and on account of such labor and materials, while the defendants' answer pleaded that they had paid the sum of $10,485, and, in effect, admitted that they were indebted to the plaintiffs in the sum of $3,257.03, which was the difference between the admitted value of plaintiffs' work and materials furnished and the sum alleged to have been paid on account thereof. In this behalf the trial court found in accord with the allegations of the defendants' answer.

[14, 15] The general rule is that interest is allowable from the time the sum in suit becomes due if the same is certain or can be made certain by mere calculation. In actions upon contracts the sum due or the means of calculating the sum are usually clearly provided for in the contract and interest is consequently allowable from the time the sum in suit becomes due. (Civ. Code, § 3302; Fairchild v. Bay Point etc. R. R. Co., 22 Cal. App. 328, 134 Pac. 338.) True, the action here is one in quantum meruit, but even so, if the exact amount of the indebtedness due the plaintiffs was known to and admitted by the defendants, the parties to be charged, the reason for refusing interest until the amount due is made certain by evidence no longer obtains. Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Courteney v. Standard Box Co., 16 Cal. App. 600, 117 Pac. 778.

[16] The test, then, to be applied in the instant case is whether or not the exact sum found to be due was known and admitted by the defendants to be due to the plaintiffs. We are of the opinion that the allegations of the defendants' answer in the particulars previously pointed out constituted an acknowledgment of plaintiffs' claim, to the extent of the sum therein admitted, and by the trial court found to be due to the plaintiffs. In short, the admission of the defendants' answer in this behalf was tantamount to an ascertainment of the balance found to be due the plaintiffs and consequently interest should have been allowed thereon from the date of the filing of the answer, namely, March 27, 1907. Skinker v. Clute, 9 Nev. 342.

It follows from what has been said that the judgment against the defendants must be, and it is hereby, affirmed. It likewise follows that the judgment allowing interest to the plaintiffs only from the date of the entry of the judgment was erroneous, and it is therefore ordered, upon the appeal of the plaintiffs, that said judgment be modified by allowing to the plaintiffs interest on the amount found due from the date of the filing of the defendants' answer, and the cause is remanded to the court below for the purpose of ascertaining said interest, and thereupon entering judgment for the plaintiffs accordingly.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SLOANE, J.; WILBUR, J.; SHAW, J.; LAWLOR, J.

186 Cal. 437

WILSON v. BEAZLEY. (L. A. 5920.)

(Supreme Court of California. July 7, 1921.)

1. Vendor and purchaser ⟸110 — Delay of vendor in tendering deed on offer to pay balance of price held not ground for rescission.

Where contract for sale of land provided that the vendor should convey title on payment in full at maturity of any installment of the price, and the purchaser, without giving notice to the vendor that he intended to exercise his option to pay the balance of the price, tendered the full amount on an installment day, and demanded a deed, a delay of five days in tendering title papers was not so unreasonable as to give the purchaser ground for rescission.

2. Vendor and purchaser ⟸114—Easement in land as a ground for rescission by vendee is waived by such vendee by his joining in the grant of a supplemental easement.

Where an easement in land prevents the vendor from giving a good title according to a contract of sale, a vendee in possession does not waive his right of rescission by continuing in possession of the land, but, by a grant of an easement supplemental to the one already in existence, he waives his objections to the first easement.

3. Vendor and purchaser ⟸119—Delay held to defeat right to rescission by injury to property.

A delay of one year after damage to the property by floods will defeat a purchaser's right to rescind.

4. Vendor and purchaser ⟸117—Damage to land by vendee prevents his rescission.

Where the vendee has damaged land by removing soil and an orchard, he cannot rescind for injury to the property by floods, since he cannot return to the vendor what he has received under the contract.

5. Vendor and purchaser ⟸114 — Tendering remainder of purchase price and demanding deed by vendee waives right to rescind contract of purchase.

Although real estate was damaged enough by floods to give vendee a right to rescind the contract, where, after such injury, he tendered the remainder of the purchase price and demanded a deed, he waived his right to rescind.

6. Vendor and purchaser ⟸214(6)—A vendor may not enforce specific performance of executory contract against an assignee of the vendee.

Although defendant, assignee of the vendee of an executory contract for the sale of land, wrote below the assignment of the contract that he agreed to accept it, and signed it, yet, such writing and signing having been made without consideration after the assignment was complete, and without the knowledge of either assignor or vendor, he is not liable to the vendor in a cross-complaint for specific performance, Civ. Code, § 1589, providing that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, being applicable to an assignee only when all the benefits of a full performance by the vendor have inured to the assignee.

7. Vendor and purchaser ⟸214(6)—Assignee of vendee held not liable on executory contract.

Where contract for sale of land is executory, the performance of acts by the assignee of the vendee causing depreciation in the value of the property can have no further effect than to render him liable in an action for damages, and does not create a contractual relation between the assignee and the vendor or personal liability by the assignor to the vendor; nor would such a contractual relation be established by the assignee's tender of the purchase price.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Philip L. Wilson against E. E. Beazley, in which defendant filed a cross-complaint. Judgment for defendant on both complaint and cross-complaint, and plaintiff appeals. Affirmed as to judgment on complaint; reversed as to judgment on cross-complaint.

Newlin & Ashburn, of Los Angeles, for appellant.

R. Y. Williams and A. W. Rutan, both of Santa Ana, for respondent.

LENNON, J. Plaintiff and cross-defendant appeals from a judgment rendered against him upon both complaint and cross-complaint. The contract out of which the present action arose was an agreement for the sale of real property executed December 1, 1911, by defendant Beazley, as owner, and O. H. and Rachel M. Embree, as purchasers. By the terms of this contract the vendees agreed to pay the sum of $8,000 in $1,000 annual installments, with interest on deferred payments payable annually on the 1st of December, and to pay all taxes and assessments that might thereafter become due on the premises. The right was reserved to the vendees "of making partial payments in any sums above the stipulated amounts before mentioned on any interest bearing date." The vendor contracted to execute and deliver, upon receipt of these payments, as called for, a good and sufficient deed of the premises, and to furnish an unlimited certificate of title thereto.

This contract was assigned by the Embrees to Philip L. Wilson, plaintiff herein, by an indorsement reading as follows:

"Los Angeles, November 15, 1912. We hereby transfer all our right, title, and interest in this contract to Philip L. Wilson."

On October 21, 1913, plaintiff Philip L. Wilson inserted in this assignment the words,

"and he agrees to accept the same," and caused the contract and indorsed assignment to be recorded. The assignee, Wilson, entered into possession of the premises after the assignment, and made payments under the contract. On December 1, 1916, at the time an installment of principal and interest became due, plaintiff Wilson tendered defendant Beazley the full amount of principal and interest under said contract, except the sum of $54.55, which had been paid by defendant for taxes, and demanded the deed and certificate of title to the property. The tender was made about 4 o'clock in the afternoon on a ranch some 14 miles from the town of Santa Ana, and defendant's papers and muniments of title had been left in town with his attorney. Defendant telephoned to the office of his attorney in Santa Ana, but found he was out of town, and so informed plaintiff, stating that it would be necessary for defendant to go to his attorney's office for the required papers. Plaintiff and his attorney thereupon departed, declaring that they "could not run all over the country."

The following day, December 2, 1916, plaintiff served defendant with a written notice of rescission of the contract based upon defendant's alleged refusal to accept and comply with the conditions of the tender of the day before. On December 6 defendant tendered plaintiff a deed to the property and a certificate of title, which had been brought down to date. Plaintiff declined to accept the same, and brought the present suit, wherein he seeks the recovery of the money paid by him under the contract, setting forth a cause of action for rescission and one based upon failure of consideration. Defendant, by cross-complaint, seeks a specific performance of the contract. The trial court decreed that plaintiff recover nothing, and that defendant was entitled to the immediate payment of the total amount of the purchase price remaining unpaid, or $4,726.95, with interest.

[1] Plaintiff directs attention to the fact that the deed and certificate of title were not produced by defendant until five days after plaintiff's tender of the purchase price. It is conceded that defendant had no notice whatever that plaintiff would elect to pay the balance of the purchase price on December 1, 1916, and that defendant had reason to believe that plaintiff did not even intend to pay the installment of principal which fell due on that date. Considering all of the circumstances, it cannot be seriously claimed that defendant's offer of the deed and certificate of title on December 6, 1916, was not a sufficient compliance, in so far as the element of time is concerned, with his contractual obligation to produce a deed and certificate upon the tender of the purchase price. The final installment of the purchase price was not actually due until December, 1918, and defendant was not required to keep a deed and certificate of title in continual readiness prior to that date, in the absence of notice that plaintiff had elected to accelerate the transfer of title. Under the facts of this case an immediate readiness to perform on the part of the vendor could mean no more than an offer and readiness to perform as soon as reasonably possible after notice of plaintiff's election (McVitty v. Flentge, 34 Cal. App. 781, 784, 169 Pac. 666), and there is every indication that there was no unreasonable delay in this respect.

[2] In support of his action to recover the money paid under the contract, plaintiff relies primarily upon two grounds. The first is that defendant was unable to furnish a clear title to the property, for the reason that the certificate of title showed the property to be subject to an existing easement. It appears that in September, 1911, prior to the execution of the contract of sale, defendant Beazley had granted to the Standard Oil Company an easement for a pipe line and for telegraph and telephone lines on a single line of poles. Plaintiff Wilson was not informed of the existence of this easement until December 19, 1913. On the date last mentioned the plaintiff, Wilson, joined in a grant to the Standard Oil Company of an easement for a second pipe line upon the premises, which was, to quote from the grant, "to be laid along and parallel to the pipe lines of grantee now upon said property." And it is further provided in this second grant:

"The rights herein granted are supplemental and in addition to the rights granted in and by certain grant to said Standard Oil Company dated September 28, 1911, and recorded in Book 4694 of Deeds, at page 224, Los Angeles county records."

The mere fact that the assignee, Wilson, continued in possession of the premises after receiving actual knowledge of the existence of the incumbrance created by defendant Beazley did not constitute a waiver of the right of rescission for defective title. This is so for the reason that, where the incumbrance is such that it can, in the nature of things, be removed, no right of rescission exists until the time for performance by the vendor has arrived and the latter has failed to effect the required removal. Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82; Prentice v. Erskine, 164 Cal. 450, 129 Pac. 585. While in such a case the vendee does not waive his right to the removal of an incumbrance by merely continuing in possession after knowledge of its existence, he may, nevertheless, waive this right in other ways before the time for performance by the vendor has arrived. That is to say, he may waive the right by performing acts plainly indicating that he does not contemplate the extinguishment of a particular incumbrance. This the plaintiff, Wilson, has done in the in-

stant case by joining in the grant of the supplemental easement for the consideration of $100 paid to him at the time of the execution of the second grant, without raising any objection to the continued existence of the rights acquired under the first grant. Upon the facts proven the trial court was amply justified in finding:

"That plaintiff, by the entering into the supplemental agreement for the additional pipe line easement, * * * intended to and did waive any and all objections that he might otherwise have had to the original grant of easement."

[3, 4] The second ground relied upon by plaintiff is the damage wrought by four floods, two in the year 1914, and two in January, 1916. The testimony shows, and it is found by the trial court, that, as a result of the floods, a large part of the surface soil on the premises was washed away; a river which formerly did not touch the property in question established a new course through the same, and the premises depreciated in value, but were not completely destroyed. On the other hand, it was found by the court that when plaintiff went into possession of the property he removed therefrom, despite defendant's objection, an apple orchard which produced a crop worth over $1,000 a year, and that he also scraped off and removed to adjoining property considerable surface soil. The court found, and the evidence shows, these acts of the plaintiff reduced the land in value from $8,000 to $4,000.

It is apparent that plaintiff by his own acts placed himself in a position where he was unable to restore to defendant that which he had received under contract. Furthermore, assuming, for the purpose of discussion, and without deciding, that the alleged injuries to the land in suit caused by the floods constituted a cause for rescission, nevertheless the duty devolved upon the plaintiff to effect a rescission, if he were entitled to the same, with promptness. Civ. Code, § 1691, subd. 1. The failure to exercise reasonable diligence in this regard, after notice of the accrual of the right, will defeat the rescission. Ferguson v. Edgar, 178 Cal. 17, 171 Pac. 1061. A considerable interval of time ensued between plaintiff's first knowledge of the destruction caused by the flood and his attempted rescission.

[5] Moreover, plaintiff not only failed to promptly notify defendant that he declined to proceed with the purchase, but, in December, 1916, almost a year after the last flood, elected to tender the balance of the purchase price and demand a conveyance of the property at that time. When plaintiff did serve a notice of rescission on December 2, 1916, it was based solely upon defendant's alleged refusal to accept plaintiff's tender and inability to furnish a clear title to the property. Having affirmed the contract after knowledge of the damage caused by the floods, plaintiff is precluded from claiming a failure of consideration or a right of rescission because of that damage.

[6] This disposes of the contentions in support of plaintiff's action for the recovery of the money paid under the contract, and there remains for consideration defendant's cross-complaint for specific performance of the contract. In this connection plaintiff and cross-defendant, Wilson, calls attention to the decision of the District Court of Appeal of this state in the case of Beazley v. Embree, 41 Cal. App. 706, 183 Pac. 298. This was an action by the present defendant Beazley against the Embrees and the assignee, Wilson, upon the same contract here in controversy for the recovery of the $1,000 installment due December 1, 1915. The court there held, upon appeal by the assignee, Wilson, that there was no privity between the assignee, Wilson, and Beazley, and, therefore, that Beazley had no right to sue Wilson directly for moneys under the contract. Plaintiff Wilson now contends that this decision is the law of the case on this appeal. Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049. We need not determine whether a decision of the district court of appeal on a former appeal is the law of the case on a subsequent appeal to the Supreme Court, irrespective of the Supreme Court's approval of that decision, for we are of the opinion that the decision in that case is correct, and that no additional facts have been presented in the case at bar to alter the reasoning there applied.

In the case of Lisenby v. Newton, 120 Cal. 571, 52 Pac. 813, 65 Am. St. Rep. 203, it was held that the assignment of the vendee's "right, title, and interest" in a contract for the sale of real property does not render the assignee personally liable to the vendor for payments thereunder, even though the assignee take possession under the contract. In the instant case there was such an assignment. There was no contract directly for the benefit of the vendor, nor was there at any time any privity between the vendor and assignee. The words "and he agrees to accept the same," even if capable of interpretation as an agreement to assume personal liability to the vendor, are without such force in this case. They were added without consideration after the assignment was complete and without the knowledge of either assignor or vendor. The finding of the trial court that plaintiff and cross-defendant Wilson "did insert and cause the said words to be written therein for the purpose of consenting to and assuming the obligations of said contract and giving notice thereof," and that "the said plaintiff assumed the obligations of the said Embrees under said contract," is not supported by the evidence, and therefore need not be further considered.

[7] The performance of acts by the assignee causing depreciation in the value of the property could have no further effect than to render him liable in an action for damages; such acts did not create a contractual relation between the assignee and vendor. Nor was a contractual relation established by the assignee's tender of the purchase price on December 1, 1916. It was held in Lisenby v. Newton, supra, that payments by the assignee of principal and interest on account of the contract price did not give rise to an implication that the assignee had assumed a personal liability to the vendor for the payment of the sums due under the contract. It was stated in that case:

"Of course, no assignee of the purchaser in an executory contract for the sale of real estate can require the vendor to convey unless the purchase money be paid, but this conditional right to a conveyance is quite a different thing from personal liability to compulsory payment at the suit of the vendor; such liability can result only from some express or implied contract of the assignee, and is not implied from the mere assignment of the original contract, although followed by possession of the land."

Section 1589 of the Civil Code, providing that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, does not alter the rule of the case of Lisenby v. Newton, supra. This section is applicable to an assignee only when all the benefits of a full performance by the vendor have inured to the assignee. Robinson v. Rispin, 33 Cal. App. 536, 541, 165 Pac. 979. It follows that the vendor Beazley cannot hold cross-defendant Wilson personally liable for performance of the contract.

The judgment upon the complaint is affirmed, and the judgment upon the cross-complaint is reversed, with direction to the court below to enter upon the findings made a judgment of strict foreclosure, requiring the payment within a reasonable time to be fixed by the court of the amount found due the defendant, and directing that, in default of such payment, the rights of plaintiff be terminated.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

186 Cal. 473

WALL v. HUNTER et al. (L. A. 6429.)

(Supreme Court of California. July 13, 1921.)

Appeal and error ⊂=411—Notice to clerk to prepare transcript not sufficient notice of appeal.

Under Code Civ. Proc. § 941b, relative to notice of appeal, and section 953a, providing that any person desiring to appeal may file with the clerk a notice stating that he desires to appeal, or has appealed, and requesting a transcript to be prepared, a notice entitled "Notice of Appeal and Request for Transcript under section 953a, C. C. P.," and stating that plaintiff "has appealed," and requesting the clerk to prepare a transcript, is not a sufficient notice of appeal; there being nothing to show that plaintiff is thereby taking an appeal.

Department 1.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by Sarah J. Wall against J. George Hunter and others. From a judgment dismissing the action, plaintiff appeals. On motion to dismiss the appeal. Appeal dismissed.

D. B. Chaplin, of Los Angeles, for appellant.

A. Aird Adair, of Riverside, for respondents.

LAWLOR, J. This is an appeal from a judgment against plaintiff, Sarah J. Wall, and in favor of the defendants, dismissing the action because of the failure of plaintiff to file an undertaking securing the payment of costs, as required by section 1036 of the Code of Civil Procedure. The action was for damages in the sum of $100,000 for the alienation of the affections of plaintiff's husband, Thomas D. Wall. Service of summons was only made on the defendants J. George Hunter and A. H. Winder, although one John J. Wall was a party defendant. The complaint was filed on August 19, 1919. A general demurrer was interposed on behalf of Hunter and Winder. On September 29, 1919, an amended demurrer was filed. On the same day Hunter and Winder, in their own proper persons, filed the demand for security for costs, whereupon the court declined to hear the demurrer. Plaintiff then moved to strike the demand from the files. Before this motion was heard, Hunter and Winder, by their attorney filed a second demand for security for costs. The motion to strike the first demand from the files was denied, and later, upon motion of Hunter and Winder, the action was dismissed, and judgment entered as heretofore stated. Following this, plaintiff filed a purported notice of appeal in these words:

"[Title of Court and Cause] Notice of Appeal and Request for Transcript under Section 953a, C. C. P. To Honorable D. G. Clayton, Clerk of said Court—Sir: You will please take notice that the plaintiff in the above-entitled action has appealed to the Supreme Court of the state of California from the order entered by said court on the 10th day of November, 1919, dismissing the above-entitled action, and does hereby request that a transcript * * *

be made up and prepared in compliance with section 953a of Code of Civil Procedure."

Respondents appeared specially before this court to move to dismiss such appeal. This motion was heard and denied, without prejudice, however, "to renewal at hearing of cause on merits." The motion was thereafter renewed, and respondent now contends that the said notice of appeal is not sufficient, in that it does not indicate an intention to thereby appeal, within the meaning of section 941b, Code of Civil Procedure. The language of this section is that the appellant "does thereby appeal." The notice here states that appellant "has appealed."

We have considered a number of cases wherein the notice under section 953a was relied on to constitute the appeal. It was said in Boling v. Alton, 162 Cal. 297, 122 Pac. 461:

"Section 953a merely provides a substitute for a bill of exceptions. It does not purport to authorize an appeal, or prescribe how it may be taken. The language of this notice is a literal compliance with this section. It does not comply with the provisions of section 940 or 941b, prescribing the method of taking an appeal. It states, in effect, that an appeal had been * * * taken, which was not true. * * * We do not think that a notice which is a literal and proper compliance with section 953a, and which merely initiates the statutory proceeding there prescribed for making up the record, should be turned by construction into a notice of appeal, and held to be good as such, under a section with which it does not comply."

In Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430, it was held:

"Because of the frequent misunderstanding of the effect of this section [953a] we repeat that it does not provide for a notice of appeal, and that a notice given under it, in the form there prescribed and without other appropriate words, is not a good notice of appeal. Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1026; Boling v. Alton, 162 Cal. 298, 122 Pac. 461; Lent v. California F. G. Ass'n, 161 Cal. 719, 121 Pac. 1002. Counsel for respondent do not raise the objection, and we therefore assume that a proper notice of appeal was filed, and that its insertion in the record was waived."

In Estate of Faber, 168 Cal. 491, 143 Pac. 737, it was declared:

"The opening part of the notice of appeal shows the defect relied on. It is as follows: 'Notice is hereby given, pursuant to section 953a of the Code of Civil Procedure, to all persons concerned that the undersigned, Mary E. Suffal, desires to appeal, and does hereby appeal, to the Supreme Court from the order,' etc. We deem this a sufficient notice in substance, although it is not in good form. It differs from the notices of appeal held insufficient in Lent v. California, etc., Ass'n, 161 Cal. 719, 121 Pac. 1002, Boling v. Alton, 162 Cal. 299, 122 Pac. 461, and Marcucci v. Vowinckel, 164 Cal. 695, 130 Pac. 430, in this: that it expressly states that Mary E. Suffal 'does hereby appeal,' from the order, etc. * * * The notices in the cases cited did not contain any equivalent language, but were plainly phrased for notices to the clerk to prepare the transcript, as provided by section 953a. This notice expressly states that the petitioner does appeal, and it is therefore good as a notice of appeal under section 941b of the Code of Civil Procedure. The fact that it is drawn to serve the double office * * * does not destroy its effect as a notice of appeal."

These cases are decisive of the question of the validity of this appeal. No notice was filed under section 941b, and the notice here contains no language which could serve as the equivalent of a notice that the appellant was thereby taking an appeal.

It is unnecessary, therefore, to consider the merits of the purported appeal.

The appeal is dismissed.

We concur: SHAW, J.; SHURTLEFF, J.

186 Cal. 445

HARRIS v. CLAYTON. (S. F. 8926.)

(Supreme Court of California. July 7, 1921. Rehearing Denied Aug. 4, 1921.)

1. Principal and agent ⟸23(1) — Evidence held to prove that plaintiff's assignor sold goods to defendant on his own account, and not as agent.

In action for goods sold and delivered, in which defendant claimed that plaintiff's assignor in the sale of the goods to defendant acted merely as the agent of a third party, and therefore was not a proper party in interest, evidence *held* to prove that the assignor sold the goods on his own account, and not as agent for a third party.

2. Principal and agent ⟸25(3)—Agent's assignee estopped from claiming that agent sold defendant goods on his own account only if fraud or disadvantage or damage to defendant is shown.

Where a salesman employed to represent a firm in certain territory introduced himself to a buyer as the representative of such firm, corresponded with such buyer on the firm's stationery, and made invoices and rendered statements upon the firm's billheads, the salesman's assignee in action against the buyer for goods sold and delivered would have been estopped from claiming that the goods were sold to buyer by the salesman on his own account, if any fraud upon the buyer or disadvantage or damage to her were shown, but was not estopped from claiming that the salesman was carrying the claim against the buyer on his own account or at least in his own name as a trustee for the firm in the absence of such a showing.

3. Parties ⟸7(2)—Salesman who sold goods on his own account could bring action against buyer.

Where a salesman who represented a firm in certain territory introduced himself to a

buyer as the representative of such firm, corresponded with the buyer on the firm's stationery, and made invoices and rendered statements upon the firm's billheads, but where the salesman kept the account in his own name and was permitted by the firm to do a business on his own account, and where in fact the firm had no account with such buyer, the salesman's assignee could maintain an action for the sale and delivery of the goods, either on the theory that the salesman was the real party in interest, or, if an agent, was acting with authority to carry and collect the account in his own name, and thereby became a trustee of an express trust within Code Civ. Proc. §§ 367, 369, permitting such a trustee to sue in his own name.

4. Limitation of actions ⊂⊃146(3)—Debtor's request to have payments applied against an old indebtedness held a promise to pay indebtedness on which creditor might have brought suit.

Retailer's letter to wholesaler requesting wholesaler to apply monthly cash payments against an old account instead of applying them toward payment of goods being furnished on a new account *held* an admission of the indebtedness on the old account and a promise to pay it that might have been sued upon as a new promise in writing.

5. Limitation of actions ⊂⊃148(4)—Letter requesting creditor to apply current payments to old account held to toll statute as to old account.

Debtor's letter to creditor requesting that the monthly cash payments being made by debtor be credited on an old account instead of being applied to a current account for goods being furnished *held* to toll the statute of limitations as to the old account.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by M. H. Harris against Nellie Clayton, also known as Nellie A. Clayton, also known as N. A. Clayton, also known as Mrs. E. O. Clayton. Judgment for defendant, and plaintiff appeals. Reversed.

Arnold C. Lackenbach and Lionel D. Hargis, both of San Francisco, for appellant.

Brantley W. Dobbins and H. M. Anthony, both of San Francisco, for respondent.

SLOANE, J. The plaintiff brought this action as the assignee of one W. J. Conroy to recover a balance on account for goods sold and delivered from San Francisco to the defendant in Manila, P. I.

The account covered a period of several years and the total sales amounted to many thousands of dollars upon which payments were made from time to time.

It is claimed by plaintiff that the account was carried for the entire period as an open running mutual account. The items sued for constitute an alleged balance for goods sold and delivered between the 1st day of November, 1913, and the 1st day of August, 1914, in the sum of $3,715.37.

The same amount is also sued for in a separate cause of action on account stated, but this count was not pressed, no evidence being offered in its support.

The defendant interposed two defenses. First, that the suit was not brought in behalf of or in the name of the real party in interest; and, second, that the balance owing on the account, the amount of which was not disputed, was for goods purchased prior to March 17, 1913, and thereafter was stated by oral agreement between the parties in July, 1914, and that any claim therefor, whether on the open account or as a stated account, was barred by the statute of limitations. The complaint was filed March 7, 1917.

The findings material to the issues here presented are as follows:

"Second. That on or about the month of March, 1911, W. J. Conroy, who was then, and ever since has been, in the employ of Muller & Raas, wholesale milliners, engaged in the business of wholesale millinery in the said city and county of San Francisco, acting for and on behalf of Muller & Raas, entered into an oral agreement with the defendant whereby the defendant agreed to purchase on open book account, and the said W. J. Conroy, acting for and on behalf of Muller & Raas, agreed to sell to the defendant on open book account at Manila, Philippine Islands, millinery goods, and thereafter and commencing in the month of March, 1911, said goods were so sold and delivered to defendant at Manila, and that from time to time additional goods were sold, as aforesaid, on open book account, up to the 26th day of December, 1912; thereafter defendant purchased millinery goods from said W. J. Conroy, acting for and on behalf of Muller & Raas, through Peabody & Co., of Manila, Philippine Islands, and San Francisco, paying for said millinery goods cash at San Francisco, and that said cash transactions continued up to the 15th day of October, 1913, at which time the defendant assigned the millinery business which she then maintained at Manila, Philippine Islands, to Peabody & Co.

"Third. That the defendant between the month of March, 1911, and the 26th day of December, 1912, purchased through W. J. Conroy, who was then and ever since has been in the employ of Muller & Raas, wholesale milliners engaged in the business of wholesale millinery in said city and county of San Francisco, acting for and on behalf of said Muller & Raas, and entered into an oral agreement with said W. J. Conroy whereby the defendant agreed to purchase on open book account at Manila, Philippine Islands, millinery goods, and thereafter and commencing in the month of March, 1911, said goods were so sold and delivered to the defendant at Manila, and that from time to time thereafter additional goods were sold as aforesaid, on open book account,

up to the 26th day of December, 1912; that on the 1st day of July, 1914, the said account was stated and upon such statement a balance of $3,715.37 was found to be due against the defendant, in favor of said W. J. Conroy, acting as aforesaid, in favor of said Muller & Raas."

As conclusions of law the court finds that the plaintiff is not the real party in interest, and that the claim sued on is barred.

[1] We agree with appellant that the evidence does not support the finding that Conroy, plaintiff's assignor, was not a proper party in interest. It is true, as contended by respondent, that Conroy introduced himself to her as the representative of the San Francisco millinery firm of Muller & Raas, and his subsequent dealings with her were calculated to assure her and doubtless did lead her to the conclusion that she was dealing with the firm of Muller & Raas through Conroy as its agent. A conversation which respondent testified to between herself and a member of the firm of Muller & Raas in effect confirmed this belief. The correspondence between Conroy and respondent was mostly on the firm stationery, and the invoices and statements were rendered upon the firm billheads.

[2] This evidence would be ample to estop the plaintiff from disputing the fact, as found, if any fraud upon respondent or disadvantage or damage to her were shown. But no elements of estoppel enter into the case. Respondent makes no claim that she suffers disadvantage by permitting it to be shown that Conroy was carrying this claim on his own account, or at least in his own name as a trustee for his firm.

That this was actually the case there can be no question under the evidence. Conroy testifies that while he was the traveling salesman of Muller & Raas within certain territory he was also doing business on his own account in the Orient with the consent of his employers, and that this was one of the accounts carried in his own name. The only entry of account in this transaction was shown to have been one kept by himself; and one of the members of the firm of Muller & Raas and secretary of the company testified that he was familiar with the accounts of the firm, and that they had never sold Mrs. Clayton any goods and never rendered her any account or demand, and that Conroy was privileged to and did carry accounts for himself in the Orient and in Australia. No attempt was made to show that any account with Mrs. Clayton appeared upon the firm books. The witness testified that, while he had not examined the books to verify his statement, he was positive there was no such account.

Mrs. Clayton testifies to a conversation which she had on one of her visits to San Francisco with a member of the firm, one of the Raas brothers, which, like her dealings with Conroy, would justify her belief that the firm was carrying the account. She says:

"He also told me that he found from long experience that it was best to have one representative, one territory, and that all my negotiations should therefore be addressed to Mr. Conroy, and all the banking business, all the customhouse business, all the cable codes, invoices, bills, etc., should be attended to by Mr. Conroy, as the Eastern representative of the firm of Muller & Raas."

At the same time this representation by a member of the firm authorized respondent to look to and deal with Conroy exclusively, and on the strength of this authorization she admits having carried on all her correspondence and made all of her remittances directly and personally to Conroy. In her answer defendant pleads that an oral account was stated on or about the 15th of August, 1914, "between said W. J. Conroy and the defendant," and that upon such statement "a balance of $3,715.37 was found due to the said W. J. Conroy from said defendant."

[3] We are satisfied under this state of the evidence that the plaintiff could maintain this action as the assignee of Conroy either on the theory that he was the real party in interest, or, if an agent, was acting with authority to carry and collect the account in his own name, and thereby became a trustee of an express trust within the meaning of section 369, Code of Civil Procedure.

Section 367 of the Code of Civil Procedure, which requires that every action must be prosecuted in the name of the real party in interest, makes an exception as provided in section 369 of the same Code to the effect that a trustee of an express trust may sue without joining with him the persons for whose benefit the action is prosecuted, and declares that—

"A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

In Mechem on Agency (2d Ed.) § 2028, it is said:

"The agent's right to sue in these cases (where a third person has dealt with an agent) is not usually defeated by the statutory provisions found in many of the states that actions shall be brought in the name of the real party in interest, since these statutes either contain express exceptions, or, under the right of a trustee of an express trust to sue, provide such comprehensive definitions of such a trustee as to include an agent who has made a contract for his principal."

In Tandy v. Waesch, 154 Cal. 108, 97 Pac. 69, the plaintiff had entered into a contract for the purchase of land in his own name, but for the benefit of a third party. In an action under this contract he was held a proper party plaintiff. This court in the

opinion in the case cited thus states the rule as provided in sections 337 and 339, Code, of Civil Procedure:

"Tandy, however, was a proper party plaintiff. To the general rule laid down in section 367 of the Code of Civil Procedure that every action must be prosecuted in the name of the real party in interest, there are certain exceptions specified in section 369 of the Code of Civil Procedure. That section authorizes the trustee of an express trust to sue without joining the beneficiary and declares that a person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this section. The contract having been made in Tandy's name for the benefit of Garland, Tandy thus became the trustee of an express trust and entitled to maintain the action."

See Walker v. McCusker, 71 Cal. 594, 12 Pac. 723; Giselman v. Starr, 106 Cal. 657, 40 Pac. 8; Los Robles Water Co. v. Stoneman, 146 Cal. 204, 79 Pac. 880; Anglo-Californian Bank v. Cerf, 147 Cal. 384, 81 Pac. 1077; Pomeroy's Code Remedies, §§ 103, 105; Bliss on Code Pleadings, § 57.

Appellant makes objection to the sufficiency of the findings on this point.

Referring again to the findings quoted, it will be observed that there is no direct finding that defendant did not become indebted to W. J. Conroy in the sum of $3,715.37 between the 1st day of November, 1913, and the 1st day of August, 1914, on an open book account, as alleged in the complaint.

The finding upon which this issue for defendant rests is only to the effect that up to the 26th day of December, 1912, goods were sold to defendant by W. J. Conroy, acting for Muller & Raas, and that thereafter within the dates alleged by the complaint "defendant purchased millinery goods from W. J. Conroy, acting for and on behalf of Muller & Raas, through Peabody & Co., of Manila, Philippine Islands, and San Francisco, paying for the millinery goods cash at San Francisco."

It does not affirmatively appear that the account covered by the findings was the same as that declared upon in the action. While, however, appellant disputes the sufficiency of this finding to support the judgment, no question is made that there was any other transaction had between the defendant and either Muller & Raas or Conroy than the one referred to in the findings, and it may be held to sufficiently refer to the account in suit.

As to the contention of appellant that this finding as to the payment for all goods delivered between the dates named is not supported by the evidence, we cannot so hold, unless upon grounds later to be discussed. There is evidence to the effect that during the period covered by the items of account sued for Mrs. Clayton did no business personally with Conroy or his firm; that under some arrangement with Peabody & Co. that firm purchased and advanced the money for all the goods bought through Conroy for Mrs. Clayton. This is borne out by the itemized account of Conroy which shows charges for goods at various dates within the period mentioned, and in each instance a corresponding credit by cash of the exact amount of each separate charge, by Peabody & Co. within 30 days after delivery of the goods. Peabody's representative testified that his firm ordered the goods on advices from Manila, received them and forwarded them to the Clayton establishment in Manila, and paid for them with the Peabody & Co. check. All but two of the charges covered by the complaint so appear, and Mrs. Clayton testified that she did not order or receive the goods comprising these.

It is a fair conclusion from the evidence thus far referred to that as found by the court the old account was closed prior to December 26, 1912, with a balance then due from defendant of some $4,851.86. In her subsequent correspondence with Conroy this was referred to by Mrs. Clayton as "the old account."

There is sufficient support in the evidence under this state of facts to uphold the finding of the court that the subsequent purchases had been paid for, and that the old account was barred by the statute of limitations.

The true state of the case with reference to the claim actually sued on would be that it had been paid rather than that it was barred.

It, however, further appears from the record that Conroy had carried this account on his books throughout as an open running account; that the goods sold were charged to Mrs. Clayton and the various payments credited on account, with nothing to show that the Peabody payments were applied to the later charges as they accrued other than the facts that they were shown to have been paid by Peabody & Co. and that the separate amounts corresponded with the separate items charged.

As between Peabody & Co. and the plaintiff, the latter would be clearly estopped from an application of these payments to the old account of Mrs. Clayton, but the relation of Mrs. Clayton to this matter is different.

[4, 5] It appears from her own letters that Conroy was pressing her for settlement of the old account, and that she requested him to credit the Peabody payments thereon in order to keep the account alive. On December 27, 1913, she writes:

"I shall try to send you one hundred dollars each month to apply to the old account."

In a letter dated June 15, 1913, she says:

"Your cable of last Monday received. In view of the fact that I have asked you to let the

monthly cash payments be applied against the old account, and have fully explained to you the inadvisability of my sending you anything until after the first of the year, I do not quite understand your cable."

And further in the same letter:

"It has not been a path strewn with roses, but if you will kindly apply the monthly cash payments against the old account and do not let Peabody & Co. into your confidence, I do see how the business will work itself out to a satisfactory end to all concerned. * * * I would prefer to throw it up sooner than worry, so I repeat I desire that you credit the monthly cash payments against my old account, which will leave me owing you on a current account."

There is an admission here of the indebtedness and a promise to pay the same that might have been sued upon as a new promise in writing, but in any event the direction to credit these subsequent payments on the old account, with the express purpose of preserving the rights of plaintiff's assignor on an open current account for the goods subsequently purchased, in our judgment establishes plaintiff's right to maintain this action and prevents the bar of the statute of limitations. That the amount sued for is owing and unpaid is not disputed.

The judgment is reversed.

We concur: SHAW, J.; WILBUR, J.; LENNON, J.

186 Cal. 467

GROSS v. BURNSIDE. (L. A. 6412.)

(Supreme Court of California. July 13, 1921.)

1. Municipal corporations ⊜706(5)—Court held justified in finding 15 miles an hour an excessive speed.

Though 15 miles an hour was a legal rate of speed for an automobile at a street intersection, where the night was dark, the place insufficiently lighted, the street slippery, and the view obstructed by a street car turning into the street from an intersecting street, the court was justified in finding that such speed was excessive, negligent, and careless.

2. Municipal corporations ⊜706(5)—Evidence held to support finding that automobile driver did not sound horn.

In an action for injuries to a person struck by an automobile, the testimony of plaintiff and her companion that they did not hear the horn supported a finding that defendant failed to sound the horn, where he and his companion gave no testimony on the subject.

3. Municipal corporations ⊜706(6)—Whether sounding of automobile horn was necessary held question for trial court, sitting without jury.

Where the night was dark, the place insufficiently lighted, the street slippery, and the view obstructed by a street car, and an automobile was driving 15 miles an hour at a street intersection, and the driver saw a pedestrian crossing the street before she stooped down to pick up an article, it was a question for the trial court, sitting without a jury, whether it was necessary for the driver to sound his horn, within the Motor Vehicle Act, requiring the horn to be sounded whenever necessary.

4. Municipal corporations ⊜706(5) — Evidence held to support finding that automobile driver negligently failed to use brakes.

In an action for injuries to a person struck by an automobile, evidence *held* to support a finding that the automobile driver negligently failed to use his brakes to stop the automobile.

5. Municipal corporations ⊜706(9)—Finding that automobile driver failed to have proper equipment held sufficiently specific.

Where, in an action for injuries to a person struck by an automobile, which skidded when the driver turned to avoid striking her, there was evidence that there were no chains on the rear wheels, a finding that defendant failed to have proper equipment on the automobile was sufficiently specific.

6. Municipal corporations ⊜706(5)—Conflicting evidence as to chains held to support finding that motorist did not have proper equipment.

In an action for injuries to a person struck by a skidding automobile, conflicting evidence as to whether there were chains on the rear wheels justified a finding that defendant's automobile was without proper equipment.

7. Municipal corporations ⊜706(5)—Evidence held to support finding that person struck by automobile was not negligent.

In an action for injuries to a person, crossing a street diagonally, and struck by an automobile when at a place not a street crossing, while stooping to pick up an article, evidence *held* to support finding that no carelessness, recklessness, or negligence of plaintiff contributed to the injury.

Department 1.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Isabell Gross against I. M. Burnside. From a judgment for plaintiff, defendant appeals. Affirmed.

Scarborough & Bowen, of Los Angeles, for appellant.

Joseph Scott and A. G. Ritter, both of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the defendant from a judgment for the plaintiff in an action for damages for injuries alleged to have been sustained by the plaintiff as a result of her being run down by defendant's automobile while it was driven by him. The case was tried by the court sitting without a jury.

The evidence shows that the accident occurred on the 13th day of November, 1919,

at about 9 p. m., near the intersection of Sunset boulevard and Echo Park avenue, in the city of Los Angeles. The night was dark and the corner was poorly lighted by an arc light. It had been raining and drizzling earlier in the day, and the street was wet and slippery. On Sunset boulevard the car tracks are double, and on Echo Park avenue single. The Echo Park avenue tracks turn the corner toward the east and join the northern tracks on Sunset boulevard. At the time in question a car of the Echo Park avenue line had run out across Sunset boulevard so far that the front of the car had crossed the northern track of the boulevard. Occupying this position, the car completely obstructed the north side of the boulevard, from the car tracks to the curb, making it necessary for one traveling west on the boulevard to turn out into the middle of the street to clear the southern end of the car. Just before the accident occurred respondent and one Mrs. Mary Jackman started across the boulevard from the northwest to the southwest corner of the intersection with Echo Park avenue. Mrs. Jackman walked straight across, and respondent went diagonally to the right. While crossing, respondent looked up and down the street to see if there were any danger from traffic; but her view to the east was obstructed by the Echo Park avenue car extending out across the northern side of the boulevard. Mrs. Jackman continued on across the street. When about half way across respondent stopped, and, facing west, stooped over to pick up an article from the street.

About this time appellant, accompanied by one Harry Furlott, was driving his machine west on the north side of Sunset boulevard. He turned out to go around the left or southern end of the Echo Park avenue car. The court found that at this point the machine was traveling at the rate of about 15 miles an hour. According to appellant's testimony, after he passed the street car he saw respondent, who had not yet stopped; that he judged she had ample time to cross in front of the automobile; that he assumed she would continue across the street; and that for this reason he did not sound his horn. It was at this time respondent stopped and stooped over. Mrs. Jackman, who had arrived at the south curb, screamed, "Belle, look out for the machine!" Appellant put on his brakes. The automobile skidded and turned almost completely around: the rear wheels describing an arc to the right. Respondent was struck, receiving the injuries complained of. She testified she did not at any time see the automobile and that Mrs. Jackman's warning was the first she knew of its approach.

The first point urged by appellant for reversal is thus stated:

"I. The evidence shows that the defendant was operating his auto at the time of the accident in a careful manner, and that he committed no act of negligence which proximately caused the plaintiff's injuries."

The court found appellant to have been negligent in these particulars: (1) That he drove his machine around the end of the street car at an excessive rate of speed, to wit, about 15 miles an hour. (2) That he failed to give any warning. (3) That he failed to use his brakes after he passed the street car, and that he failed to have proper equipment on the automobile.

[1] Appellant contends there was no negligence on his part, because 15 miles per hour is the lawful rate of speed at such intersections, and nothing in the circumstances of this case made it unlawful. While this is the legal rate of speed, yet it cannot be held that under the circumstances shown the court was not justified in finding that appellant—

"negligently and carelessly drove said automobile at said intersection on the left-hand or southerly side of said Pacific Electric car, then standing on Echo Park avenue car track, at an excessive rate of speed, to wit, about fifteen miles per hour."

The evidence was uncontradicted that the night was dark, the place was insufficiently lighted, the street was slippery, and the street car obstructed the view. While, under other circumstances, 15 miles an hour might not be an excessive rate of speed, it may well have been excessive in this particular situation. Appellant testified he was driving carefully, and had slowed down when he came to the street car; but it was for the trial court to determine whether he was driving carefully and at a proper rate of speed under the circumstances.

[2, 3] The court also found:

"* * * That said defendant negligently and carelessly failed to sound the horn, or give any signal or warning whatever, by which plaintiff might be warned of the near approach of said defendant's automobile. That after said defendant passed said Pacific Electric car he negligently and carelessly failed to notice said plaintiff, or to use the brakes of his automobile for stopping said automobile, and also failed to have proper equipment of said automobile at said time, but, on the contrary, negligently and recklessly ran said automobile against said plaintiff, and that the negligence of said defendant was the proximate and direct cause of the accident."

Respondent and Mrs. Jackman testified they did not hear the horn, and neither appellant nor Furlott gave any testimony on the subject. Therefore the finding that appellant failed to sound the horn must be sustained. Appellant relies, however, on the provisions of the Motor Vehicle Act (St. 1915, p. 405) that "every auto must be equipped with a horn and the person operating it shall sound the horn whenever necessary as a warning of danger but not at any other time

nor for any other purpose," and insists it was not necessary to blow the horn in this instance. The statute provided the horn should be sounded "whenever necessary." Appellant testified his headlights were burning brightly; that he saw respondent as soon as he passed the street car, while she was still walking across the street and before she stooped down. Keeping in view, also, the condition of the night, there was evidence from which it could be determined whether it was or was not necessary to sound the horn, and the court impliedly found the necessity existed.

[4] Appellant also insists there was no negligence in the use of the brake. He testified on this subject to the effect that he was driving carefully around the street car; that about a third of a block away he saw respondent; that—

"When you see people crossing the street, you figure on them going across, but here she stopped and stooped over facing west. At that time I jammed on the brakes and tried to turn to the side."

On cross-examination he testified:

"Q. Did you put on the brake when you first saw her? A. No, sir; not until I saw her stoop over. Q. Not until you saw her stoop over? A. No, sir; there was no need. Q. Answer the question yes or no. A. I don't know that I did —I did not. I had one foot on the clutch and one on the brake. As near as I can remember I did not put on the brake until I saw that we were going to run into her."

The finding, as we have seen, was that he negligently failed to use the brakes. Appellant admitted he did not put on the brakes until he saw respondent stoop over, and that he "jammed on" the brakes, causing the car to skid. Since he carelessly failed to sound the horn, the court might have concluded that there was all the more reason for using the brakes sooner than he did, and hence it cannot be said that the finding is not supported by the evidence.

[5, 6] Appellant objects to the finding that he failed to have proper equipment, for the reasons that it is not specified what equipment was omitted, and that his testimony showed the automobile was equipped with headlights, chains on the rear wheels and with a brake. He also asserts opposing witnesses merely testified they did not see any chains on the wheels either at the place of the accident or at the hospital, and that there was no testimony that the absence of chains caused the skidding. However, Mrs. Jackman and Harry A. Davis, the conductor on the street car, testified positively there were not chains on the rear wheels. We are of the opinion that the finding was sufficiently specific. As to the evidence, there is a direct conflict as to whether there were chains on the rear wheels; it is not claimed there were any on the front wheels. Considering all the evidence on this point, it was sufficient to justify the finding that appellant "failed to have proper equipment of said automobile at said time."

[7] Appellant next urges that:

"II. The plaintiff herself was negligent, and her negligence contributed to the accident, and was the proximate cause of the accident, and of her injuries resulting therefrom."

This contention is based on the conduct of respondent in stopping in the middle of a heavily traveled street without any light, in being at a place which was not a street crossing, where pedestrians would not be expected to be and in failing to keep a lookout for traffic. The court found:

"That it is not true that any carelessness or negligence or recklessness of plaintiff contributed to the damage which said plaintiff sustained by reason of said collision," or that the "injuries suffered by plaintiff were directly or proximately caused by the negligence or carelessness or recklessness of the said plaintiff herself."

Respondent testified that before leaving the curb she looked up and down the street, that she looked again when she got to the car track, and that before stooping over to pick up the article she looked both ways, but failed to see the machine, because the Echo Park avenue car obstructed her view. She testified:

"I had just stooped over, picking up the article, when Mrs. Jackman yelled, 'Look out for the car!' and the car swerved around the end of the street car."

The conductor estimated the distance from the end of the street car to the point where respondent was struck at from 60 to 70 feet. We cannot say from this evidence, considered with the other evidence in the case, that the findings on this subject are without support, or that as a matter of law respondent, by want of ordinary care, brought the injury upon herself.

The parties have cited a number of authorities, but it would serve no purpose to discuss them, for the reasons that there is no question as to the law involved, and that on their facts they would not aid us in determining whether appellant acted negligently, or respondent contributed to her injuries.

Judgment affirmed.

We concur: SHAW, J.; SHURTLEFF, J.

186 Cal. 567

In re RITZMAN'S ESTATE. (L. A. 6733.)

(Supreme Court of California. July 28, 1921.)

1. Wills ⟸440—Testator's intent must govern.

The intention of the testator expressed in his will shall prevail, provided it is consistent with the rules of law; and, while statutory rules of interpretation are to be followed in so far as they aid in determining the testator's intention, they are all subject to such intention as shown by the will.

2. Wills ⟸629 — Dispositions presumed to vest at testator's death.

It is a rule of interpretation that testamentary dispositions are presumed to vest at the testator's death, although such rule will not prevail if an intention to the contrary clearly appears in the will.

3. Wills ⟸634(1) — Gifts to children after life estate in widow held to vest at testator's death.

Where a will gave the widow all income and as much principal as necessary for her support during her life, and further provided that "Upon the death of my wife I give, devise and bequest" all property to the children in equal parts, *held* that such language showed an intent to presently vest in such children all property that at the death of the wife should not have been used for her support, and such gift was not postponed to the time of the death of the wife, which marked the commencement of the enjoyment of the property given.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of George W. Ritzman, deceased. Eva E. Bike, an heir at law, appeals from a decree of partial distribution. Affirmed.

G. A. Gibbs and Elliot Gibbs, both of Pasadena, for appellant.

Lloyd W. Brooke, of Pasadena (F. G. Cruikshank, of Pasadena, of counsel), for respondent.

ANGELLOTTI, C. J. This is an appeal by Eva E. Bike, one of the children of deceased, from a decree of partial distribution. The deceased died testate October 23, 1913. By his will, dated June 25, 1912, he declared that he had a wife, naming her, and six children, naming them. After directing payment of his debts and funeral expenses, he provided for his wife as follows:

"Third. I hereby give, devise and bequeath to my wife Sarah Ritzman all of the income and so much of the principal as may be necessary for her comfortable living and support so long as she lives, and my executors hereinafter named are directed to pay to her monthly sufficient funds for her living and support so long as she lives, and my executors hereinafter named are appointed trustees to hold and manage all of my property for the purpose of carrying out said trust, if any surplus over her living it shall be added to my estate.

"Fourth. Upon the death of my wife Sarah Ritzman I give, devise and bequest and all the rest, residue and remainder of my property as follows: To be in six equal parts. One-sixth (⅙) thereof to my daughter Mary Auman, one-sixth (⅙) thereof to my daughter Eva E. Bike, one-sixth (⅙) thereof to my daughter Maggie Hoff, one-sixth (⅙) thereof to my daughter Lucy Matter, one-sixth (⅙) thereof to my daughter Cora Heiss, and the remaining one-sixth (⅙) thereof to my son William J. Ritzman."

By the fifth paragraph he directed his executors to permit any heir indebted to him to continue owing the estate as long as the wife lives, keeping the interest paid, and on the death of the wife "to take such indebtedness out of the share due to such child." The remaining provisions are not of importance here.

Lucy Matter, one of the six children, died November 1, 1919, one day before the death of Sarah Ritzman, the surviving wife of deceased, who died November 2, 1919. On application for partial distribution the question of the effect of the death of Lucy Matter after the death of deceased and prior to the death of Sarah Ritzman, the wife, was presented. It was held by the trial court that under the terms of the will Lucy Matter upon the death of the testator was at once vested with ownership of one-sixth of the property of the estate subject to administration and the disposition in favor of the wife for her life, and distribution of her share to the administrator of the estate of said Lucy Matter was made on this theory. The theory of appellant is that by the terms of the will, the gift to each child was contingent upon such child surviving the wife, with the result that the gift to Lucy Matter lapsed upon her death prior to the death of the wife.

[1, 2] Appellant's counsel quite correctly claim, quoting Chief Justice Marshall in Smith v. Bell, 6 Pet. 68, 8 L. Ed. 322, that—

"The first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law."

That this is the well-settled law in this state, both by express statutory provision (section 1317 et seq., Civil Code), and under our decisions, must, of course, be admitted. As we said in Estate of Wilson, 193 Pac. 581:

"Statutory rules of interpretation are to be followed in so far as they aid in determining the intention of the testator, but they are all subject to the fundamental rule that the intention as shown by the will must prevail."

So that while we have a rule of interpretation of wills that testamentary dispositions "are presumed to vest at the testator's death," this rule would not prevail here if "an intention to the contrary clearly" appeared in the will before us. But to our minds the intention of the testator as expressed in his will is in full accord with the presumption declared by this rule.

[3] It seems to us that the language used clearly shows the desire of the testator to presently vest in his six children, share and share alike, all of his property that at the death of his wife shall not have been used "for her comfortable living and support." The gift to the wife is limited to "all of the income and so much of the principal as may be necessary for her comfortable living and support so long as she lives," the executors being directed to pay to her monthly so long as she lives sufficient funds for such living and support, and as trustees for that purpose to hold and manage all of the property. "All the rest, residue and remainder" of his property he gives, devises and bequeaths in equal one-sixth parts to his six children, specifically naming each one as the recipient of a one-sixth part. There is absolutely nothing in the will upon which to found a suggestion that this gift to the children, as distinguished from the possession and enjoyment of the property given, was to be postponed to the time of the death of the wife, except the words preceding the words of disposition, viz.: "Upon the death of my wife Sarah Ritzman I give," etc. But these words, coming immediately after the limited disposition to the wife for "so long as she lives," and used in connection with the gift of the remainder, clearly appear to us to have been used simply as defining the time of commencement of the enjoyment of the property given. Such words so used are usually taken as in no way indicative of an intent to postpone the vesting in right, and as relating "to the time of taking effect in possession and not to the time of taking effect in interest." Norton v. Mortensen, 88 Conn. 28, 36, 89 Atl. 882, 885. See, also, Lingo v. Smith, 174 Iowa, 461, 468, 156 N. W. 402. We have also in this will the division of the residue into six equal parts, and the separate specific absolute gift of a one-sixth part to each of the six children, by name, without any words indicative of the idea of a possible lapse of the disposition as to any child. We have further the provision as to any debt due deceased from any heir, allowing the indebtedness to continue during the life of the wife, such indebtedness to be taken upon the death of the wife "out of the share due to such child," clearly implying the idea in the testator's mind of the certain existence at that time of a one-sixth share in the residue due to the child so indebted to him, from which the indebtedness can surely be paid.

As is apparent from what we have said, we are of opinion that the conclusion of the learned judge of the trial court is correct.

The decree is affirmed.

We concur: SHAW, J.; SHURTLEFF, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

186 Cal. 520

IVANCICH v. DAVIES. (L. A. 6413.)

(Supreme Court of California. July 26, 1921.)

1. Carriers ⇐238—Person boarding jitney bus while in motion and riding on step without actual knowledge of operator and without paying fare held a passenger.

One boarding a jitney bus as it was leaving a stopping place was no less a passenger because he got aboard while it was in motion, had not paid his fare, and rode on the running board, and the operator had no actual knowledge of his presence, where it was the custom to collect the fare at the end of the journey, and he had money for the fare, and was ready and willing to pay, knowledge of his presence being implied.

2. Carriers ⇐238—By boarding bus person sufficiently indicates intention to become passenger.

Where one boarded a jitney bus with the implied knowledge of the operator of the bus, this was a sufficient indication of his intention to become a passenger.

3. Carriers ⇐331(5)—Riding on running board of crowded jitney bus not negligence as matter of law.

It was not negligence as a matter of law to ride on the running board of an inclosed jitney bus, where the bus was crowded and the passenger could not get inside the entrance.

4. Carriers ⇐322—Finding held not to show court thought leg of passenger riding on running board was protruding.

In an action for injuries sustained by a jitney bus passenger riding on the running board, from contact with a standing truck, where there was evidence that the fender on the truck was higher than that on the bus, and might strike a passenger on the running board without first striking the fender of the bus, and the court's finding did not state what part of the two machines came in contact with plaintiff's leg, it cannot be said that the court adopted the theory that plaintiff's leg protruded, rather than the theory that the injury was due to the difference in height of the two fenders.

5. Carriers ⇐331(5)—Passenger bound to use ordinary care, but ordinary care depends on circumstances, though passenger on running board riding backwards.

A jitney bus passenger must use ordinary care, but whether, in a given case, it was a want of ordinary care to ride backwards on the running board, instead of facing in the direc-

tion in which the bus was traveling, must be determined by the circumstances of the case.

6. Carriers ⊂=318(7), 346(2)—Evidence held to support finding that injury was due to negligence of jitney bus operator, and that passenger was not negligent.

In an action for injuries to a jitney bus passenger riding on the running board, evidence *held* to warrant a finding that the accident was caused by the driver's negligence in driving too close to an ice wagon, and an implied finding that plaintiff was not guilty of a want of ordinary care in the position he assumed on the running board.

7. Carriers ⊂=322—Findings in jitney bus passenger's action for injuries not inconsistent.

In an action for injuries to a jitney bus passenger riding on the running board, a finding that it was not true that the bus had not stopped to take on passengers was not inconsistent with a finding that the bus had moved 8 or 10 feet before plaintiff got on, where the court also found that defendant stopped at a corner and that plaintiff got on the running board after the bus had gone 8 or 10 feet from the corner; and neither was a finding that plaintiff did not stand outside the automobile willfully, recklessly, and secretly, inconsistent with a finding that defendant did not know he was on the bus, and riding with his back in the direction the bus was going, where it was a question for the trial court whether he showed a want of ordinary care in riding backwards; and actual knowledge of his presence was not necessary.

Department 1.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John Ivancich against W. T. Davies. From a judgment for plaintiff, defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

Rosecrans & Emme, of Los Angeles, for respondent.

LAWLOR, J. This is an appeal from a judgment for the plaintiff in an action for damages for injuries received by the plaintiff while riding on a Ford jitney bus. It is alleged that the accident was due to the negligence of the defendant in driving the bus, which he owned and operated. The case was tried by the court sitting without a jury.

The facts are as follows:

Appellant operated the jitney bus in the streets of San Pedro, county of Los Angeles, carrying passengers for hire. The bus had an extended body, which was inclosed all around, the seats running lengthwise along the sides of the car. The driver's seat was at the front on the left side, and the only entrance to the bus was through the side, at the driver's right. There were no seats between the driver's seat and the entrance, which was open at all times.

On the morning of April 14, 1919, at about 6:45 a. m., appellant was driving the bus north on Beacon street in the city of San Pedro. He stopped at the intersection of Sixth and Beacon streets to discharge and receive passengers. Respondent came from a restaurant across the street to board the bus, which had started, and proceeded about 8 or 10 feet, when respondent swung on the right-hand running board. All the seats in the bus were taken, and passengers were standing up inside. One passenger was standing in the entrance. Respondent rode on the running board, and at the time of the accident was holding on with his right hand and facing to the rear.

Appellant drove north on Beacon street until he came to Fifth street, where he turned east, and proceeded along Fifth street. While driving along Fifth street he drove so close to a truck of the Union Ice Company, which was standing by the curb, that the fender of the truck struck respondent's left leg, cutting and bruising it, and wrenching his knee. No other injury was done, either to the passenger or to the bus.

[1, 2] 1. The first point made by the appellant for reversal is that "Plaintiff was not a passenger, for the reason that he was not upon the bus with the knowledge of the driver." It is argued that—

"Until there is an acceptance—that is, until either within the express or implied knowledge of the carrier the person seeking to become a passenger has indicated his intention to become a passenger, which intention has been in some way acquiesced in—the relation of passenger and carrier does not arise, even though the person attempting to become a passenger is to pay his fare when required."

The finding is that respondent was a passenger for hire on the bus without the personal knowledge of appellant, and the fact that appellant had no actual knowledge of his presence, is not disputed.

In the case of street car transportation the relation of passenger and carrier may be established without the express knowledge of the carrier or employee in charge of the car. It was said in Hatcher v. Quincy Horse Ry. & Carrying Co., 181 Ill. App. 30:

"The stopping of a car at the customary place for the reception of passengers is an invitation to persons intending to become passengers to board the car, *and is tantamount to an acceptance of such persons as passengers.* [Italics ours.] Yet whether a person boarding such car does so for the purpose of becoming a passenger depends largely upon the intention of such person at the time of boarding such car. North Chicago St. R. Co. v. Williams, 140 Ill. 288; West Chicago St. R. Co. v. Manning, 170 Ill. 420. There must be a bona fide intention on the part of such person to become a passenger or such a state of facts that the person will be a passenger if he gets

on the car. Chicago & E. I. R. Co. v. Jennings, 190 Ill. 484."

It is said in Booth on Street Railways, § 326:

"But it is not necessary that there should be an express contract to constitute the relation of passenger and carrier, nor that there should be a consummated contract. It may be implied from slight circumstances, and may arise before the payment of fare or entry into the car. The existence of the relation depends largely upon the intention of the person at the time he enters, or while attempting to enter."

It follows, then, that one who boards a street car at a regular stopping place becomes a passenger, whether or not the carrier actually knows of his presence on the car. In such a case knowledge is implied.

But appellant also contends that because respondent boarded the bus after it was in motion he did not become a passenger. It is also said in Booth on Street Railways, supra, that a person—

"is not necessarily a trespasser after he boards a car, even if no fare has been collected from him before he suffers an injury, simply because he has violated a rule of the company as to the mode of getting on."

It was declared in **Sharrer v. Paxson et al.**, 171 Pa. 26, 33 Atl. 120, where a passenger had jumped upon a moving train and secured a standing on the step of the car before he was pushed from the step by the brakeman and killed:

"It is contended, however, that, inasmuch as the deceased reached the position from which he was pushed while the train was moving, his own negligence contributed to his death, and is a bar to this action. The attempt to board a moving train is undoubtedly a negligent and hazardous act, but if it is successful and the negligent party gets safely upon the car it will not justify or excuse the subsequent negligence of the company or its servants, by which he is injured."

Respondent in this case ran to catch the bus, and did get safely aboard before it had gone 10 feet from its last regular stopping place. The fact that he boarded the bus just after it had started did not operate to preclude him from becoming a passenger. It is true he had not paid his fare, but the custom was to collect it at the end of the journey, and respondent testified he had the money for the fare and was ready and willing to pay. Appellant also contends that—

"The mere intention to go on board a car, which intention has not been by acts or otherwise indicated to the carrier, does not render the person a passenger, although he may be entitled to transportation."

However, in this case respondent had executed his intention to become a passenger; he had safely boarded the bus. In the light of the authorities we have discussed as to the implied knowledge by appellant of respondent's presence on the bus, it must be held this was a sufficient indication of respondent's intention to become a passenger. Nor is this conclusion affected by the circumstance that he was riding on the running board. The rule is well settled that a person may be a passenger even though he is riding on the steps of a car. Birmingham Railway, Light & Power Co. v. Bynum, 139 Ala. 389, 36 South. 736; Sharrer v. Paxson et al., supra; Holloway v. Pasadena & Pacific Ry. Co., 130 Cal. 177, 62 Pac. 478; Seller v. Market-Street Ry. Co., 139 Cal. 268, 72 Pac. 1006. Hence, notwithstanding that respondent got aboard the bus while it was in motion, that he had not paid his fare, that he rode on the running board, and that appellant had no actual knowledge of his presence on the bus, he was none the less a passenger.

2. Appellant's next contention is that, although respondent may have been a passenger, he was guilty of contributory negligence both as matter of law and as matter of fact, and that this negligence bars a recovery; that respondent's—

"negligence not only contributed or helped bring on the accident, but was the sole cause thereof, because the evidence is uncontradicted that he would not have been injured except for the position assumed by him, without the knowledge of the driver."

Respondent testified there were so many people inside the bus he could not get in. He said:

"Well, I got on myself. I went right in the entrance of the door and immediately the machine started. * * * Here is the running board here, and here is the entrance. Then immediately when I got here he moved, started to go on to the north on Beacon street, and then I kind of thought, 'I will go in and get a seat.' At that time I seen I couldn't get in, and I was standing right here by this post, holding by the arm.

"Q. You held on there; stood in that position? A. Yes. * * *

"Q. Did you get inside the jitney bus at all? A. Yes; I got right here—I couldn't get in. I say when I got in, immediately when I got into the entrance of the door the jitney started. * * * I got in here, and the people was around here, and I could see the conditions, and I could not get in. I saw the driver, and then I caught hold of that frame that holds up the jitney roof right with my hand."

He further testified he was standing straight up facing the east, and continued:

"Well, I think the jitney bus skidded right to one side, and hit me; the fender of the Union Ice truck hit my knee. It caught the fender of the Union Ice truck on my left leg."

Four other passengers—Verne Ostendorf, John Dupic, M. Park Davies (appellant's son), and Richard Ireland—all testified they either saw respondent get on the running board, or saw him after he was there. They all, together with respondent himself, tes-

tified respondent was hanging on to the bus; Ireland and respondent testified he was holding on with his right hand. Dupic testified as follows:

"Q. Was Mr. Ivancich a passenger on the running board at the time of the hitting? A. Yes, sir.

"Q. Was Mr. Ivancich's body swinging out? A. No, sir; he was hanging on them there poles.

"Q. Did he have his arm around it? A. His arm.

"Q. Up close, or leaning out? A. Up close."

He testified further:

"Q. What part of the bus were you riding on? A. The first—from Fourteenth street to Sixth street I was on the running board. * * * At Sixth street I got off there and tried to get in, and I got as far as the entrance. * * * I went around that side to get a seat, but I could only get as far as the entrance. * * *

"Q. But you were inside of the door? A. Yes. * * * Q. Everybody else had seats, didn't they? A. Yes; most of them were standing up in the back. * * *

"Q. Standing up? A. Yes.

"Q. There was space then left in there, wasn't there? A. No; you couldn't get in. I could not get in any further when I got on at Sixth street. I just had room to get in the doorway."

The witness also testified that after the bus turned into Fifth street respondent was facing the direction the bus was going. Appellant testified that there were passengers standing up right to the back of his seat, and there was one man standing in the entrance.

The court found that the bus was so crowded with passengers that respondent was unable to get a seat, and therefore rode on the running board, and that at the time of the accident respondent was riding on the running board with his back toward the Union Ice truck; that it was the custom of appellant "to take passengers on the running board of his jitney bus"; that the bus did not skid, but that the accident was caused through the negligence of appellant in driving so close to the truck that respondent's leg was caught between the bus and the truck; that the accident was not due to respondent's fault, carelessness and neglect; "that it is not true that plaintiff negligently and carelessly placed himself in a position so that as said automobile passed near another automobile or truck the same was caused to come slightly in contact with the plaintiff, all without the knowledge, information, or consent of the defendant;" that it is not true that defendant's bus had not stopped to take on passengers when plaintiff attempted to board the same; and "that it is not true that the plaintiff willfully, recklessly, and secretly swung on the side of said automobile, causing his body to hang outside, * * * and that he so continued in said position until he received the said injuries."

[3] Appellant asserts that—

"Where there is standing room inside of a common carrier vehicle a passenger standing on the platform, outside, is guilty of negligence as a matter of law."

In view of the evidence as to the crowded condition of the bus, and that respondent could not get inside the entrance, it cannot be maintained that the mere fact of his riding on the running board constituted negligence as matter of law. There is counter evidence that there was standing room in the rear of the bus, but this only raised a conflict which was resolved in the finding already stated.

[4] Appellant contends, and cites numerous authorities to the proposition that "the protrusion of limbs of the passenger, even to the minutest distance, will be regarded as such contributory negligence as will deprive him of recovery;" that inasmuch as it is found that no damage was done to the bus, respondent's body must have protruded beyond the side of the bus, and that this was negligence as matter of law, which caused the injury. We do not think this deduction necessarily follows. One George Miller gave testimony to the effect that the fender on the truck was higher than the one on the bus; also, that it would have been possible for the truck fender to have come in contact with a passenger on the running board of the bus without first striking the fender thereof. The finding does not state what part of the two machines came in contact with respondent's leg, but from the finding of liability it cannot be said that the trial court did not adopt respondent's theory of the accident, that—

"The leg was hurt, not because it was protruding out, but because the difference in the height of the fenders of the two machines allowed the fender of the bus to go under that of the ice truck, which naturally caught the person on the running board."

[5, 6] Appellant next claims:

"It was the plain and unmistakable duty of the plaintiff to ride with his face in the direction he was going, for by the slightest movement of his leg he would have avoided the same object that the bus in which he was riding avoided."

We are aware of no legal rule that a passenger must invariably face the direction the vehicle is going. It is the duty of a passenger to use ordinary care, and whether in a given instance riding backwards shows a want of ordinary care must be determined by the circumstances of the case. We have heretofore referred to the finding that respondent at the time of the accident was riding with his back toward the ice truck, and in view of the conflict in the evidence on

the point the finding must be accepted. There was evidence that respondent's right arm encircled the upright or post of the bus; that by this means he held himself "up close," and that he was "not swinging out" nor "leaning out."

Respondent testified on cross-examination that he did not swing his leg out and that his attention was not "engaged elsewhere" as he went by the ice wagon; and that he was "facing out" when he was struck on the hip by the ice wagon.

"Q. Did you see the ice wagon before you were struck? A. Yes; I see the wagon before; of course I did.

"Q. How far were you from it when you saw it? A. I was no farther at all, because the ice wagon, you know, is long; probably 10 or 12 feet; and then they are right close, you know; they get right close, just enough to hit my knee, the fender of the Union Ice truck."

Since he was riding on the right-hand running board, and holding on with his right arm, respondent's back would naturally be toward the front of the bus. Moreover, from respondent's testimony that he was "facing out," the court may have concluded that he was looking to his left to see if the bus was coming close to any other vehicle. This is supported by the testimony that he saw the ice wagon before he was struck. If respondent was thus observant, the court might have regarded the position of his body as without any special significance. In any event, we cannot say from the evidence that the finding that the accident was caused through the negligence of appellant in driving too close to the ice wagon, or the implied finding that respondent did not show a want of ordinary care in the position he assumed on the running board cannot be sustained.

As already shown, in addition to appellant's contention that respondent was guilty of contributory negligence as matter of law in the particulars we have discussed, he urges that as matter of fact respondent contributed to the injury, and that the evidence is not sufficient to sustain the findings on that issue. We think that, upon the evidence we have set forth, the findings are amply supported. Although respondent got on the running board while the bus was in motion, he was safely aboard before it turned into Fifth street. There is evidence of such a crowded condition of the car as would justify him in remaining on the running board. The testimony that he was holding on with his right arm and riding "up close" to the body of the bus—that he was "not swinging out" nor "leaning out," and that he did not swing his leg out—is not contradicted. It was also shown that the fender of the ice truck was high enough to have missed the fender of the bus and still have struck a passenger on the running board. It will not be necessary to repeat what we have said about the direction he was facing when the collision occurred. The evidence abundantly supports the findings.

3. Appellant contends that certain findings of the court are inconsistent, and that therefore the conclusions of law and the judgment cannot be sustained. He attributes inconsistency to the findings that appellant had no knowledge of respondent's position on the bus, and to the one that respondent was a passenger. As we have shown, it was not necessary in order to constitute respondent a passenger that appellant should have had actual knowledge of his presence on the bus. The point is without merit.

[7] It is insisted that the finding that it is not true the bus had not stopped to take on passengers is inconsistent with the one that the bus had moved 8 or 10 feet before respondent got on. We perceive no inconsistency here, for, considered with another finding that "defendant stopped said jitney bus at the corner * * * and that the plaintiff got on the running board * * * after it had gone about 8 or 10 feet from said corner," it is apparent that the meaning of the finding is that the bus had stopped for passengers, but that respondent did not get on until it had proceeded 8 or 10 feet.

The finding that respondent did not stand outside of the automobile willfully, recklessly, and secretly is claimed to be inconsistent with the finding that appellant did not know respondent was on the bus, and that he was riding with his back in the direction the bus was going. But, in view of our conclusion that actual knowledge of respondent's presence was not necessary, and that it was for the trial court to determine whether respondent showed a want of ordinary care in riding backwards, these findings are not inconsistent.

Judgment affirmed.

We concur: SHAW, J.; SHURTLEFF, J.

186 Cal. 488

DE LEON v. PACIFIC MUT. INS. CO. OF CALIFORNIA. (L. A. 6963.)

(Supreme Court of California. July 26, 1921.)

1. Insurance ⊂=530—Recovery under one provision of accident policy for loss of sight precluded recovery of monthly indemnity under provision for loss of time.

Where loss of sight occurred contemporaneously with the accident, the insured, on recovery of amount specified in accident policy as indemnity for the loss of the sight, to be paid with monthly indemnity "for the time between the date of accident and date of such loss," could not recover indemnity for loss of time under provision of policy providing for monthly indemnity for loss of time.

2. Appeal and error ⊂=1180(1)—Motion to substitute judgment for greater amount for that rendered on verdict not a waiver of right to judgment on verdict.

Grant of plaintiff's motion to substitute for the judgment entered on the verdict a judgment for a greater amount than the verdict on condition that he waive right to smaller judgment did not preclude plaintiff from claiming the right to a judgment for amount of verdict on reversal by the appellate court of the judgment for the greater amount, as the reversal operated on the condition also, and had the effect of restoring verdict.

3. Costs ⊂=241—Apportioned between parties on affirmance of one judgment and reversal of other.

Where Supreme Court, on appeal from two judgments, reversed one and affirmed the other, the costs of appeal should be apportioned between the parties in as equitable a manner as seems practicable.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by George De Leon against the Pacific Mutual Insurance Company of California. Verdict for plaintiff, and from the judgment entered thereon, and from the judgment for a greater amount entered after granting motion to vacate the judgment on such verdict, and to enter judgment for the greater amount, defendant appeals. Subsequent judgment reversed, and judgment on verdict affirmed.

Loeb, Walker & Loeb, of Los Angeles, for appellant.

J. H. Ryckman, of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is an action on a policy of accident insurance. In accord with the verdict of the jury plaintiff was given judgment for $300, said judgment being entered August 8, 1919. Subsequently defendant gave notice of intention to move for new trial, which, so far as the record shows, was never acted upon. Plaintiff, subsequent to such notice of motion, gave notice of a motion to vacate the judgment for $300, based on the verdict of the jury, and to enter a judgment for $640. Over the objection of defendant this motion was granted by order made September 29, 1919. Defendant appeals both from the judgment as entered August 8, 1919, and from the order or judgment made September 29, 1919, whereby plaintiff was given judgment for $640.

Plaintiff's action as shown by his complaint, was for $300 alleged to be due under the policy for the loss, by reason of the accident, of the sight of one eye, and $80 per month for eight months because of inability, by reason of the accident, to work at his occupation during that time. This was his theory throughout the trial, and until after the judgment of August 8, 1919. He never consented to waive his claim for the $300 for loss of sight of one eye until when, after the entry of judgment, the trial judge decided that he could not have both such $300 and a payment for loss of time. The defendant by its answer denied that plaintiff's loss of sight of one eye was caused by the accident, claiming that the same was due to a senile cataract of long standing. It further set up as a defense falsity of the statement in plaintiff's application with relation to his power of vision.

Upon these issues the case was tried, with a jury. The jury found a general verdict for plaintiff for $300, for the loss of the sight of the eye. It also, as a part of its verdict, answered four special questions submitted to it, the answers being substantially that the injury was due to "a blow of a bolt by his fellow workman," that there was no senile cataract at the time plaintiff made his application for a policy, that the "concussion cataract" was the sole cause of the loss of sight in plaintiff's left eye, and that from the date of the accident (September 20, 1918) to the date of the verdict (August 7, 1919) plaintiff was totally and continuously disabled from the performance of all duty pertaining to his occupation. It seems that upon the trial defendant claimed that under the terms of the policy plaintiff could not recover any monthly indemnity in addition to the $300 for loss of sight in one eye, if the loss of sight occurred immediately upon the happening of the accident. The trial judge being in doubt upon this proposition, upon his suggestion it was stipulated as follows:

"At the suggestion of the court, it was agreed that the jury was to find whether the defendant was liable or not, and if they found that the defendant was liable, then they were to bring in a verdict for $300, and that the court would then take under advisement the question as to whether, under the circumstances of this case, the evidence presented, and so forth, they were also liable for $640."

After the entry of the judgment the trial court concluded that plaintiff "could not re-

cover under two articles" of the policy. Then followed the motion to vacate the judgment for $300, and to substitute the judgment for $640. The action of the trial court in this respect was protested by defendant, it being claimed that the court had no power to so interfere with the judgment already given and entered. It should also be stated that, before granting the motion, the trial court asked counsel for plaintiff, "if now, and for all time, he waives recovery under article 3 for $300," and he answered in the affirmative.

An examination of the record satisfies us that, upon the question whether the loss of the sight of the eye was wholly due to the accident, the verdict of the jury in favor of the plaintiff finds sufficient support in the evidence. There was a conflict in the evidence, it is true, but there was substantial evidence in favor of plaintiff's claim in this respect. This is also true as to the issue relating to the truth or falsity of the statement in the application for the policy as to the power of vision of plaintiff. As to this the preponderance of evidence may fairly be said to be with plaintiff. The jury was fairly and correctly instructed as to the issues thus presented, and no good reasson appears to us for concluding that the verdict for $300 should be disturbed. Under the terms of the policy, which was for $900, the plaintiff was entitled to receive one-third of the principal sum for the loss of sight of either eye. A provision in the judgment that a monthly indemnity not to exceed $640 is to be added to the $300 by the court if it shall decide that a monthly indemnity should be paid under the policy need not be considered in view of the subsequent decision of the court that it could not be added. This brings us to a consideration of what followed the verdict and the judgment based thereon.

[1] It seems to us very clear that, in view of the terms of the policy, plaintiff, having and insisting upon the right to recover $300 for the loss of sight of an eye, could not recover any monthly indemnity in addition if the loss of sight was immediately caused by the accident. That it was so immediately caused he himself testified, and the jury substantially so found by the third and fourth answers to the special interrogatories. Article 1, relative to indemnities, provides, it is true, for monthly indemnities for the time, not exceeding 36 months, that such accident immediately, totally, and continuously disables from the performance of every kind of duty pertaining to the insured's occupation. Article 3, however, provides a schedule of indemnities for certain losses. This amount is to be paid with "the accident monthly indemnity for the time between the date of accident and date of such loss." The schedule provides that "for loss of * * * sight of either eye" there shall be paid "one-third principal sum." Article 11 provides:

"The right to make claim for loss of life or for any total loss named in the schedule of indemnities, shall exclude all other claims based upon the same accident, except a claim from monthly indemnity provided in article 3. * * *"

Of course, courts are bound by the terms of the contract between the parties, and it seems to us clear beyond question that the asserted rights of plaintiff, pressed by him to verdict and judgment of compensation for the loss of sight of one eye, given him by article 3, excluded any claim by him for monthly indemnity under article 1, except such as was allowed by article 3, viz. indemnity "for the time between the date of the accident and date of such loss." Admittedly, it must be held here that there was no such time, the loss of the sight occurring contemporaneously with the accident. It may be that under the policy plaintiff could originally have waived all claim for a total loss under article 3, and proceeded under article 1 for a monthly indemnity for loss of time only. As to this it is not necessary here to decide. He did not do so, but elected to assert his claim under article 3, as well as a claim under article 1. Certainly, after pressing this claim to verdict and judgment, he could not properly be allowed, over the objection of the other party, to recover upon the theory of a waiver of all rights under article 3, a theory upon which the action was not instituted, or tried, or decided. It follows that the judgment for $640, given September 29, 1919, finds no proper support in the record. The only recovery proper, in view of the circumstances, was one for $300 for the loss of the sight of one eye.

[2] This being the situation, it is earnestly urged by defendant that plaintiff, as a condition precedent to the granting of his motion to vacate the $300 judgment and substitute a judgment for $640, having waived for all time any recovery under article 3 for $300, he cannot now have his judgment for the $300. We see little force in this claim. His motion was substantially one for the substitution of a judgment of $640 for the $300 judgment, and not a motion for the mere vacating of the $300 judgment. The two things were inseparably united. The whole purpose of the requirement by the learned trial judge of the express waiver of any claim under article 3 was to prevent the enforcement by plaintiff of any such claim in the event that he was given a recovery under article 1, and the waiver amounted to no more than that. He has been given no such recovery, for it is now determined on appeal that, in view of the circumstances, no such recovery could properly be allowed, and the award is set aside. With the setting aside on appeal of the award for monthly indemnity, the waiver and the vacating of the first judgment, which seem to us to be inseparably connected with such award, and were included in the same order, also fall, and we have the former judgment for $300

in full force and effect (unless also reversed on this appeal), except as to the provision for the possible addition by the trial court of a monthly indemnity, which provision became ineffective for any purpose on the decision of the trial court that no such addition could be made.

We have not attempted herein to comment on the practice followed in the trial court after the entry of the first judgment, or as to the attempted postponement of the determination of the question of monthly indemnity and the attempted reservation in the judgment of the right to subsequently add the same. It is apparent that the sole desire of the learned trial judge was to reach the correct and just conclusion as to the rights of the respective parties. The method adopted was, however, somewhat novel, and it may well be doubted whether the trial court could, on motion, against the protest of a party, vacate a judgment which has been entered except on a ground and in the manner specified by our statutes. It is to be noted that the stipulation to which we have referred did not purport to authorize such action as was in fact had.

[3] In view of the fact that the appeal is from two judgments, and that one of the judgments appealed from should be affirmed and the other reversed, the costs of appeal should be apportioned between the parties in as equitable a manner as seems practicable.

The judgment or order of September 29, 1919, is reversed. The judgment entered August 8, 1919, is affirmed. Appellant shall recover the amount paid by it for filing record in the appellate court and one-fourth of the amounts paid the superior court clerk and stenographer for preparing the record on appeal. Neither party shall recover any amount as costs for printing briefs.

We concur: WILBUR, J.; SHURTLEFF, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.

SHAW, J., being disqualified, does not participate herein.

186 Cal. 419

STATE v. SECURITY SAV. BANK et al.

(Sac. 2890.)

(Supreme Court of California. July 5, 1921.)

1. Escheat ⊂⊃6—Statutes for escheat of bank deposits do not provide for actual seizure of money.

Code Civ. Proc. § 1273, and St. 1915, p. 1106, § 5, do not provide for an actual seizure by the state of any money in bank unclaimed for 20 years, either before or after judgment escheating it, but do provide, with respect to each depositor, for the payment to the state by the bank of the debt the bank owes the depositor; the statutes not being intended to apply exclusively to moneys held by the bank as custodian or bailee.

2. Constitutional law ⊂⊃42—Bank proceeded against for escheat of deposits can question validity of law.

A bank proceeded against by the state for the escheat of deposits under Code Civ. Proc. § 1273, and St. 1915, p. 1106, § 5, has an interest sufficient to authorize it to challenge the validity of the law on its own account.

3. Constitutional law ⊂⊃309(2)—Escheat ⊂⊃6—State cannot, by mere statutory declaration, appropriate bank deposit.

Under Const. art. 1, § 13, the state cannot, by a mere statutory declaration, take away the right of the depositor to his bank deposit and appropriate to its own use his property therein, so that the depositor is a necessary party to any action by the state to enforce payment of the money due on the deposit into the state treasury, and the bank has the right to insist that the depositor be brought into the case as party by some valid process or notice, and can contend that the process and notice prescribed by Code Civ. Proc. § 1273, and St. 1915, p. 1106, § 5, providing for the escheat of bank deposits unclaimed for 20 years, do not constitute due process of law.

4. Escheat ⊂⊃6—Proceeding by state to escheat unclaimed deposit quasi in rem.

The state's proceeding under Code Civ. Proc. § 1273, to escheat a bank deposit unclaimed for 20 years, is not an action in personam, nor is the judgment a personal judgment against the bank and the depositor, but the proceeding is quasi in rem.

5. Constitutional law ⊂⊃309(2)—Escheat ⊂⊃6—Method prescribed for notice of proceeding to escheat unclaimed bank deposit not unreasonable.

Method prescribed by Code Civ. Proc. § 1273, for imparting notice to the bank depositor of the state's proceeding to escheat the deposit, unclaimed for 20 years, being that of publication in a newspaper of general circulation in the county where the state capitol is located, *held* not unreasonable or inadequate to invalidate the procedure under Const. art. 1, § 13, providing that no person shall be deprived of his property without due process of law.

6. Constitutional law ⊂⊃309(2)—Escheat ⊂⊃6—State can take charge of unclaimed and unchanged bank deposit on general notice by publication.

It is within the power of the state, pursuant to Code Civ. Proc. § 1273, and St. 1915, p. 1106, § 5, to take charge of bank deposits unclaimed and unchanged for 20 years under the general notice by publication provided by Code Civ. Proc. § 1273, despite the claim of the bank that there can be no valid service on the depositor by publication unless there has been some preliminary proof to the court that the depositor resides out of the state or has departed from it.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the State of California against the Security Savings Bank, a corporation, and others. From judgment escheating certain bank deposits to the State, defendant Bank appeals. Affirmed.

See, also, 154 Pac. 1070.

McCutchen, Willard, Mannon & Greene, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for the State.

Charles C. Conner, of San Francisco, amicus curiæ, on behalf of several defendants.

SHAW, J. This is an action by the state of California to declare an escheat of certain bank deposits, under the provisions of section 1273 of the Code of Civil Procedure. Judgment was given for the plaintiff in the court below. The defendant bank alone appeals.

Section 1273 declares that when money is on deposit in a bank in this state and the depositor does not, for a period of more than 20 years, deposit any more money in the account, nor draw out any part thereof, nor claim the same, and neither the depositor nor any claimant has filed with the bank any notice of his present residence such deposit, with the accumulations of interest thereon, shall escheat to the state.

The section then further provides that the Attorney General, on being informed of such deposits—

"shall commence an action or actions in the name of the state of California, in the superior court of the county of Sacramento, in which shall be joined as parties the bank or banks in which the moneys are deposited and the names of all such depositors."

With respect to process the section declares:

"Service of process in such action or actions shall be made by delivery of a copy of the complaint and summons to the president, cashier or managing officer of each defendant bank, and by publication of a copy of such summons in a newspaper of general circulation published in said county for a period of four weeks."

All or any number of banks or depositors may be included in one action. Upon the trial, if it be determined that the moneys deposited in any bank are unclaimed, as previously stated, the court must render judgment in favor of the state, declaring that said moneys have escheated to the state and directing payment thereof into the state treasury. This section was added to the Code in 1915. Stats. 1915, p. 107. At the same session section 15 of the Bank Act was amended. Stats. 1915, p. 1106, § 5. It provides that moneys remaining unclaimed in a bank by a depositor who had not drawn any money therefrom or made any further deposits thereto, nor filed any notice of residence, for the period of 20 years, shall be deposited with the state treasurer "after judgment in the manner provided in the Code of Civil Procedure." It further provides that—

"At the time of issuing the summons in the action provided for in section 1273 of the Code of Civil Procedure, the clerk shall also issue a notice signed by him, giving the title and number of said action, and referring to the complaint therein, and directed to all persons, other than than those named as defendants therein, claiming any interest in any deposit mentioned in said complaint, and requiring them to appear within sixty days after the first publication of such summons, and show cause, if any they have, why the moneys involved in said action should not be deposited with the state treasurer as in said section provided, and notifying them that if they do not so appear and show cause, the state will apply to the court for the relief demanded in the complaint. A copy of said notice shall be attached to and published with the copy of said summons required to be published by said section, and at the end of the copy of such notice so published there shall be a statement of the date of the first publication of said summons and notice."

This section further provides that upon the completion of the publication of the summons and notice and the service of the summons—

"the court shall have full and complete jurisdiction over the state, and the said deposits and of the person of every one having or claiming any interest in the said deposits, or any of them, and shall have full and complete jurisdiction to hear and determine the issues therein, and render the appropriate judgment thereon."

The case presents the single question whether or not the provisions of the statute requiring process in actions of this character are valid under the Fourteenth Amendment of the Constitution of the United States and section 13, article 1, of our Constitution, providing that no person shall be deprived of his property without due process of law.

It is clear that section 15 of the Banking Act and section 1273 aforesaid, although separately enacted, relate to the same subject and are to be considered and construed as if both were contained in a single act, at least with respect to the provisions for process and notice in the action under section 1273. The provisions for notice in section 15 apply to such an action and constitute a part of the process necessary to confer jurisdiction upon the court to proceed therein.

[1] These statutes speak of "amounts of money * * * deposited with any bank," and which "have remained unclaimed"; they refer to the "money deposited," and state that such "moneys" escheat to the state, and provide for judgment "commanding said bank to forthwith deposit all such moneys with the state treasurer." This language, if taken literally according to its legal significance, would be apropriate to describe money in the custody of the bank as bailee of its depositors. It is evident, however, from the context and from the purpose and object to

be accomplished, that it was not intended to apply exclusively to moneys held by the bank as such custodian or bailee, although possibly it might include such special deposits. It is not an accurate use of language to speak of the general deposits in an ordinary bank as the money of the depositors. When a general deposit is made with a bank, the title to the money delivered to it passes at once to the bank. The relation thereby established between the bank and the depositor is that of debtor and creditor and not that of bailee and bailor. The bank is the debtor and the depositor the creditor to the amount of the deposit. It is of some importance, in view of the argument presented, to note that the statutes in question do not provide for an actual seizure of any money, either before or after the judgment, but do provide, with respect to each depositor, for the payment to the state by the bank of the debt the bank owes to the depositor.

The only appellant in the case is the Security Savings Bank. None of the depositors appeared in the action and their rights cannot be here adjudicated, except so far as may be necessary in determining the rights of the bank.

The appellant claims that the law is void in all particulars because the notices provided in the action are not sufficient with respect to the depositors whose rights are to be affected thereby, and that as the judgment provided for, when given, requires the bank to pay the money due the depositors into the state treasury without their consent, it is invalid as to the bank itself, because such judgment will not protect it against the subsequent demands of the depositors in case they should appear and claim the money so deposited.

[2, 3] It is claimed on behalf of the state, as a preliminary objection, that the defendant bank has no interest which authorizes it to dispute the validity of the law with respect to the depositors. It is not necessary to determine whether or not it could vicariously for its depositors raise the objection that the law is invalid as to them. The bank has an interest sufficient to authorize it to challenge the validity of the law on its own account. The deposit, as above shown, creates a contract between the bank and its depositors whereby the bank takes the money of the depositor and agrees to repay the amount thereof in whole or in part at any time on demand. Until payment is demanded by the depositor the bank may loan the money deposited with it, or a large part thereof, at interest for its own benefit. It therefore has an interest in keeping the money and the right to refuse payment on a deposit account until demand therefor is made by the depositor, or some one by him authorized, or by his successor in interest. It follows that, if such demand is made by another, the bank may require from such person reasonable proof of his authority. And when a third person who has not acquired the legal title to the chose in action of the depositor but who merely claims a right to demand and receive payment of the amount deposited, sues the bank to enforce such claim, the bank has the right, for its own protection, to insist that the depositor be made a party to the action to answer as to his interest.

"The person with the legal title to the demand in question should usually be made a party, as otherwise he might proceed at law notwithstanding the decree." 15 Ency. Pl. & Pr. 593.

See, also, Wilson v. Castro, 31 Cal. 427.

It cannot be doubted that the state is not the holder of the legal title of the depositor. That title has not been transferred to the state by any act of the depositor, and the state cannot, by a mere statutory declaration, take away the right of the depositor and appropriate to its own use his property therein. Const. art. 1, § 13. The depositor is therefore a necessary party to any action by the state to enforce payment of the money due on deposits into the state treasury, and the bank has the right to insist that the depositors be brought into the case as parties by some process or notice that the law recognizes as valid. It therefore has the right to contend that the process and notice prescribed by these statutes no not constitute due process of law.

The claim of the bank in that behalf is that in order to make a valid service of process upon the depositors there must be either personal service upon them or valid constructive service; that in an action in which the judgment asked for may ultimately deprive the depositors of the title to their demands against the bank, as is the case here, the service of the process against those who reside in the state and can be found therein must be a personal service upon them and each of them, and that there can be no valid constructive service upon any of them, unless it is shown to the satisfaction of the court that the persons so served are not residents of the state, or are absent therefrom, or have concealed themselves to avoid service of process, or cannot with due diligence be found therein. The statute does not require any showing of the facts thus claimed to be necessary to authorize a constructive service, and it does not require personal service upon any of the depositors. The record does not show that any personal service has been made on any of them, or that any showing was made preliminary to the publication of the summons and notice or at all, to the effect that the depositors or any of them are nonresidents or absent from the state or have concealed themselves to avoid service of process or cannot with due diligence be found in the state. If the contention of the bank in this respect is sound, the statute is contrary

to the Constitution, both of this state and of the United States, in failing to require due process of law on the parties whose property is to be taken, and the entire proceeding is without force or validity.

[4] The argument of the appellant on this subject is mainly based on the proposition that the proceeding authorized by section 1273 is an action in personam, and that the judgment therein to be rendered is a personal judgment against the bank and the several depositors made defendants therein. This proposition is not maintainable. The judgment does not seek to declare or enforce any obligation of the depositors, or any of them, to any other person or persons. Its sole object with respect to them is to act upon the obligations they respectively hold against the bank, to effect a substitution of the state for the bank with respect to such obligation, and to transfer the title of that particular property of the depositors, respectively, to the state. Such proceedings are not proceedings strictly in rem; but they are proceedings quasi in rem. The proceeding is not in that respect distinguishable from an ordinary garnishee process against a debtor of a defendant to appropriate the debt to the payment of the plaintiff's demand. In such cases the defendant in the action may be a nonresident, or not within reach of the process of the state court. But if service is made on the garnishee, the court has jurisdiction to dispose of that asset of the defendant and apply it to the payment of the plaintiff's debt. In Pennoyer v. Neff, 95 U. S. 727, 24 L. Ed. 565, the court said:

"The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem."

The court was there discussing the validity of attachment proceedings against one who was a nonresident of the state and had no service of process except by publication. In Cooper v. Reynolds, 77 U. S. (10 Wall.) 317, 19 L. Ed. 931, the court was considering the validity of a sale rendered upon a judgment in attachment where the only service upon the defendant was by publication. The court said:

"Jurisdiction of the res is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. * * * So also while the general rule in regard to jurisdiction in rem requires the actual seizure and possession of the res by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which, being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court."

The service of the summons on the bank is, under the doctrine thus established, the equivalent of a seizure of the property of each depositor in his account with the bank, and gives the court jurisdiction over it to the same extent as in cases in garnishment and other proceedings quasi in rem. To the same point, see 6 Corp. Jur. p. 90, where many cases are cited.

With respect to the question of the kind of process necessary against the owner of the chose in action in such cases, the rule is declared to be that the state has power to dispose of such specific property and adjudicate the title thereto without personal notice to the owner thereof, provided the substituted notice is reasonable and adequate. In Roller v. Holly, 176 U. S. 409, 20 Sup. Ct. 414, 44 L. Ed. 520, on this point the court said:

"It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose."

In Arndt v. Griggs, 134 U. S. 321, 10 Sup. Ct. 559, 33 L. Ed. 918, in a decision holding that a decree to quiet title to real estate was valid if made upon a regular service by publication the court said that the state—

"has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice."

This brings us to the question whether or not the notice to the depositors provided by the statute is reasonable and adequate under the circumstances.

It is not contended that the facts required to be stated in the summons and notice to be

published are insufficient to apprise any depositor who may read them of the nature of the proceeding and the object sought. The only serious objection to the efficacy of the publication as notice is that the statute requires nothing more than it be made in a newspaper of general circulation published in Sacramento county, and that this is not a reasonable notice with respect to persons having deposits in banks doing business in other counties. We see no force in this objection. A person may bring an action in any county in the state to recover money on contract, may obtain jurisdiction of the defendant for the purpose of attachment by publication, and may serve garnishee process on any debtor of the defendant who can be found in any county of the state. Code Civ. Proc. §§ 412, 413, 540, and section 542, subd. 5. The superior court of such county has jurisdiction of such action although the defendant may never have resided therein and the person served as garnishee may reside in some other county and the contract may have been made elsewhere. The publication in such cases in the county in which the suit is brought is the universal practice. Yet it would be no more likely to give notice to the defendant in the action than the notice provided for in these statutes. The validity of judgments regularly obtained in that manner has never been questioned. Our numerous statutes provide for many proceedings, either strictly in rem or quasi in rem, in which the property rights of individuals are affected and the notice provided for is solely by publication in some newspaper, or, in some instances, by merely the posting of notices in public places in the county, and in which the residence of the person to be affected thereby is regarded as immaterial to the validity of the proceeding. Crall v. Poso Irr. Dist., 87 Cal. 148, 26 Pac. 797; Estate of Warfield, 22 Cal. 63, 83 Am. Dec. 49; Rogers v. King, 22 Cal. 72; Halleck v. Moss, 22 Cal. 274; State v. McGlynn, 20 Cal. 270, 81 Am. Dec. 118; Irwin v. Scriber, 18 Cal. 500. In Bennett v. Creditors, 22 Cal. 41, and Brewster v. Ludekins, 19 Cal. 170, it was held that the court acquired jurisdiction, under the statute (Stats. 1860, p. 283), to discharge an insolvent upon notice by publication for four weeks in a newspaper of the county in which the debtor resides. Many similar examples could be given, but we deem it unnecessary to pursue this subject further.

[5] In view of the nature of the proceeding, the character of the property to be affected thereby, and the conditions to which they apply, we think it cannot be said that the method prescribed for imparting notice to the depositor is unreasonable or inadequate. The complaint must show that the deposit accounts in question have remained unclaimed and unchanged by any deposit or withdrawal for a period of 20 years, and that no person claiming it has filed any notice with the bank showing his present residence. Ever since the year 1893, every savings bank in the state has been required to publish annually in a newspaper of the city or town in which it is situated a sworn statement showing the amount of each deposit therein, the name and last known residence of each depositor, and the fact of his death, if known, in all cases where the depositor has not made a deposit or withdrawal for more than 10 years next preceding, except where the depositor is known to be living and the deposit is less than $50. Stats. 1893, p. 183. In 1897 these requirements were extended to all banks of deposit. Stats. 1897, p. 27. In 1905 these provisions were incorporated into the Code. Civ. Code, § 583b. It is to be presumed that these statutes have been obeyed by the banks concerned. It may fairly be inferred that the owner of a deposit under $50 who has not claimed it for 20 years has either forgotten it or abandoned it. It is altogether improbable, after these annual publications of deposits over $50, that any person who resided in the county in which the bank was situated would remain ignorant thereof, or that, being aware of it, he would not have claimed it before 20 years had elapsed. It may reasonably be presumed that the owners of such accounts are nonresidents of such county or of the state, or that they are dead and that their next of kin are nonresidents. It would follow that no county would be a more suitable place in which to give a general notice of this character than the county of Sacramento. The Legislature is the authority that must determine questions of this character, and the determination is final unless the court can say that it is unreasonable. As we are unable to reach such conclusion, we must hold the provision valid.

[6] The further claim is made that there can be no valid service by publication in any case unless there has been some preliminary proof to the court as foundation therefor that the person to be affected by the published notice resides out of the state or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid service of summons. One or the other of these facts are required to be stated, by the Code, in order to obtain an order for publication of summons in an ordinary action. Code Civ. Proc. § 412. We are cited to no decision holding that preliminary proof to the court of either of these things is essential to constitute due process of law in case of service by publication. There are, of course, very many decisions holding that a publication under the Code cannot be valid unless this section is complied with. But such decisions do not establish the proposition that the Legislature is without power to authorize service by publication in any case where such facts are not established prima facie by some preliminary showing. The decisions already cited show that

rights can be affected and changed upon notice by publication without such preliminary showing. We perceive no reason why the Legislature, when providing for a special class of persons such as the depositors here in question, may not itself determine that the facts authorize a substituted service. We are of the opinion that it is within the power of the state, under circumstances such as appear in the present case, to take charge of the deposits such as are here involved, upon the general notice provided by this statute. Cunnius v. Reading School Dist., 198 U. S. 470, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121; Nelson v. Blinn, 197 Mass. 279, 83 N. E. 889, 15 L. R. A. (N. S.) 651, 125 Am. St. Rep. 364, 14 Ann. Cas. 147.

Section 1272 of the Code of Civil Procedure allows "a person not a party or privy" to "any proceeding had under this title" to petition the court at any time within five years after final judgment in such proceeding for another judgment directing that the property declared in the previous judgment to have escheated to the state be delivered to him, or, if it is money, that the amount be paid to him by the state and be declared to be his own. The title referred to is title 8, the subhead of which is "Escheated Estates," and it includes sections 1272 and 1273. Although the language of section 1273, literally interpreted, would bar all persons whatever from afterward claiming the property adjudged to have escheated, section 1272 indicates that it was not intended to be final except as to persons who were "parties or privies" to the proceeding. As the process provided for in the proceeding under section 1273 purports to run to all the world, it may be difficult to give effect to the phrase "party or privy," as used in section 1272, unless it is confined to persons who appeared in the proceeding and those claiming under such persons. If it has this meaning, the judgment under section 1273 does not finally bar the depositors or others interested who did not appear, but merely sets the five-year period running against them. As we remarked at the outset, no persons appeared or appealed except the bank, and the rights of other persons cannot be adjudicated on this appeal. Consequently we express no opinion upon the question just stated. We mention it only to forestall the inference that we have decided it by implication.

It may be true, as the appellant insists, that the result of proceedings under this statute may in rare instances operate unjustly upon depositors, even if they have an additional five years in which to appear. This objection is answered by the Supreme Court of the United States in Blinn v. Nelson, 222 U. S. 7, 32 Sup. Ct. 2, 56 L. Ed. 65, Ann. Cas. 1913B, 555, by the following remark:

"Now and then an extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done."

We find no ground upon which the appeal can be sustained.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.

186 Cal. 517

FEDERAL MUT. LIABILITY INS. CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 9608.)

(Supreme Court of California. July 26, 1921.)

Master and servant ⟹386(1) — Expenses of support of minor deducted from contributions to dependent parent claiming compensation.

Under the Workmen's Compensation Insurance and Safety Act as amended by St. 1917, p. 840, § 9, subd. 3, par. (c) cl. 2, giving to partial dependents three times the annual amount devoted by deceased to the support of the partial dependent, a mother, to whom her minor son made contributions, which she expended for the support of the family, of which her son was a member, is not entitled to compensation based on the total contributions of the son, but must allow as deductions therefrom the amount expended for the support of the son, notwithstanding her legal obligation to support him.

In Bank.

Proceedings under the Workmen's Compensation Act by Harriet Baldwin, individually and as guardian ad litem and trustee, to recover compensation for the death of Charles Frederick Baldwin, brought against the Pacific Marine & Construction Company, for whom was substituted the Federal Mutual Liability Insurance Company, the insurance carrier. The Industrial Commission awarded compensation to the petitioner, and the insurance carrier brings writ of review. Award annulled, with directions.

Cooley & Lachmund, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

SHAW, J. This is a proceeding to review an award in favor of Harriet Baldwin for the sum of $3,654.90, made on September 3, 1920, on account of the death of her son, Charles Frederick Baldwin, which occurred on January 23, 1920, from an injury to him arising out of and in the course of his employment. The Pacific Marine & Construction Company was the employer, and the petitioner was the insurance carrier of the employer. It was substituted for the employer, and the award is against it as such carrier.

The Commission found that the decedent left surviving him his mother, Harriet Baldwin, and that she was partially dependent upon him for support; that the annual amount devoted by him to the support of his mother was $1,218.30, and that the death benefit was $3,654.90.

The award was made under the Workmen's Compensation, Insurance and Safety Act as revised and amended in 1917. It provides that in a case where an injury causes death to an employee, and such employee leaves one or more persons partially dependent upon him for support the said dependents shall be allowed $100 for funeral expenses and "in addition thereto, a death benefit which shall amount to three times the annual amount devoted by the deceased to the support of the person or persons so partially dependent." Section 9, subd. 3, par. c, cl. 2, Stats. 1917, p. 840. The findings further show that for the year preceding his death the decedent was living with his mother, his sister Virginia, and his brother Gordon, as members of the same family and household, and boarded and lodged with them; that at the time of his death he was 18 years of age, and his brother Gordon was 20 years of age; that during that year he contributed to the support of his mother the sum of $1,218.30 as aforesaid, and that this included the expenses of his own board and lodging and $30 for his own clothing. It will be observed that the Commission made no deduction for the expenses of his clothing, board, and lodging. Its theory was that the language of the act authorizes an allowance in such cases, not only for the amount devoted to the support of the person who is partially dependent upon the minor child, but also for the amount which such minor child contributes to the dependent person to be applied to his own support. The argument in support of this theory appears to be that the mother is primarily chargeable with the support of her minor children, and that a contribution which one of those minor children makes to the support of himself and the mother is, in the contemplation of the law, money devoted to the support of the mother, as the statute expresses it. We can see no reason for such a construction of the statute. The language is plain, and it limits the measure of the amount of the award "to the annual amount devoted by the deceased to the support of the person or persons so partially dependent." Money which goes to the support of the deceased himself is, of course, not devoted to the support of any other person. The award is not made to the mother because of the fact that she is primarily responsible for the support of the minor children. The purpose of the act is to provide a compensation to the dependent person for the loss such person will sustain because of the death of the decedent, necessarily a loss subsequent to the death, and not a loss of any thing acquired before death. This loss, by the words of the act, is to be measured by the money previously devoted by the decedent to the support of the dependent. This implies that the loss to be compensated for does not include loss of the society, love or affection of the decedent, but that it is to be confined to the loss of support from the decedent. There could be no loss of the latter character after such death, on account of the money previously devoted to providing clothing, board, and lodging for the decedent himself, and supplied by the decedent to the general family chest. It follows that in determining the annual amount devoted to the support of the dependent mother, the amount of the general family expense paid by the decedent should be diminished by deducting the fair proportion thereof that went to the support of the decedent and to others in the family who were not dependent upon him. Everything should be excluded therefrom except the amount of his contributions that was devoted to the support of the dependent. The Commission appears to have been induced to adopt its theory on the authority of the decision in Re Gove, 223 Mass. 187, 111 N. E. 702, which holds to a similar theory of compensation under the Massachusetts Compensation Act (St. 1911, c. 751 as amended by St. 1912, c. 571). There is, however, a marked difference between the language of that act and the language of the statute of California on the subject, and it is precisely this difference which caused the decision in Massachusetts. The Massachusetts act makes the measure of the compensation dependent upon "the amount contributed by the employee to such partial dependents." The Massachusetts court construed this to mean all amounts contributed by the deceased to the dependent, regardless of the purpose to which it was applied, and thereupon it concluded that where the deceased was a minor and the dependent person was his parent with whom the deceased lived, the amount of his contribution going to the support of the deceased himself was not to be a deduction from the total contribution to the dependents. This was a fairly logical conclusion from the language of the Massachusetts act, but it cannot be taken as authority for the conclusion that the California act has the same effect. The language of our law, in cases of partial dependency, points to exactly the opposite conclusion, and limits the measure of the award to three times the annual amount devoted to the support of the dependent. This, of course, could not include any amount devoted to the support of some other person, or to the support of the decedent himself while living with the dependent as a member of the family.

The award is annulled, and the Commission is directed to proceed to an award in

conformity with the views expressed in this opinion.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; SHURTLEFF, J.; LAWLOR, J.; LENNON, J.

186 Cal. 538

EISENMAYER v. THOMPSON. (L. A. 6702.)

(Supreme Court of California. July 28, 1921.)

1. Executors and administrators ⟹194(6)— Setting aside estate to widow is not open to collateral attack.

A judgment of the probate court setting aside the estate of a decedent to the widow under Code Civ. Proc. § 1469, which on its face vested absolute title to the property in the widow, is not open to collateral attack, but can only be questioned by direct attack.

2. Executors and administrators ⟹194(6)— Allegations of fraud in procuring judgment held insufficient.

In an action to quiet title based on a judgment setting aside realty to the widow of deceased owner, an answer alleging that the plaintiff fraudulently, with intent to deceive the court, misrepresented the value of the property, is not a sufficient allegation of fraud to open the judgment to collateral attack or to admit testimony disputing the finding of the probate court as to its value.

3. Judgment ⟹443(1) — Not set aside for fraud involved in action.

A court of equity will annul a judgment for fraud only where the fraud is extrinsic or collateral to the matter tried by court, and will not grant the relief for fraud involved in the merits of the action or in any matter on which decree was rendered.

4. Executors and administrators ⟹199—Evidence held not to show fraud in obtaining judgment setting property aside to widow.

In an action to quiet title for property set aside to a widow, evidence that the widow had estimated the value of the property in making her homestead declaration at $5,000, and stated in her petition for administration it did not exceed $5,000, with expert testimony the property was worth $4,500, does not show fraud by the widow in petitioning to have the property set off to her, and alleging that its value was $2,800, which was the value placed upon it by the appraisers.

5. Executors and administrators ⟹181 — Wife's declaration of homestead does not affect her right to have property set aside to her.

The right of a widow to have set aside to her the separate property of her husband where his estate was less than $1,500 in value, under Code Civ. Proc. § 1469, is not affected by the fact that the wife alone had made a declaration of homestead affecting the property before her husband's death.

In Bank.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by Marcy K. Eisenmayer against W. K. Thompson, to quiet title to real estate. Judgment for defendant, and plaintiff appeals. Reversed.

Sidney J. Parsons, of Los Angeles, for appellant.

Porter & Sutton, of Los Angeles, for respondent.

SLOANE, J. The plaintiff, claiming under a decree of the probate court assigning to her the property in question under the provisions of section 1469 of the Code of Civil Procedure, brings this action to quiet her title against the defendant, adversely claiming as a creditor of the estate of plaintiff's deceased husband.

It is conceded that decedent, George F. Eisenmayer, plaintiff's husband, died seized of title in fee to lot 13, block 15, of Montecito Park, in the county of Los Angeles, with the dwelling house thereon occupied by himself and wife as the family residence. The defendant, W. K. Thompson, pending the administration of said estate, in an action against the administratrix, obtained a judgment against the estate payable in due course of administration for upwards of $50,000. Thereafter, in due course of the administration of the estate, an inventory and appraisement was returned and filed showing the entire estate to consist of $193 in money and this real property, appraised at $2,800, making a total of $2,993. This valuation was subject to a mortgage of $1,900 on the real property, reducing the net value of the estate on the basis of the appraisement to less than $1,500, to wit, $890.

Proceedings were thereupon had in which these facts were set out by petition and this property was assigned to the widow, the plaintiff in this action, in conformity with the provisions of section 1469, supra.

The only pretense of any irregularity in the proceedings on the face of the record is that in the notice of the hearing of the application the blanks for the date on which the order to show cause thereon referred to was made were not filled out, and the order to show cause, which was dated August 2, 1919, was marked filed August 1st. These, of course, are inconsequential errors on a collateral attack.

The order of assignment itself recites the filing of the petition, order to show cause, notice of hearing, and the finding of the court that the net value of the whole estate does not exceed the sum of $1,500, and that all expenses of last illness, funeral charges and expenses of administration have been paid, and it is thereupon ordered, adjudged,

and decreed that the whole of said estate "be and the same is hereby assigned to and the title thereof shall vest absolutely in Mary K. Eisenmayer, widow of said deceased," subject to mortgages, liens, or incumbrances existing at time of death of decedent. This judgment became final without any attempt to review it by either motion or appeal.

The ground of attack, which respondent presents with apparent seriousness, is, under the allegation of his answer, that, notwithstanding the finding and judgment of the court that the value of this estate was less than $1,500, it was in reality of greater value, and that the land in controversy was reasonably worth the sum of $4,500 at the time the order of the court was made, or $2,600 after deducting the mortgage, and that plaintiff "fraudulently and with intent to deceive said superior court falsely misrepresented the value of said real property."

On the trial the defendant was permitted, over the objection of plaintiff, to introduce evidence disputing the order and decree of the probate court as to value. The plaintiff was placed on the stand and admitted that she had placed an estimated value of $4,500 on the property in a declaration of homestead filed by her on the premises more than a year prior to the decree in the probate proceedings, and that in her petition for letters of administration it was recited that the value of the estate "did not exceed $5,000." Two other witnesses testified, over the objections of plaintiff, that in their opinion the market value of the real property was $4,500 or $5,000 at the time of the probate assignment.

On this evidence the trial court found that the plaintiff was not and never had been the owner of this real property; that the net value of the estate of the decedent on the 6th day of October, 1919, at the time of the order, was over the sum of $1,500, to wit, of the value of $2,500 and gave judgment for the defendant. This judgment was unauthorized by either the pleadings or the evidence.

[1] Under section 1469 of the Code of Civil Procedure the order of the probate court on its face vested absolute title to this property in the plaintiff. This judgment became final and conclusive, and not open to collateral attack. Dennis v. Winter, 63 Cal. 16, 18; Dungan v. Sup. Ct., 149 Cal. 98, 84 Pac. 767, 117 Am. St. Rep. 119; Luscomb v. Fintzelberg, 162 Cal. 433, 123 Pac. 247.

The conclusiveness of this order could only be questioned by a direct attack for fraud, extrinsic or collateral, to the issues tried. It could not be collaterally attacked merely for false testimony on the hearing as to its value.

[2] Fraud, if it could be raised at all by answer, must at least be pleaded with the particularity required in an equitable action to vacate the order. The only averment in the answer sounding in fraud was the allegation that—

"The plaintiff fraudulently, and with intent to deceive said superior court, falsely misrepresented the value of said real property, to wit, represented that the value of such real property, after deducting the balance of $1,900 due on the trust deed for $2,250 against said real property, was of the value of only $890, whereas in truth and in fact said property was of the value of $4,500, and said estate, after deducting the balance due on said trust deed as aforesaid, was of a value in excess of $2,500."

This was not a sufficient allegation of fraud to open the judgment to collateral attack or to admit testimony disputing the finding of the probate court as to the value of the property.

[3] A court of equity will only set aside or annul a judgment for fraud where the fraud is extrinsic or collateral to the matter tried by the court, and will not grant relief for fraud involved in the merits of the action or in any matter on which the decree was rendered, and a pleading based upon such intrinsic matter does not state a cause of action or a defense. Fealey v. Fealey, 104 Cal. 354, 38 Pac. 49, 43 Am. St. Rep. 111; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736; Bancroft v. Bancroft, 178 Cal. 359, 173 Pac. 579, L. R. A. 1918F, 1029.

Even on an appeal by a creditor from an order under section 1469, Code of Civil Procedure, claiming the value of the property to be greatly in excess of that stated, this court has said:

"Admitting that the court below could, if it had been imposed upon by a false inventory and appraisement, or by false testimony on the hearing, have set aside the decree, * * * we see no ground for doubting the correctness of the ruling. * * * The statute has confided to the appraisers in the first instance, and to the court in the second instance, the duty of ascertaining and fixing the value; and the reasonable and proper exercise of this judgment cannot be interfered with." Est. of Palomares, 63 Cal. 402.

[4] The court in this action makes no finding that there was any fraud or bad faith, and the evidence admitted at the trial would not justify such a finding.

It does not appear that the plaintiff here testified on the probate hearing, and her petition to have the property set apart to her, in which she alleges the value of the estate to be less than $1,500, recites and is predicated upon the appraisement fixing the value of the entire estate at $2,993 before deducting the $1,900 mortgage lien. It does not appear that she did not in good faith accept such appraisement as the fair valuation of the property. Her estimate of $4,500 as the value of the real estate in her homestead declaration a year previously does not reflect upon the correctness or good faith of her verified petition in the probate proceedings, in view of the fact that the homestead law permitted a declaration on property to the value of

$5,000, and only requires an estimated value to be placed in the declaration. Her only other reference to the valuation of this property was the statement in the petition for letters of administration that the property of the estate "did not exceed $5,000 in value."

In view of the fact that three disinterested appraisers and the probate court fixed the value at less than $1,500, the mere circumstance that witnesses at the trial of the present action had a different opinion, and fixed the value at $4,500, cannot be taken to show fraud on the part of this plaintiff, or to destroy her right in equity to have her title quieted.

[5] The declaration of homestead was introduced on this trial apparently as a muniment of title in plaintiff's behalf. The property was the separate estate of decedent, and the declaration of homestead was by the wife alone. It neither added to nor subtracted from her right to have the entire estate assigned to her under section 1469 of the Code of Civil Procedure. Estate of Neff, 139 Cal. 71, 72 Pac. 632.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SHURTLEFF, J.; LENNON, J.; LAWLOR, J.

186 Cal. 459

MONTGOMERY v. MEYERSTEIN et al. (S. F. 9227, 9271.)

(Supreme Court of California. July 9, 1921.)

1. Vendor and purchaser ⟸341(1½)—Incumbrancers joining in contract held not personally liable to return purchase money after rescission for vendor's fraud.

Where the grantee of a trust deed and the beneficiary thereunder joined in the contract for the sale of the property to plaintiff at plaintiff's request, but had no interest therein except to receive the payment of the debt secured by the trust deed by plaintiff, they are not personally liable to plaintiff for the amount paid on the secured debt after plaintiff rescinded her contract for the fraud of the vendor in which the incumbrancers did not participate.

2. Mortgages ⟸209, 298(4)—After payment of debt conveyance from trustee is only necessary to perfect record title.

Under Civ. Code, §§ 871, 2279, the estate of a trustee, under a trust deed to secure a debt, absolutely ceases upon the payment of the debt, and the only purpose to be served by having the trustee join in conveyance of the property after payment of the debt would be to make the record title clear.

3. Vendor and purchaser ⟸337—Statute giving lien for purchase money after failure of consideration does not exclude other liens.

Civ. Code, § 3050, giving a lien for the purchase money paid for land where there is a failure of consideration, was not intended to be exclusive, and to abrogate previously established rules of equity on the subject, and does not prevent a lien for the purchase money paid after the purchaser rescinds for the vendor's fraud.

4. Vendor and purchaser ⟸337 — Purchaser has lien after rescission for vendor's fraud.

A purchaser of realty who rescinds a contract for the vendor's fraud is entitled to a lien on the property for the portion of the purchase price paid before the rescission.

5. Vendor and purchaser ⟸341(5)—Purchaser rescinding for fraud should account for value of use.

A purchaser who took possession of the property and made payments and improvements thereon, and thereafter rescinded on discovering the vendor's fraud, and sued to recover the payments and cost of improvements, should account to the vendor for the value of the use of the premises.

6. Vendor and purchaser ⟸36(1)—Fact that property was worth amount paid does not prevent rescission for fraud.

The fact that the property was worth the amount which the purchaser paid for it does not bar the purchaser's right to rescind the contract for fraudulent misrepresentations if the property was not worth as much as it would have been had the representations been true.

7. Vendor and purchaser ⟸119 — Purchaser held not guilty of laches in rescinding for fraud.

Where vendor represented that he had paid more for the house than he actually did, and exhibited the contract, which had been padded to support such misrepresentation, the fact that the purchaser had seen the contract and knew the name of the contractor did not put her on inquiry to discover the misrepresentation, but rather tended to lull her into security, so that she was not guilty of laches in not rescinding until after discovering the fraud.

8. Mortgages ⟸151(1)—Lien for return of purchase money is subject to prior trust deed.

The lien of the purchaser for the purchase money paid after rescission by her for the vendor's misrepresentation is subject to the lien of a trust deed and mortgage against the property at the time the contract was made.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by May Montgomery against Alfred L. Meyerstein and others, to rescind a contract. From a judgment awarding rescission of the contract, but giving plaintiff judgment for refund of the purchase price paid, and expenses only against defendant Otto A. Brown, and refusing to make the judgment a lien against the property, and from an order denying plaintiff's motion for additional judgment under the findings, plaintiff ap-

peals. Reversed and remanded, with instructions.

Ornbaun & Fraser, of San Francisco (Cleveland R. Wright, of San Francisco, of counsel), for appellant.

Walter H. Linforth, of San Francisco, for respondents.

SHAW, J. The complaint states a cause of action in favor of the plaintiff against the defendants to recover of the defendants the sum of $2,020 upon the rescission of a contract for the conveyance of a certain lot executed by the defendants to the plaintiff. The money sought to be recovered consists of $500 paid by plaintiff to defendant Brown, and $1,170 paid by her to defendant Forest Hill Realty Company, both sums being paid as part of the purchase price of said property, and several sums paid upon the property, the items being $215 for improvements upon the property, $10 for a defective door in a house erected on the property by the defendants, $75 for taxes, and $50 for insurance on the property. The ground upon which the rescission was claimed was the false and fraudulent representations of the defendants to the plaintiff concerning the property which induced her to enter into the agreement of purchase. The complaint also asks that the plaintiff be given a lien upon the property for the above-stated amounts.

Issues were taken upon the material allegations of the complaint, the cause was tried by the court, and findings were made and judgment rendered in favor of the plaintiff against the defendant Brown alone for the recovery of $2,020, being the total amount demanded in the complaint as aforesaid, but without declaring any lien upon the property, and in favor of the other defendants against the plaintiff for their costs. Thereafter the plaintiff moved the court, under section 663 of the Code of Civil Procedure, to enter a judgment on the findings for $1,170 against the Forest Hill Realty Company, and for a lien upon the property contracted to be sold by defendants to the plaintiff for the amount due her from the Forest Hill Realty Company and Brown. This motion was denied. Plaintiff has appealed from the judgment, and also from the order denying the said motion. The appeals were taken separately and separate transcripts were filed. The appeal from the judgment is numbered 9227, and that from the order denying the motion is numbered 9271. As the same questions are presented by both appeals it is unnecessary to distinguish between them in the opinion.

The facts stated in the findings are as follows: On September 23, 1915, while Brown was the owner of the land sold to the plaintiff, he executed to defendant Meyerstein a deed of trust of said land to secure the payment of $2,125 then owing by him to defendant Forest Hill Realty Company. The property was also then subject to a prior lien executed by Brown to the Bank of Italy to secure the payment of $3,500 owing by him to said bank. The agreement of sale between the defendants and the plaintiff was executed on February 7, 1916. The negotiations were conducted by Brown alone, and the representations complained of were made by him alone. Neither of the other defendants had any part therein, and had no knowledge thereof at the time they executed the agreement, or afterwards, so far as appears, until this suit was begun. While the negotiations for the agreement of sale were pending the plaintiff learned of the fact that the property was incumbered by the deed of trust and mortgage aforesaid. Because of this fact, and for no other reason, plaintiff requested that the two other defendants, Meyerstein, the trustee, and Forest Hill Realty Company, the beneficiary under the deed of trust, join in the execution of the agreement, and they did so. She knew that they had no right or title to the property, and she fully understood that she was not buying the property from them, but was purchasing it from Brown.

The agreement for the sale fixed the price of the property at $7,630, of which $500 was paid to Brown upon its execution. The balance of the price was to be paid in installments of $65 per month, with interest at 6 per cent. per annum, to the Forest Hill Realty Company, until the entire sum was paid. The opening paragraph named the three defendants as "parties of the first part." Thereafter, in describing the parties, the phrase used is "party of the first part." It provides that upon full payment "the party of the first part" will execute to the plaintiff a deed conveying title to her free and clear of all incumbrances. The false representation by which plaintiff was induced to execute the agreement was made by Brown, and was to the effect that the house then on the premises had cost $5,000, and to establish that fact to her satisfaction he exhibited to her the contract between himself and the contractor who erected the same, which stated that the contract price was $5,000. The fact was that the contract price was only $4,100, and the court found that the written contract therefor was "padded to the amount of $900 for the express purpose of making the buyer believe that the house cost $5,000." The plaintiff would not have purchased the property had it not been for such fraudulent representation, and she believed it to be true.

She immediately took possession of the property, and thereupon proceeded to make the monthly payments to the Forest Hill Realty Company until she had paid it the sum of $1,170. After taking possession she expended $215 for improvements, consisting of a fence on the property and some stairs and hardwood floors in the house, $10 paid on

account of a defective door, $75 for taxes, and $50 for an insurance premium on the house, making the total payment $2,020. The plaintiff first learned of the fact that the said representation as to the cost of the house was false and fraudulent on September 22, 1917. She immediately demanded the return of the money she had paid upon the contract and for the expenditures thereon as aforesaid, and offered to restore what she had received under the contract. Thereupon she began this action.

[1] We find no merit in the claim of the plaintiff that the Forest Hill Realty Company and Meyerstein are liable for the money paid by plaintiff on the agreement, and for the improvements made and for taxes and insurance, because of the fact that they are parties to the agreement of purchase. The facts found clearly show that they had no interest in the purchase other than the fact that they held the incumbrance upon the property by virtue of the deed of trust and the obligation of Brown. It was the plaintiff herself who requested them to sign the agreement, and it is obvious that her object was to protect herself against the contingency that the incumbrances aforesaid might not be paid if the payments were made to Brown. The payments made did not fully satisfy the claim of the Forest Hill Realty Company under the deed of trust. Neither that company nor Meyerstein had any knowledge whatever of the fraud of Brown in procuring the agreement to be executed. They were innocent participants in the agreement, and they were entitled to the money upon the preceding obligation of Brown to the Realty Company. They are not responsible for Brown's fraud, and the only recourse of the plaintiff was against Brown alone. As the money they received was owing to them prior to the execution of the agreement they cannot be charged with having received it by reason of the fraud, nor can it be held Brown was their agent in procuring the agreement by means of the fraudulent representations so as to make them responsible for the return of the money.

[2] While the agreement on its face appears to be the agreement of all three of the parties of the first part, it is obvious from the facts that the other two parties had no interest in the transaction except so far as they had a lien upon the property to be satisfied out of the purchase money. The obligation to convey the property would bind them to join in the conveyance upon full payment of the price, if any part of the incumbrance they held remained unpaid or undischarged at that time. The estate of Meyerstein under his deed would absolutely cease upon the payment of the debt of Brown to the realty company (Civ. Code, §§ 871, 2279), and the only purpose to be served thereafter by having Meyerstein join in the conveyance would have been to make the record title clear. McLeod v. Moran, 153 Cal. 100, 94 Pac. 604. Under these circumstances we are of the opinion that no personal obligation for the return of the money paid on the price or expended upon the property was created by the rescission of the contract for the fraud of Brown.

[3] We are further of the opinion that under the facts in this case the plaintiff was entitled to a lien upon the lot for the amount of the purchase money paid by her and the expenditures she made upon the property, including the taxes and insurance. The claim of the defendants in this behalf is that, under section 3050 of the Civil Code, the right to a lien for the purchase money paid is limited to cases where there is a failure of consideration, and does not extend to cases where the contract is properly rescinded by the vendee on the ground that fraudulent representations of the vendor induced the execution of the contract. We do not understand that section 3050 was intended to be exclusive and to abrogate the previously established rules of equity on the subject. It contains no language to that effect, and we can perceive no reason why it should be so interpreted.

[4] The reasons for the rule which gives the vendee the right to rescind upon the failure of the vendor to execute the contract, or the avoidance thereof for any reason, and to a lien upon the land, applies as forcibly to cases of rescission for fraud as to cases of failure of consideration, and are thus clearly stated by the English court of Chancery in Rose v. Watson, 10 H. C. L. 672, 11 Eng. Reprint, 1190:

"When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. * * * Every portion of the purchase money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate. * * * In conformity, therefore, with every principle, the purchaser paying the money acquired an interest in the estate by force of the contract and of that part performance of the contract, namely, the payment of that portion of the purchase money."

And thereupon the court adjudged that the vendee was entitled to a lien upon the property for the purchase money paid.

See, also, 2 Sugden on Vendors, 672.

The doctrine is also stated as follows:

"If the contract fails, or *is avoided*, because of the inability or refusal of the vendor to make a proper title, or *because of fraud or misrepresentation in the contract*, or for any other reason chargeable to the vendor, and which is not due to the default of the vendee, he is given a lien upon the land as security for the

repayment of what he has paid in performance of the contract." 29 Am. & Eng. Ency. of Law 730; 39 Cyc. 2032. (The italics are ours.)

"The lien also exists to secure the vendee any amount to which he is entitled for having erected improvements upon the land." 29 Am. & Eng. Ency. of Law, 730; 39 Cyc. 2037.

It also extends to expenditures for taxes and insurance. 2 Black on Rescission, § 694. Many cases are cited to the proposition stated in these authorities, and they fully support the text. It is unnecessary to cite them here.

[5] Perhaps it should be stated as a complete exposition of the doctrine that the vendee who has been in possession should, upon claiming such rescission and lien for the purchase money paid, account for the value of the use of the property during the time he has been in possession. This being an appeal by the plaintiff for an additional judgment giving a lien for the purchase money and expenditures, and the defendants having made no claim for such rentals in their pleadings, the question does not arise upon this appeal, and it is not presented in the briefs.

[6] The respondents claim that the court below was in error in adjudging that the plaintiff had a right to rescind. The argument is that the findings predicate the right to rescind solely upon the fact that Brown made false statements concerning the contract price of building the house upon the premises, and that it is not stated in the findings that the property was not worth the full amount of the price agreed upon. The case comes up upon the judgment roll alone, and the evidence is not shown. It is well settled that in a case of fraud the fact that the property was worth as much as the price agreed upon does not prevent the right of rescission if it appears that it would have been worth more if the representations which procured it had been true. Spreckels v. Gorrill, 152 Cal. 389, 92 Pac. 1011; Davis v. Butler, 154 Cal. 627, 98 Pac. 1047.

[7] There is no merit in the objection that the plaintiff was guilty of laches in not making her offer to rescind sooner. The findings show that she did not discover the falsity of the representation until about one month prior to the beginning of the action. The fact that she was informed of the name of the contractor and inspected the contract itself was not sufficient to put her upon inquiry as to the truth of the statement. On the contrary, its tendency was to lull her into security regarding it.

[8] It is necessary to add that the lien to which the plaintiff is entitled, to secure the return of the money she has paid on the price and expended on the property is subject to the lien of the Forest Hill Realty Company for the remainder of the debt secured to it by the deed of trust to Meyerstein, and also subject to the prior mortgage to the Bank of Italy. The decree to be rendered upon the going down of the remittitur should so declare. The court should have granted the motion to enter a different judgment with respect to the lien claimed for the amount of expenditures made, but subject to the aforesaid prior liens. If correctly refused to enter personal judgment against the Forest Hill Realty Company for $1,170 paid to it upon the purchase price.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the plaintiff against Brown for the sum of $2,020, with interest to the date of such entry, and declaring a lien therefor upon the property described in the complaint, subject to the liens of the Forest Hill Realty Company and the Bank of Italy aforesaid.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.; LAWLOR, J.

186 Cal. 530

HOLLOWELL et ux. v. CAMERON.
(L. A. 6436.)

(Supreme Court of California. July 26, 1921. Rehearing Denied August 25, 1921.)

1. Highways ⟸184(2)—Evidence held to sustain verdict finding plaintiff's rear lamp was lighted.

In an action for injuries sustained in an automobile collision, testimony by plaintiff that he had lighted his rear light, and by the driver of the car which he passed just before the accident that the rear light was burning, is sufficient to sustain a verdict finding plaintiff's automobile carried a lighted rear light as required by statute.

2. Highways ⟸184(2)—Defendant has burden of proving defect in plaintiff's light, unless it appeared from plaintiff's evidence.

Since contributory negligence is an affirmative defense, the burden of proving which is on the defendant, defendant cannot rely on the insufficiency of plaintiff's rear light to be visible at a distance of 500 feet, where such insufficiency did not appear from plaintiff's evidence, and defendant introduced no evidence to establish it.

3. Highways ⟸184(4) — Defendant cannot complain of instruction omitting requirement as to plaintiff's rear light, in absence of evidence showing defect.

Where there was no evidence in the case as to whether plaintiff's rear light complied with the requirement of Motor Vehicle Law, § 13, that it shall illuminate the number on the vehicle, defendant cannot complain that the court failed to instruct the jury as to such re-

quirement, since, if the failure to comply with that requirement was negligence contributing to the accident, the burden was on defendant to prove it.

Department 1.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by John F. Hollowell and wife against Adrien E. Cameron to recover damages for personal injuries and for damage to an automobile. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Brinton Gregory and Fred W. Morrison, both of Los Angeles, for respondents.

LAWLOR, J. The plaintiffs, husband and wife, brought this action against the defendant for damages for personal injuries received by them in an automobile collision and for injury to the machine in which they were riding. The case was tried by jury, and judgment was entered upon a verdict in favor of plaintiffs. The defendant appeals.

About 8 o'clock on the evening of July 1, 1917, respondents were riding in their Ford automobile along Avenue 64, between Los Angeles and Pasadena, and with them was their 15 months old grandson. Mr. Hollowell was driving, and the machine was traveling at a rate of about 20 miles an hour. He drove to one side to pass another machine, driven by one William Clark Houston, and had just swung back to the right side of the road, when appellant, in a Stutz car, came up from behind and crashed into the rear end of the Ford. The Ford was overturned and damaged, and respondents were both injured; Mrs. Hollowell being thrown through the top of the car. The baby escaped injury. Mr. Houston testified:

"I saw Mr. Cameron before I got to the accident; he passed me also. I did hear a noise coming before he reached me. I heard a terrific blowing of the horn. * * * He was going 50 miles an hour, if he was going a mile."

Henry W. Baker testified:

"No; I do not know how fast he was driving. * * * I saw he was driving at a terrible rate of speed."

Appellant testified:

"I was driving around 30 miles an hour, but not in excess of 30."

Appellant bases his claim for reversal upon three contentions—(1) insufficiency of the evidence to justify the verdict; (2) that the verdict is against the law and the evidence; and (3) that certain instructions were erroneous.

[1] 1. First as to the sufficiency of the evidence. We quote from appellant's brief:

"The entire testimony of both plaintiff and defendant centered around the light on the rear of the machine of the plaintiff. Witnesses for the plaintiff testified that he did have a tail light on the automobile; but a search of the record will not disclose that any witness for the plaintiff testified that he had a tail light on his Ford visible for 500 feet in the rear, as the law requires."

Respondent testified in part as follows:

"Q. The front lights you can light from the inside of the car? A. Yes, sir. Q. The tail light, you have to get out? A. I would like to make a statement about when I lighted the tail light. Q. When did you light the tail light? A. On Fremont street, about 100 feet from Third street, near the Friends' Church, here in Los Angeles. Q. At what time of night or day? A. 7:45, or a quarter to 8. I know that, because I looked at my watch at that time. Q. How did you happen to look at your watch then? A. Because I had not taken the time of day, and that is how I happen to. * * * It was 7:45. * * * The tail light was in good condition, because I had cleaned it and put oil in that morning."

William Clark Houston testified:

"He [Mr. Hollowell] did drive over onto the right-hand side of the road when he passed me. His tail light was lit at that time," and that "I saw the tail light on the Ford, and it was lighted."

It follows that the implied finding of the jury that the Ford carried a lighted tail light is supported by the evidence.

[2] Next, as to the claim that no witness for respondents testified that the tail light was visible for 500 feet to the rear. It is true that neither the transcript nor the briefs contain any such evidence. But the burden of proving contributory negligence was upon appellant. In Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734, it was said:

"It remains to consider the question of alleged contributory negligence on the part of the plaintiff's decedent. In considering this, it is important to bear in mind that such negligence is a matter of defense, to be proved affirmatively by the defendant, and hence that the burden of proof is on him [citing cases]. 'In this state * * * it is sufficient for the plaintiff to show, in the first instance, that the injury resulted from the negligence of the defendant.' Smith v. Occidental S. S. Co., 99 Cal. 468. And see also Shearman & Redfield on Negligence, §§ 107–109, there cited. * * * It must also appear affirmatively, in the same conclusive way, that the negligence of the plaintiff was, in whole or in part, the proximate cause of the injury, or in other words, that it contributed to that effect. Smith v. Occidental, etc., Steamship Co., 99 Cal. 468."

In Gay v. Winter, 34 Cal. 153, the court declared:

"In the absence of any direct proof, we are of the opinion that the jury are at liberty to infer ordinary care and diligence on the part of the plaintiff from all the circumstances of the case—his character and habits and the nat-

ural instinct of self-preservation. To hold otherwise would be in effect to presume negligence on the part of one in excuse of negligence on the part of another."

In McDougall v. Central R. R. Co., 63 Cal. 431, the court said:

"Of course, the circumstances, as related by the plaintiff's witnesses, will often satisfy the court or jury that plaintiff has been guilty of such contributory negligence as will prohibit a recovery."

The jury was repeatedly instructed that, if the tail light on the Ford was not lighted, or if it did not have a light plainly visible for 500 feet to the rear, then respondent was guilty of negligence. It is clear that the evidence offered by respondent does not tend to establish contributory negligence, and that it was sufficient to justify the jury in finding that the proximate cause of the accident was the negligence of appellant in driving the Stutz car at an excessive rate of speed. Hence it devolved upon appellant to prove affirmatively that the red light was not visible 500 feet to the rear, and, having failed to do so, he will not be heard to charge the omission of the proof to respondents.

2. In view of what we have already said, the contention of appellant that "the verdict is against the law and the evidence" must be held to be without merit.

[3] 3. Appellant's final contention is that—

"The court charged the jury that certain acts of the defendant might or might not constitute negligence, and named the elements mentioned in the statute; but in charging the negligence which rested upon the plaintiff (and the negligence of both the plaintiff and defendant is created entirely by statute in so far as this case is concerned), we find the court leaves out one of the essential elements in so far as plaintiff is concerned, to wit, that of placing a light of such character and description that its strength might not only be tested by the red light shining 500 feet in the rear, but by the white light which must display the numbers for a distance of at least 50 feet to the rear."

Appellant bases this contention on the provisions of the Motor Vehicle Act (section 13, p. 405, Stats. 1915), to the effect that the tail lamp shall exhibit a red light plainly visible for a distance of 500 feet toward the rear—

"and so constructed and placed that the number plate carried on the rear of such motor vehicle shall be illuminated by a white light in such manner that the number thereon can be plainly distinguished * * * at a distance of not less than fifty feet toward the rear."

The court charged the jury that if the Ford did not have a tail light visible 500 feet in the rear, or if he did have and it was not lighted, respondent was guilty of negligence, and that such negligence proximately contributed to the injury. In connection with this point appellant assigns error to the refusal of the court to give an instruction to the effect that a failure to carry a tail light which would comply with the double requirement of exhibiting a red light visible 500 feet to the rear, and a white light illuminating the number plate to make it visible 50 feet to the rear, would be contributory negligence. We do not understand appellant to complain of the instructions concerning the red light. Respondent's answer to these contentions is that, even if the tail light was not so constructed and placed with reference to the number, this was not the proximate cause of the accident, and that, in addition, there is no testimony that the light was not so constructed and placed. It is true the instruction given does not specifically refer to the white light. But, as we have shown, the burden of proving contributory negligence was on appellant, and we cannot find any evidence as to whether or not the tail light was so constructed and placed as to show the number, or that it did not show the number on this occasion.

Judgment affirmed.

We concur: SHAW, J.; SHURTLEFF, J.

186 Cal. 453

MILLER et al. v. SUPERIOR COURT OF YOLO COUNTY et al. (Sac. 3263.)

(Supreme Court of California. July 9, 1921.)

1. Courts ⊜475(2, 3) — Application for general administration deprives other courts of jurisdiction during its pendency.

Under Code Civ. Proc. §§ 1294, 1295, providing for issuance of letters testamentary or administration, a petition looking to the appointment of an executor or general administrator in one court vests that court with exclusive jurisdiction thereof until the petition is finally disposed of, so that a petition for similar letters in any other court is beyond the jurisdiction of that court.

2. Courts ⊜475(2, 3) — Special administrator may be appointed while application for general administration is pending in another court.

A special administrator, who is purely an emergency officer to preserve the property until the appointment of a general administrator, and from whose appointment no appeal will lie, under Code Civ. Proc. §§ 1411, 1417, may be appointed by a court of the county in which the property of the estate is situated, while proceedings for the issuance of general letters of administration or letters testamentary are pending in another county.

3. Courts ⊜475(2, 3) — Application for special administrator does not deprive other courts of jurisdiction to appoint such administrator.

A pending application for the appointment of a special administrator to preserve property

does not deprive other courts, in counties where some property of deceased was situated, from entertaining an application for the appointment of such special administrator while the proceedings were still pending in the other county.

In Bank.

Application by Gant D. Miller and another, in the District Court of Appeal, for writ of prohibition against the Superior Court of the County of Yolo, and the Judge thereof, to restrain further action in connection with special administration. Writ discharged, and proceeding dismissed.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for plaintiffs.

Sanborn & Roehl and De Lancey C. Smith, all of San Francisco, for defendants.

Dozier & Dozier, of San Francisco, amici curiæ.

ANGELLOTTI, C. J. In this matter, originally commenced in the District Court of Appeal of the First Appellate District, Division One, an alternative writ of prohibition was issued restraining defendants from proceeding further in the matter of the estate of one Francis M. Miller, deceased, and subsequently a peremptory writ was ordered issued. Upon petition to this court, this decision was vacated, and a hearing ordered herein.

The only action on the part of respondents relative to the estate of Francis M. Miller is the appointment by the Yolo county superior court on February 14, 1921, of one Cora White as special administratrix of the estate of deceased, the qualification of said Cora White as such special administratrix, and the issuance to her of special letters of administration, and the institution by her as special administratrix in said superior court of an action against one J. H. Miller, to recover certain money alleged to belong to said deceased. It was not and is not suggested that respondents entertained or were threatening to entertain any proceeding looking or relating to the appointment of a general administrator or the general administration of the estate.

The claim of plaintiffs is that the Yolo county superior court was without jurisdiction to entertain any special administration proceeding or to appoint a special administrator solely by reason of the fact of the prior inauguration and pendency in the superior court of the city and county of San Francisco of a proceeding for the probate of an authenticated copy of the will of deceased, and the issuance to plaintiffs, who are nonresidents, of letters testamentary thereon, and also the issuance to them pending such admission to probate of special letters of administration.

The deceased was a resident of and died testate in the state of West Virginia. His will was there regularly admitted to probate. It appointed plaintiffs executor and executrix, and they regularly qualified in West Virginia as such, and subsequently presented a duly authenticated copy of the will for probate in this state, filing their application in the superior court of the city and county of San Francisco, alleging that deceased left property in such city and county. Their application was opposed by parties beneficially interested in the estate. Pending determination of this contest in the San Francisco superior court the Yolo county application for special letters of administration was made, based upon sufficient allegations of property in Yolo county.

Prior to the hearing in this court the application for special letters in the San Francisco superior court was denied. The necessity for a special administrator pending the appointment of an executor or general administrator is not denied. Since the submission of the matter herein, it has been represented to us by a statement filed herein, served on plaintiffs, that since the oral argument and submission the San Francisco superior court has given judgment denying the application for the admission of the will to probate and the appointment of plaintiffs as executors, on the ground that deceased left no property in the city and county of San Francisco. This judgment, however, has not become final, and the pendency of the proceeding may be indefinitely protracted by an appeal.

[1] Our law provides that "wills must be proved, and letters testamentary or of administration granted: * * * 3. In the county in which any part of the estate may be, the decedent having died out of the state, and not resident thereof at the time of his death" (section 1294, Code Civ. Proc.) and that "when the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, * * * the superior court of that county in which application is first made, for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate," (section 1295, Code Civ. Proc). It is settled that, in view of this section, action by any other court than that in which a petition is first filed, looking to the appointment of an executor or general administrator or the settlement of the estate, is in excess of its jurisdiction during the pendency of the proceeding inaugurated by the filing of such petition. Dungan v. Superior Court, of Fresno County, 149 Cal. 98, 84 Pac. 767, 117 Am. St. Rep. 119. The situation in this respect is the same as when jurisdiction to grant letters of administration depends on the residence of a deceased resident of this state, in which case exclusive jurisdiction exists in the court of the county in which a petition for general letters is first filed, for

so long as the proceeding thus inaugurated is pending. See Estate of Damke, 133 Cal. 430, 65 Pac. 889. The question here is whether this rule is applicable in the matter of special letters of administration.

[2] A special administrator is purely an emergency officer, appointed not to conduct the administration of the estate, but solely to conserve the property where necessary because of the absence of a qualified executor or general administrator. His powers are such generally "as may be necessary for the preservation of the estate," and he has nothing to do with the matter of general administration. Such an officer may be appointed "at any time, and without notice," and "when letters testamentary or of administration on the estate of the decedent have been granted" his powers cease, and he must account for and forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands. It is expressly provided that no appeal lies from the order appointing him. Sections 1411 to 1417, Code Civ. Proc.

The whole theory as to such an officer is that it is essential in some cases to the preservation of the property of a deceased to have some regularly authorized person at once to gather together and hold and care for the property of the deceased pending the issuance of letters testamentary or general letters of administration. The obvious design was to provide for the immediate appointment and installation of such an officer, where necessary, who may exercise the limited powers essential to the protection of the property of the estate pending the delay incident to the installation of an executor or general administrator, and who may prevent loss or injury to the property in just such a situation as is here presented, where such installation may be indefinitely delayed pending final determination of the question of jurisdiction to grant letters testamentary or of general administration. In a sense the proceeding for the appointment of such an officer is separate from and independent of the general administration proceeding, and the court entertaining such a proceeding has jurisdiction only for the special purposes of that character of proceeding.

It was held in Estate of Damke, 133 Cal. 433, 65 Pac. 888, that the prior appointment of a special administrator by the court of one county in no degree affects the question of the determination of the question of jurisdiction of proceedings for the general administration of the estate, and that the latter question is left open for determination on an application for general letters entirely regardless of the prior grant of special letters. The same thing was held by the Supreme Court of Washington in Stern v. Sill, 39 Wash. 557, 81 Pac. 1007; where the distinction in this regard between special and general letters is noted. In both of these cases the validity of the grant of special letters was taken for granted, and in the latter case was expressly upheld. In both of these cases it is true that the grant of special letters was prior to the filing in the other county of a petition for general letters, but we think this is immaterial to the question here involved. The important thing is that the two kinds of proceeding are to such an extent so separate and distinct, and have such different purpose, that the mere pendency in one county of a proceeding looking to the appointment of an executor or general administrator, which may ultimately fail for want of showing of facts essential to jurisdiction, should not be held to operate as a limitation on the jurisdiction of the superior court of the other county to entertain and act upon an application for special letters, and that consequently the rule of Dungan v. Superior Court, 149 Cal. 98, 84 Pac. 767, 117 Am. St. Rep. 119, and Estate of Damke, 133 Cal. 430, 65 Pac. 889, as to the exclusive jurisdiction of the court in which the petition for general letters is first filed, has no proper application in so far as the appointment of a special administrator is concerned.

[3] Of course the law contemplates that an application for special letters shall be made only in a county the superior court of which has jurisdiction by reason of the jurisdictional facts essential to general administration in that county, such as residence of the deceased when a resident of the state, the presence of property in the county when a nonresident, etc. Section 1294, Code Civ. Proc. But for the purposes of special administration, the court to which the application is addressed must determine those matters solely for the purpose of such special administration. And we think the mere fact of the pendency of an ungranted application of the same character in another county should not be held to operate as a bar to such action. Doubtless, too, where occasion arises for the appointment of a special administrator after the county of general administration has been finally determined, the application must be to the proper court of that county. But we think that, under the circumstances of this case, the superior court of Yolo county, in which confessedly most of the property of the deceased is situate, did not exceed its jurisdiction in entertaining and acting upon the application for special letters of administration merely because of a pending application for general letters in the superior court of the city and county of San Francisco.

The question upon which this court specially requested argument was as to the jurisdiction of the District Court of Appeal of one district to issue a writ of prohibition against the superior court of a county beyond the limits of its district. In view

of the apparent necessity of deciding speedily the question we have discussed, in order that proper measures may be taken for the immediate conservation of the property of the estate pending the contest for general administration, we have devoted ourselves to the latter question, and in view of our conclusion thereon it is not necessary to consider the question of the jurisdiction of the District Court of Appeal.

The alternative writ of prohibition issued by the District Court of Appeal is discharged, and the proceeding is dismissed.

We concur: SLOANE, J.; LENNON, J.; LAWLOR, J.; SHURTLEFF, J.

SHAW, J. I concur. I wish to add another point. Section 1416 of the Code of Civil Procedure provides that the powers of the special administrator cease when letters testamentary or of general administration upon the estate are finally granted and that thereupon the special administrator "must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands." This provision would, of course, apply to every special administrator, regardless of the county in which his appointment was made. It is the equivalent to a statement that the special administrator must render an account to the executor or administrator of the estate. As the jurisdiction of the estate must thenceforward be in the superior court of the county by which the general letters are granted, it should follow that the superior court of that county must have jurisdiction to require such account of the special administrator, and to settle the same when it is rendered. In no other way can the affairs of the estate be assuredly settled without confusion and conflict of authority.

I concur; WILBUR, J.

52 Cal. App. 625

COSGRAVE et al. v. DONOVAN et al.
(Civ. 2305.)

(District Court of Appeal, Third District, California. May 13, 1921.)

1. Boundaries ⟸46(1)—No agreed boundary, in absence of uncertainty.

There can be no agreed boundary line, in absence of uncertainty, and there could be no orally agreed boundary, where stakes of the original government survey were in place when the fence was constructed under agreement.

2. Boundaries ⟸37(5)—Proof held not sufficient to require finding of agreed boundary.

In a boundary dispute, proof produced *held* not so clear and certain as to require finding that a line was agreed upon.

3. Appeal and error ⟸1011(1)—Findings on conflicting evidence conclusive on appeal.

Finding of court on conflicting evidence is conclusive on appeal.

4. Boundaries ⟸46(2) — Agreement as to boundary not binding, on proof of an undivided interest.

An agreement as to correct boundary was not binding on one owning an undivided interest in one of the tracts of land, who was neither a party to the agreement nor gave her consent thereto.

5. Appeal and error ⟸1054(3)—Question to defendant as witness as to ill feeling harmless, if erroneous.

In a boundary dispute, tried to the court, it was harmless, if error, to permit question to defendant as a witness as to disagreement with and ill feeling toward a plaintiff, where the witness had testified to matters relative only to an alleged agreed line, which issue was necessarily determined against the appellants, and the court did not fix the location of the dividing lines other than by reference to the public land surveys; the evidence not furnishing the court with the necessary data to more definitely locate the line.

6. Quieting title ⟸51 — Both parties entitled to have ownerships adjudged.

In an action to quiet title, involving a boundary dispute, both parties were entitled to have their respective ownership adjudged.

7. Trial ⟸388(4)—Finding not necessary on admitted fact.

In an action to quiet title, where plaintiff's title to certain part of the land involved was not denied in the answer, no finding on the issue thus tendered was necessary.

Appeal from Superior Court, Calaveras County; S. A. Smith, Judge.

Action by Margaret Cosgrave and others against Kate Donovan and another. Judgment for defendants, and plaintiffs appeal. Modified and affirmed.

Application for transfer to Supreme Court denied. 199 Pac. 810.

Dave Cosgrave, of San Francisco, and Snyder & Snyder, of San Andreas, for appellants.

Virgil M. Airola, of San Andreas, for respondents.

FINCH, P. J. The plaintiffs sued to quiet their title to the southwest quarter of a section of land and to ascertain and adjudge the location of the eastern boundary line thereof. It is alleged that the plaintiffs and defendants together surveyed and laid out said boundary line; that the plaintiffs at large expense, and with the consent and acquiescence of the defendants, built a substantial fence on the line so fixed; and that said line is the true boundary line of said land. The defendants answer, setting up ti-

tle to the southeast quarter of said section and other lands in defendant Kate Donovan, and denying the allegations of the complaint relative to the establishment of such boundary line. The court found for the defendants on the issue as to the boundary line, and the plaintiffs appeal from the judgment.

It appears that there was a public road running east and west through the north half of the south half of the section and crossing the common boundary line.

[1] 1. Plaintiffs endeavored to show that the boundary line was established by agreement between the predecessors in title of the plaintiffs and defendants. In the year 1880 Michael Cosgrave owned the southwest quarter of the section and David Maloney the southeast quarter. Near the center of the dividing line there was then "a little open space," called the "flat." To the north and the south of the "flat" there were "trees and rock." During that year Maloney caused to be plowed "a double furrow and a single furrow, a few feet apart." Maloney then told George Cosgrave, a son of Michael, that "he had produced a line and to keep the sheep on the west side of the line." About the year 1883, Michael Cosgrave built a fence on "the same line," and Maloney "furnished a part of the lumber to build it." George Cosgrave, the only witness who testified concerning the transaction, said he did not remember "any conversation at all." The fence thereafter remained as at first located and was used by both owners. This fence was about a quarter mile long, running south from the road. The land was surveyed by the United States in 1876. The testimony shows that the land was "staked" for several years; that the "stake" in the center of the section was in place for several years after the fence was built. It is plain that this evidence is insufficient to prove an agreed line. The "stakes" of the original survey locating the corners were in place when the fence was built, and hence there could have been no uncertainty at that time as to the location of the true line. The law applicable is well settled.

"The doctrine of an agreed boundary line and its binding effects upon the coterminous owners rest fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. When that uncertainty exists, or is believed by them to exist, they may amongst themselves, by agreement, fix the boundary line, and that agreement will bind all the consenting parties. Acquiescence is merely evidence of the agreement and can properly be considered as evidence of an agreement only when a formal agreement would itself have made a binding contract. But a formal agreement to fix a boundary line is not valid, indeed is void, if the parties know, or one of them knows, that the agreed line is not the true line, or, in other words, if there be not an actual or believed uncertainty as to the true line. This is so because under our law title to real property can be transferred only by descent, devise, conveyance inter vivos, or by adverse holding, and to allow parties where their common boundary line was not uncertain or in dispute by a mere agreement to give one title which belongs in another would be the recognition of a mode of transferring title not countenanced by law." Clapp v. Churchill, 164 Cal. 745, 130 Pac. 1061. See, also, Lewis v. Ogram, 149 Cal. 505, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151; Mann v. Mann, 152 Cal. 23, 91 Pac. 994; Grants Pass Land, etc., Co. v. Brown, 168 Cal. 457, 143 Pac. 754; Friedman v. Southern Cal. T. Co., 179 Cal. 266, 176 Pac. 442; Staniford v. Twombly, 181 Cal. 372, 186 Pac. 599; Wilder v. Nicolaus, 195 Pac. 1068.

[2] The proof produced is not so clear and certain as to require a finding that the line was agreed upon. Grants Pass Land, etc., Co. v. Brown, 168 Cal. 457, 143 Pac. 754.

[3, 4] 2. In an effort to prove an agreed line north of the road, the plaintiff introduced evidence to the effect that in the year 1908 one of the plaintiffs, James Cosgrave, and the defendant W. F. Donovan laid out and agreed upon the location of the line and that the plaintiffs built a fence upon the line so located, Donovan furnishing part of the material. Donovan denies that he agreed to this line. The court found against the plaintiffs on this issue, and, in view of the conflict in the evidence, such finding is conclusive on appeal. Furthermore, the evidence shows that the defendant Kate Donovan, the wife of W. F. Donovan, then owned an undivided interest in said southeast quarter, and that she was neither a party to the alleged agreement nor gave her consent thereto, and consequently was in no wise bound by it.

[5] 3. The court sustained objection to the following question propounded to the defendant W. F. Donovan, who was a witness for the defendants:

"Now, then, after you and Mr. Cosgrave made that survey, and before this action was commenced you had some disagreement, some ill feeling?"

Whether or not the ruling complained of was erroneous, it did not prejudice the substantial rights of the plaintiffs. The witness had testified to but two material matters: (1) Relative to the alleged agreed line north of the road, and, as has been pointed out, that issue was necessarily determined against the plaintiffs because Kate Donovan was not a party to the agreement; (2) that a subsequent survey showed that the plaintiffs' fence north of the road inclosed about an acre of the southeast quarter of the section, and this evidence is uncontradicted. Further, the court did not fix the location of the dividing line, other than by reference to the public land surveys of the United States.

The evidence did not furnish the court with the necessary data to more definitely locate the line.

[6] 4. The court limited its judgment to the lands lying north of the road. The complaint alleged ownership of all of the southwest quarter of the section. The answer does not deny this allegation. The defendants alleged ownership of all of the southeast quarter. The evidence established such ownership. The parties were entitled to have their respective ownerships adjudged. The court found that the plaintiffs are the owners of the southwest quarter of the section, and that the defendant Kate Donovan is the owner of the southeast quarter. The conclusions of law provide that the respective parties are entitled to a decree quieting their titles to said lands and then is added the following: "provided, however, that the lands south of the Old County Road are not affected hereby." The judgment is likewise limited to the lands north of "the Old County Road."

[7] Since the plaintiffs' title to the whole of the southwest quarter is admitted by failure to deny the allegation of ownership in the complaint, no finding on the issue thus tendered was necessary. The proviso quoted is not a finding of fact, but a conclusion merely and does not limit the findings of fact to the lands lying north of the road.

It is ordered that the judgment be modified by striking therefrom, wherever it appears therein, the following clause: "of all that portion lying north of the Old County Road." As thus modified the judgment is affirmed.

We concur: HART, J.; BURNETT, J.

52 Cal. App. 625

COSGRAVE et al. v. DONOVAN et al. (Sac. 3086.)

(Supreme Court of California. July 11, 1921.)

1. Costs ⟸234 — Respondent pays costs on modification and affirmance.

Where District Court of Appeal modifies and affirms judgment, without giving direction as to costs, respondents are to pay the costs of appeal.

2. Courts ⟸212—Cause not transferred from District Court of Appeal to review costs.

The Supreme Court will not order a cause transferred to it solely for the purpose of reviewing the exercise of the discretionary power of a District Court of Appeal with relation to costs of appeal, where the matter was never in any way suggested to that court.

In Bank.

Appeal from Superior Court, Calaveras County; S. A. Smith, Judge.

Action by Margaret Cosgrave and others against Kate Donovan and another. There was a judgment for defendants, which was affirmed by the District Court of Appeal (199 Pac. 808), and plaintiffs apply for transfer. Application denied.

Dave Cosgrave, of San Francisco, and Snyder & Snyder, or San Andreas, for appellants.

Virgil M. Airola, of San Andreas, for respondents.

PER CURIAM. [1] Judgment was given herein by the District Court of Appeal of the Third Appellate District, modifying the judgment appealed from, and affirming the judgment as thus modified. No direction was given as to costs, with the result that, under the law and our rules, respondents will be compelled to pay the costs of appeal. Application is made to us to transfer the cause to this court solely for the purpose of making provision for the payment of said costs by appellants, it being claimed that under its discretionary power the District Court of Appeal should have provided that appellants do not recover costs of appeal. No application for such a provision was made to the District Court of Appeal.

[2] This court will not order a cause transferred to this court solely for the purpose of reviewing the exercise of the discretionary power of a District Court of Appeal with relation to costs of appeal, where the matter was never in any way suggested to that court.

The application is denied.

53 Cal. App. 178

YOUNG et al. v. LAGUNA LAND & WATER CO. (Civ. 3833.)

(District Court of Appeal, First District, Division 2, California. June 13, 1921. Rehearing Denied July 8, 1921. Hearing Denied by Supreme Court Aug. 13, 1921.)

1. Vendor and purchaser ⟸39—Contract referring to unrecorded map is void.

A contract for the sale of land by reference to an unrecorded map is void under Act March 15, 1907 (St. 1907, p. 290), as amended by St. 1913, pp. 570, 571.

2. Appeal and error ⟸193(9)—That a complaint does not state a cause of action may be raised for the first time on appeal.

The objection that a complaint does not state a cause of action may be raised for the first time on appeal.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Florence R. Young and others against the Laguna Land & Water Company,

a corporation. From a judgment for defendant, plaintiffs appeal. Affirmed.

Woodruff & Shotmaker, of Los Angeles, for appellants.

John E. Biby and Harry C. Biby, both of Los Angeles, for respondent.

NOURSE, J. Plaintiffs commenced this action to establish the validity and existence of a certain contract for the purchase of land in a subdivision of Los Angeles county, to protect the rights and interest of the plaintiffs under the contract, and to adjudge the contract in full force and effect notwithstanding cancellation thereof by the defendant. The complaint alleges that on May 26, 1919, plaintiff Florence R. Young signed in triplicate a form of contract for the purchase of a certain lot of land in accordance with a map which was thereupon exhibited to her by the defendant; that each of the three original copies so signed by her were left in the custody of the defendant; that they were signed by the proper officers of the defendant, but before any one of said copies was delivered to her the defendant canceled all three copies by stamping the word "canceled" thereon, and refused to recognize the contract as having any binding force. Defendant answered, alleging that the contract upon which plaintiffs sued was signed by inadvertence and mistake; that as soon as the mistake was discovered it notified plaintiffs thereof, offered to restore the portion of the purchase price which had been paid thereon, and tendered plaintiffs a new contract, but that plaintiffs refused to accept tender of the money so paid. Upon the trial the court found, in accordance with the allegations of the answer, that the contract upon which the suit was based was signed through inadvertence and mistake, and also that it was based upon a map or plat of a subdivision of land which defendant was offering for sale to the public, and that said map or plat was never recorded. Judgment was rendered in favor of defendant, from which plaintiffs prosecute this appeal.

[1] The case is controlled by the rule announced in Smith v. Bach (Sup.) 191 Pac. 14. There the court held that a contract for the sale of land by reference to an unrecorded map in violation of the provisions of the act of March 15, 1907 (Stats. 1907, p. 290), was void. This act, though amended in 1913 (Stats. 1913, pp. 570, 571), is not now materially different from that considered by the Supreme Court in the above case. By the rule announced in that case the contract in suit was void from the beginning and is unenforceable. Plaintiffs did not seek rescission of the contract or pray for equitable relief arising out of its execution. They expressly sought the enforcement of the contract, and prayed the court to declare it to be still in full force and effect, and to determine their rights under it. That such relief cannot be had upon a void contract goes without question.

[2] It is argued by appellants on this appeal that the invalidity of the contract by reason of the failure to record the map was not raised in the court below, but that it was raised for the first time by respondent on this appeal. For this reason, it is argued, this court cannot consider the point.

The question was raised by the plaintiffs in the amendment to their complaint, wherein they expressly alleged that the contract for the sale of this lot was made in reference to the map which was exhibited to the plaintiff Florence R. Young, and which had been prepared for recordation at the date of said agreement, but which was never recorded by said defendant at all. Thus, on the face of plaintiffs' complaint, the contract was void and unenforceable. The complaint did not therefore state a cause of action, and of course the insufficiency of a complaint can be raised at any time.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 187

RANSOME-CRUMMEY CO. v. FIKES et al.
(Civ. 3735.)

(District Court of Appeal, First District, Division 1, California. June 13, 1921. Hearing Denied by Supreme Court Aug. 13, 1921.)

1. Municipal corporations ⇐408(2)—Assessment lien for work on street after its acceptance cannot be foreclosed, though act exempting from future taxation subsequently repealed.

Under Vrooman Act, § 20, exempting property owners from future taxation for improvements on a street after its acceptance by city ordinance, an assessment for work done on a street after its acceptance cannot be foreclosed, though such act was thereafter repealed by St. 1911, pp. 626, 635, the work having been completed while the act and such ordinance were still in effect, and though, on the adoption of a charter by the city after such ordinance, a new government was created superseding the old.

2. Municipal corporations ⇐408(2)—Ordinance accepting street, thus precluding enforcement of assessment for subsequent work done as provided in a statute afterward, not affected by adoption of a new charter.

Where a city charter declared that all ordinances and other regulations in force should remain so until changed or repealed, an assessment for work done on a street after its acceptance by ordinance, and while Vrooman Act, § 20, exempting property owners from future taxation for improvements on such street after such acceptance, was still in force, could not be enforced, though such act was repealed (St.

1911, pp. 626, 635), rights existing on the adoption of a charter not being affected in the absence of some provisions abrogating them, especially where the charter provides that existing ordinances shall remain in force until repealed.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Ransome-Crummey Company against Mrs. E. E. Fikes and another. Judgment for defendants and plaintiff appeals. Affirmed.

R. M. F. Soto, of San Francisco, for appellant.

R. C. McComish and R. M. Wright, both of San Jose, for respondents.

KERRIGAN, J. This action was brought to foreclose a street assessment for certain street work done under a freeholders' charter amounting to the sum of $304.39. The work performed was for the improvement of Santa Clara street, in the city of San Jose. Judgment was in favor of defendants, and plaintiff appeals.

The record on appeal consists of the judgment roll, together with a stipulation to the effect that the original complaint, which is omitted from the record, is identical with the amended complaint except as to the date of filing, and that it lacks the recitals as to the affidavit concerning noncollusion and noncollateral agreements found in the amended complaint, and which are required to be filed before an assessment can be issued.

The complaint contains eight paragraphs, the first six of which in substance allege the various steps taken from the adoption of the resolution of intention down to and including the return of the warrant, resulting in the assessment roll. It is alleged that the resolution of intention to order the work done was adopted in February, 1910, and that the contract, entered into on April 29, 1910, provided for the completion of the work within 60 days. It is next recited that the warrant, assessment, diagram, and certificate of engineer were recorded on September 17, 1910, and that the warrant was returned on October 5, 1912. Then follow allegations to the effect that the work was done according to the contract. Paragraph 7 contains allegations as to fictitious defendants, and the eighth and last paragraph of the complaint avers that defendants should be estopped from objecting to the proceedings or to the doing of the work by plaintiff. The answer contains seven paragraphs. The first is a general denial, and the succeeding five paragraphs contain affirmative matter relating to alleged insufficiency of the posting of notice, collusion, and insufficiency of the bond. The seventh and last paragraph of the answer alleges that the work mentioned in plaintiff's complaint was done upon an accepted street. The trial court found all the allegations of paragraphs 1 to 6 of plaintiff's complaint to be true. This included every allegation in the complaint except the seventh, referring to the fictitious defendants, and the eighth, as to the claimed estoppel. As to these the court found that they were not true. It further found that none of the matters set forth in the defendants' answer were true except that contained in paragraph 7 in regard to the acceptance of the street. With reference to this paragraph the court found in substance as follows: That on the 11th day of November, 1889, the mayor and common council of the city of San Jose found and decided that East Santa Clara street, from Main street to the Coyote river, had been fully constructed, repaired, and improved, and that said mayor and common council then and there passed an ordinance accepting said street, and that such ordinance had never been repealed or modified, and was at the time of the doing of the work mentioned in plaintiff's complaint in full force and effect, and that the work was done upon a portion of said street accepted by the ordinance. In conformity therewith final judgment was entered in favor of defendants.

At the hearing on appeal it was agreed by counsel that the date of the recordation of the assessment, given in paragraph 5 of the amended complaint as the 17th day of September, 1910, was in the original complaint alleged to be the 17th day of September, 1912. Counsel for respondents, however, reserve the objection that we cannot consider this fact for the reason that the trial court found that the allegation of the amended complaint reciting that the recordation was on the 17th of September, 1912, was true.

[1] The ground relied on for a reversal is that this appeal is governed by the decisions of Ransome-Crummey Co. v. Bennett, 177 Cal. 560, 171 Pac. 304, and Ransome-Crummey Co. v. Coulter, 177 Cal. 574, 171 Pac. 308, which decisions, it is claimed, dispose of the ordinance of acceptance in this case, upon which the defense is based, for the reason that it is in legal effect the same as the ordinance involved in each of those cases, as all were adopted under section 20 of the Vrooman Act, so called (St. 1885, p. 160), which was repealed April 5, 1911 (St. 1911, pp. 626, 635).

Appellant contends that the claimed immunity or exemption from future taxation by reason of the acceptance was destroyed by the repeal of section 20 of the Vrooman Act, and cites us to the cases invoked as supporting this contention. It is true that in those cases it is held that certain ordinances accepting streets were abrogated by the repeal of the section in question, and that they therefore constituted no defense to the foreclosure of the assessment liens claimed in

those cases. Quite different, however, is the situation that is here presented. In the instant case work was completed in 1910 when section 20 of the Vrooman Act was still in full force and effect. This distinction is fully recognized in the Bennett and Coulter Cases, for it is there expressly held that, while the law providing for the exemption remained in force the immunity that it created still existed. See, also, Barber Asphalt Co. v. Jurgens, 170 Cal. 273, 149 Pac. 560; Same v. Abrahamson, 38 Cal. App. 109, 175 Pac. 490.

Counsel seeks to avoid the effect of this express declaration in the opinion in the Bennett Case by claiming that, upon the adoption by the city of San Jose of its charter in 1897, a new government was created which superseded the old, especially as to municipal affairs, as to which it is claimed a new régime was to control in the future, the new charter being prospective. This same point was raised by appellant's counsel in the Bennett Case, but it was not expressly passed upon, and it is here claimed that, notwithstanding this fact, the decision covered all the points of law which were involved in the contention of each party, and which must necessarily have been considered to enable the court to reach the conclusion that the ordinance constituted no defense, although the opinion of the court did not in express terms decide that this particular contention was or was not well founded. We see no force in this contention. The court expressly held, as above indicated, that, while the statute creating the exemption exists, the immunity from future assessments was not extinguished. As before stated, at the time the work here involved was performed both the act and the ordinance were in force.

[2] That rights existing upon the adoption of a charter are not affected in the absence of some provision abrogating such preexisting rights is expressly held in Barber Asphalt Co. v. Jurgens, 170 Cal. 273, 149 Pac. 560. Not only is there an absence of such a provision here, but the charter of San Jose contains an express declaration that all ordinances and other regulations in force shall remain so until changed or repealed. A change made in the organic law under which cities of a designated class are organized or controlled does not repeal existing ordinances, and they remain in full force after the adoption of a new charter, and especially so where, as here, it is provided in the charter that existing ordinances shall so remain until repealed. 1 Dillon on Mun. Corp. (5th Ed.) §§ 233, 234; 23 Cyc. 387. There is nothing expressed in the Bennett and Coulter Cases that in any manner rejects this doctrine. On the contrary, it is expressly recognized.

Counsel for respondent also invoke the statute of limitations against appellant. It is pointed out that, as the record shows that the assessment and diagram were recorded on the 17th day of September, 1910, and on the same day delivered to plaintiff, his action commenced on the 17th day of September, 1914, was too late, the limit being two years. The statements of respective counsel in their briefs as to when the original complaint was filed do not agree, and the stipulation in the record does not contain the full date. However, considering the conclusion we have reached, a discussion and decision upon the question becomes unimportant.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

53 Cal. App. 75

COALINGA MOHAWK OIL CO. v. R. H. HERRON CO. et al. (Civ. 3830.)

(District Court of Appeal, First District, Division 2, California. June 7, 1921. Hearing Denied by Supreme Court Aug. 4, 1921.)

1. Contracts ⟸346(11)—Agreement pleaded held not to sustain allegations.

Where the complaint alleged a contract whereby defendant agreed to deliver to buyer stated amounts of oil well casings on specified dates, the written contract in evidence stating that deliveries were not guaranteed, but that the seller would do all he could to procure deliveries on the dates specified, do not sustain the allegations, and the seller could rely upon its denial of the execution of the contract pleaded.

2. Contracts ⟸172—Prior war orders held to excuse delivery of oil well casings.

Where the seller expressly refused to guarantee deliveries, but promised to use its best efforts to procure deliveries on the dates stated, proof that the particular kind of casing specified could be procured from a single manufacturer, with whom the government had placed large orders for war materials, which had priority over private orders, and which delayed deliveries, establishes that the seller did not neglect or refuse to deliver the casing described.

3. Appeal and error ⟸1068(4)—Error as to damages immaterial where no breach was shown.

Where the trial court properly found that defendant was guilty of no breach of its contract, alleged conflict in findings with reference to the damages and failure to find on the issue of special damages are immaterial.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action for breach of contract by the Coalinga Mohawk Oil Company against the R. H.

Herron Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

C. W. Durbrow and F. B. Austin, both of San Francisco, and W. I. Gilbert, of Los Angeles, for appellant.

Geo. E. Whitaker, of Bakersfield, and Kemp & Clewett, of Los Angeles, for respondents.

NOURSE, J. Plaintiff appeals from a judgment in favor of defendants in a suit to recover damages for breach of contract. The complaint alleged that on the 5th day of March, 1917, plaintiff and defendants entered into a written contract whereby defendants agreed to sell to plaintiff and plaintiff agreed to purchase from defendants certain quantities of oil well casing, and that defendants agreed to make deliveries thereof on certain specified dates. It was then alleged that defendants had failed to make deliveries; that the price of such casing had greatly increased over the price fixed in the contract; that when the contract was executed the defendants knew that plaintiff intended to use the casing for the purpose of drilling oil wells; and that, by reason of the failure in delivery of the casing, plaintiff had been damaged to the extent of $102,660, segregated as follows: Increased cost of casing, $12,350; interest on other equipment purchased by plaintiff, but remaining idle on account of failure to deliver casing, $1,750; anticipated profits from oil wells if they had been sunk as contemplated, $88,560.

Demurrers to the complaint were overruled, and separate answers were filed by each defendant. The Oil Well Supply Company denied the execution of any contract with plaintiff, and, as the trial court found in accordance with this denial, this defendant may be dismissed from further consideration. The defendant R. H. Herron Company denied the execution of the contract pleaded in the complaint, and set forth in hæc verba the full contract entered into between the parties; it then set forth facts upon which it relied to excuse performance of the contract so pleaded.

Consideration should first be given to the pleadings. If the plaintiff had fully pleaded the contract, which was in fact executed without any further allegation than those appearing in its complaint, the action would have fallen on demurrer. By an incomplete statement of the transaction plaintiff was able to put forth a complaint for breach of contract to deliver certain specified quantities of casing on specific dates, whereas the contract actually made contained the specific proviso:

"We cannot guarantee deliveries, but have promise for shipment as near to the dates you mention as it is possible for the mill to ship. We will do all we possibly can to have the goods shipped."

This is far different from the contract pleaded by plaintiff:

"That defendants agreed to deliver 3,500 feet of * * * casing on October 1, 1917; 3,500 feet * * * on January 1, 1918," etc.

[1] Plaintiff failed to sustain the allegations of its complaint that the contract pleaded was either executed or breached. The defendant could have rested upon its denial of the execution of such a contract. The finding of the trial court that the contract pleaded was never entered into was amply supported by the evidence, and is in itself sufficient to warrant an affirmance of the judgment.

However, the defendant R. H. Herron Company elected to go further, and put in issue another contract and alleged facts to excuse its failure to perform it. This issue was tried, and the bulk of the testimony related to the circumstances surrounding the transaction between the parties, and the conditions which prevented said defendant from making the deliveries at the time requested by plaintiff.

[2] In this connection evidence was offered to prove that this particular kind of casing could be procured from a single manufacturer in Pittsburg, Pa.; that about the time the contract was executed the United States Government placed large orders with this concern for war materials; that such orders had precedence over all other orders from private concerns, both as to manufacture in the mills and transporation over railroad lines; that defendant R. H. Herron Company did not neglect or refuse to deliver the casing described, but did all in its power reasonably to procure shipment and make deliveries as requested by plaintiff.

[3] The court found these facts to be true. The finding is supported by the evidence, and is sufficient to sustain the judgment. The alleged conflict in the findings in reference to the damages suffered and the failure to find on the issue of special damages are alike immaterial, since no damages were recoverable.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 204

PEOPLE v. WYMER. (Cr. 961.)

(District Court of Appeal, First District, Division 1, California. June 15, 1921. Rehearing Denied July 15, 1921. Hearing Denied by Supreme Court Aug. 13, 1921.)

1. Evidence ⊂⊃552(1)—Fact in issue may be proved by direct or by circumstantial evidence.

Under Code Civ. Proc. § 1870, subd. 15, a fact in issue may be proved either by direct evidence or by proof of other facts or circumstances from which the fact in issue may be inferred.

2. False pretenses ⊂⊃47, 49(1)—Conduct and declarations of defendant may be looked to, to furnish evidence corroborative of complaining witness.

In a prosecution for obtaining money by false pretenses by representing to the complaining witness that defendant held a contract with the government to cut wood in certain mountains for the use of the United States army, and that he needed money with which to pay the men, etc., the circumstances connected with the transaction, the entire conduct of defendant, and his declarations to other persons, are proper matters for the consideration of the jury, and may be looked to, to furnish the corroborative evidence contemplated by Pen. Code, § 1110, where the false pretense is oral.

3. False pretenses ⊂⊃49(1) — Circumstances corroborating complaining witness held to justify inference defendant made false statements.

In a prosecution for obtaining money by false pretenses by representing to the complaining witness that defendant held a contract with the government to cut wood in certain mountains for the use of the United States army, and that he needed money with which to pay the men, etc., facts and circumstances disclosed *held* to constitute corroborative evidence from which the jury could infer that defendant made the false statements to the complaining witness as charged and testified to by her, thus satisfying Pen. Code, § 1110, providing that where the false pretense is oral, it must be proved by the testimony of two witnesses or of one witness and corroborating circumstances.

4. Criminal law ⊂⊃1159(5)—Verdict of jury on sufficient evidence conclusive.

On appeal in a prosecution for obtaining money by false pretenses, where there is sufficient circumstantial evidence corroborative of the complaining witness, as required by Pen. Code, § 1110, justifying the jury in inferring that defendant made the false statements to the complaining witness as charged and as testified to by her, the verdict is conclusive; the jurisdiction of the Appellate Court under such circumstances being limited to questions of law alone.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Reginald G. P. Wymer was convicted of obtaining money by false pretenses, and from the judgment and from an order refusing his motion for new trial he appeals. Judgment and order affirmed.

Nathan S. Lee, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the people.

WASTE, P. J. The defendant was charged with obtaining money by false pretenses. The trial resulted in a verdict of guilty, and from the judgment of conviction and sentence defendant appeals, after motion for a new trial made and denied.

The information charged, and the complaining witness testified, that the appellant stated to her that he held a contract with the United States government to cut and supply wood in the Santa Cruz mountains to be used by the United States army; that the contract was worth $5,000 to him; that he needed money from time to time with which to pay the men who were working for him in order to complete the contract, and asked the complaining witness to advance these sums to him, promising her to repay the money when the contract was complete. Believing and relying upon the representations, the complaining witness advanced various sums of money to the defendant at different times, amounting in all to $4,000, which sum has never been paid. It was established at the trial that these statements were untrue; that defendant had no contract for cutting and supplying wood with the United States government, or, so far as the record discloses, with any other person. The defendant admitted getting the money, but testified it was advanced in contemplation of his making a sale of an apartment house belonging to the complaining witness.

[1, 2] Section 1110 of the Penal Code provides that where the false pretense is oral, it must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances. The complaining witness, Mrs. Sears, was the only one who gave direct testimony to the false statements made to her by the appellant. But a fact in issue may be proved either by direct evidence of the facts, or by proof of other facts, or circumstances, from which the fact in issue may be inferred. Code Civ. Proc. § 1870, subd. 15; People v. Donnolly, 143 Cal. 394, 398, 77 Pac. 177; People v. Seeley, 139 Cal. 118, 123, 72 Pac. 834. Mrs. Sears had listed her apartment house with the defendant for sale, and was frequently in his office during the time she was advancing money to him. Maud Howell, a stenographer in the office during the time, testified that she heard defendant say to some one (she did not know to whom) that he had a contract for cutting

wood in the Santa Cruz mountains, and that he had to go down at the end of each week and pay his men, and that it took considerable money. Mrs. Louisa Betz testified that the defendant called on Mrs. Sears at her home very many times, and was most importunate in asking her to loan him money. In this class of cases the circumstances connected with the transaction, the entire conduct of the defendant, and his declarations to other persons, are proper matters for the consideration of the jury, and may be looked to, to furnish the corroborative evidence contemplated by the law. People v. Gibbs, 98 Cal. 661, 33 Pac. 630; People v. Martin, 102 Cal. 558, 565, 36 Pac. 952. The testimony of the witnesses Maud Howell and Mrs. Betz was therefore properly admitted by the court, and its refusal to strike it out was not error.

[3, 4] While the facts and circumstances disclosed in this case are not extensive, it cannot be said there is not corroborative evidence from which the jury could draw the inference that the defendant made the false statements to the complaining witness as charged and as testified to so strongly by her. Therefore the verdict of the jury is conclusive, as the jurisdiction of this court under such circumstances is limited to questions of law alone.

The judgment and the order refusing a new trial are, and each is, affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

53 Cal. App. 109

Ex parte BALLAS. (Cr. 569.)

(District Court of Appeal, Third District, California. June 8, 1921.)

1. Habeas corpus ⟸4, 27—Granted on behalf of convicted person when lack of jurisdiction clearly appears on face of record.

The writ of habeas corpus is not granted for the release of persons convicted of felonies in the absence of a clear and unquestionable showing upon the face of the record that the court was wholly without jurisdiction, but if, on the face of the record, it plainly or undebatably appears that there was a lack of jurisdiction, the writ may be granted instead of requiring the applicant to pursue his more dilatory remedy by appeal.

2. Habeas corpus ⟸3—Convicted person left to remedy by appeal when question of jurisdiction of more than ordinary importance.

Where an application for a writ of habeas corpus by a person convicted of forgery by raising a check involves a legal proposition of more than ordinary importance concerning the jurisdiction of the court of the county in which the bank on which the check was drawn was situated, the check having been cashed in another county, and an appeal is pending on which the question may be decided, and on which the people may have a review by the Supreme Court if the decision of the District Court of Appeal is adverse, the writ will be discharged, especially where the prisoner is at liberty under bail.

Original application by P. J. Ballas for a writ of habeas corpus directed to the sheriff of Yolo county. Writ discharged.

A. G. Bailey, of Woodland, and Alfred S. Ormsby and E. B. Taylor, both of Martinez, for petitioner.

C. C. McDonald, Dist. Atty., of Woodland, and U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

HART, J. The petitioner was convicted in the superior court of the county of Yolo of the crime of forgery, the information (made a part of the petition for the writ) under which he was so convicted alleging that he raised a check issued to him by one Jessa Dunsmore on the First National Bank of Woodland, at Woodland, Yolo county, from the sum of 65 cents, for which the check was originally drawn, to the sum of $65. The information further alleged that the defendant passed said check on the Bank of Martinez, at Martinez, Contra Costa county, and that said bank cashed said check by paying to defendant the sum of $65, the ostensible value thereof.

This application of petitioner for writ of habeas corpus is based upon the contention that the jurisdiction of the alleged offense is solely in the superior court of Contra Costa county, and that therefore his conviction of the offense in the superior court of Yolo county is coram non judice, and void.

At the hearing of this petition, among other contentions advanced by the district attorney of Yolo county in resistance to the petition, it was maintained that the petition here would not lie, for the reason that there was available to the petitioner an adequate remedy in the ordinary course of law—that is, by appeal.

It was admitted by counsel for the petitioner at the hearing hereof that an appeal had been taken to this court in the latter's behalf from the judgment of conviction of which he here complains. It was further stated by counsel that, after the issuance of this writ by this court, and before the hearing of this application, the petitioner was admitted to bail by the superior court of Yolo county; that he furnished the required bail, was thereupon discharged from custody, and was, at the time of the hearing of this petition, at liberty; and, we may assume that he is still at liberty.

[1] The courts of this state have never made a practice of releasing persons convicted of felonies through the writ of ha-

beas corpus in the absence of a clear and unquestionable showing upon the face of the record of the case that the court in which the conviction was had was wholly without jurisdiction to try the accused for the offense charged, and of which he had been convicted. If, upon the face of the record of conviction, it plainly or undebatably appears that there was a lack of jurisdiction to try the accused, then there would be no serious objection to releasing the accused through the writ here applied for, rather than to require him to pursue his more dilatory remedy by appeal.

[2] In this proceeding there has been submitted for solution a legal proposition of more than ordinary importance, and, while it is true that it could as easily be determined in this proceeding as in a proceeding by way of appeal, yet, after giving the matter due consideration, we have reached the conclusion that, all the circumstances considered, the decision of the question on the appeal which is now pending is preferable to a decision thereof here. Frankly, we may say that we have not so considered the merits of this application as to enable us to satisfy ourselves one way or the other upon the question presented, but, as one reason for preferring to pass a definite opinion thereon on the appeal now pending, we may suggest that, should we in the latter case be persuaded to the conclusion that the petitioner's claim for release is meritorious, or of legal force, the people could, nevertheless, pursue their position to the Supreme Court, which they could not do in the case of the release of the prisoner under the writ. Moreover, in discharging this writ, we do so knowing that the petitioner can in no way be prejudiced thereby, since he not only has an adequate remedy by appeal, but is prosecuting that remedy. Besides, he is not under restraint of his personal liberty, and perhaps will not be under such restraint pending the determination of his case by appeal.

For the reasons given, the writ is discharged.

We concur: FINCH, P. J.; BURNETT, J.

53 Cal. App. 72

GADETTE v. RECORDER'S COURT OF CITY OF EAST SAN DIEGO.
(Civ. 3333.)

(District Court of Appeal, Second District, Division 2, California. June 6, 1921.)

1. Costs ⊂=137—Requirement that proceedings be stayed till nonresident plaintiff give required security for costs mandatory.

Code Civ. Proc. § 1036, providing that when a nonresident plaintiff is required by defendant to give security for costs, all proceedings in the action "must" be stayed till an undertaking is filed, is mandatory.

2. Prohibition ⊂=3(1)—Lies to prevent further proceedings till nonresident plaintiff gives security for costs.

Prohibition lies to prevent further proceedings in an action till the nonresident plaintiff therein gives the required security for costs under Code Civ. Proc. § 1036; defendant therein having no plain, speedy, and adequate remedy at law.

3. Costs ⊂=111—Demand for security, though not stating plaintiff was a nonresident, sufficient.

Demand for "security * * * for * * * costs * * * under Code Civ. Proc. § 1036" is sufficient without stating that plaintiff was a nonresident; the section providing for giving security only when plaintiff is a nonresident or a foreign corporation.

4. Costs ⊂=111—Demand for security alone stays proceedings.

Under Code Civ. Proc. § 1036, providing that when plaintiff is a nonresident security for costs may be required by defendant, and when required all proceedings in the action must be stayed till an undertaking is filed, demand, by notice that security is required, is sufficient to stay proceedings, without proof of plaintiff being a nonresident, unless plaintiff claims to be a resident.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Petition by L. Gadette for prohibition against the Recorder's Court of the City of East San Diego. From an adverse judgment, plaintiff appeals. Reversed, with directions.

Charles B. Delong, of San Diego, for appellant.

Arthur T. French, of San Diego, for respondent.

CRAIG, J. Appellant filed a petition in the superior court of the county of San Diego for a writ of prohibition directed against the recorder's court of East San Diego. A general demurrer was interposed by the defendant and was sustained, and the appeal is taken from the judgment entered upon the petitioner's failure to amend.

The petition alleged the beginning of an action in the recorder's court of East San Diego wherein one Ava C. Roberts was plaintiff and L. Gadette was defendant; that said plaintiff was at the commencement of said action a resident of another state; that in said action the defendant therein had filed a demurrer and at the same time filed with the recorder's court and served upon the plaintiff a notice requiring security for costs as provided in section 1036, Code of Civil Procedure; that notwithstanding the filing of said notice, the recorder's court subsequently heard the demurrer and overruled the same, and ordered the defendant to an-

swer forthwith and thereupon entered judgment in favor of plaintiff and against defendant; that the recorder's court was about to enforce this judgment and the plaintiff in said action entirely failed to deposit a bond as required by said notice.

The case of Carter v. Superior Court, 176 Cal. 752, 169 Pac. 667, is relied upon by both the appellant and respondent. In that case the plaintiff was a resident of Oregon; defendant made demand, as provided in section 1036, Code of Civil Procedure, for security, etc.; plaintiff filed an undertaking with but one surety. After the expiration of 30 days from the date of demand, defendant moved to dismiss the action on the ground that the undertaking did not comply with the law. The court points out that in section 1037, Code of Civil Procedure, the word "may" is used and not "must," which authorizes the dismissal of an action where the undertaking is not filed within the time provided. The view is expressed that in so far as passing upon the motion to dismiss is concerned, the court is "acting in the exercise of its jurisdiction whether it grants or denies the motion"; "that in the absence of a dismissal the court retains jurisdiction of the case."

In construing section 1037, Code of Civil Procedure, the language of the opinion in Meade County Bank v. Bailey, 137 Cal. 447, 70 Pac. 297, is quoted with approval. A part of the opinion thus reaffirmed is as follows:

"The statute vests in the defendant the right to have the bond. * * * When the demand for security for costs is made in the proper case, the law itself enjoins further proceedings on the part of the plaintiff until the demand is complied with according to the provisions of the Code."

[1] It will be noted that section 1036, Code of Civil Procedure, employs the word "must." The provision is mandatory. It differs from that of section 1037, Code of Civil Procedure, allowing a dismissal of action, in that no discretion is here allowed the court. "All proceedings in the action or special proceeding *must* be stayed."

[2] Referring further to Carter v. Superior Court, supra, it is there held that prohibition will lie to prevent further proceedings pending the filing of the undertaking, and that a defendant is entitled to such a writ because he has no plain, speedy, and adequate remedy at law.

[3] Respondent suggests that the demand was insufficient, in that it does not, in terms, state that the plaintiff was either a foreign corporation or a nonresident. This defect is one of uncertainty. The demand is for "security from plaintiff for defendant's costs and charges * * * as provided for under section 1036, Code of Civil Procedure, of the state of California." We think this language was sufficient to apprise plaintiff that it was claimed that she was either a foreign corporation or a nonresident.

[4] Respondent urges that a demand alone is not sufficient to stay the proceedings, but asserts that there must be, in addition to demand, proof submitted to the court that the plaintiff is either a nonresident or a foreign corporation. No other action on the part of the demanding party appears to have been contemplated by the Legislature than that he should require security as provided in section 1036, Code of Civil Procedure, by a "notice" that security is required. In the case at bar, Gadette served notice, and thereby required security for his costs and charges. Doubtless plaintiff might have contested the right of defendant to an undertaking. The Code is indefinite as to how the fact of nonresidence is to be determined in case it is disputed. But the record does not disclose that the respondent in any way indicated to the recorder's court that she claimed to be a resident of California.

The decisions of courts of last resort of other states are of but little value in passing upon this point because the statutes which they interpret, in most instances, especially provide that where security is required on the ground of nonresidence of the plaintiff, the defendant must proceed by motion or notice accompanied by affidavits. The statute of West Virginia, which was construed in Dean v. Cannon, 37 W. Va. 123, 16 S. E. 444, is quite like that of California. The opinion as to the point in question is in part as follows:

"By * * * the Code of West Virginia (Ed. 1891) p. 877, c. 138, § 2, the notice is required to be given by a suggestion on the record of the court, * * * 'that the plaintiff is not a resident of this state and that security is required of him.' The present law requires no other notice, nor the entry or service of any rule; for section 2, c. 138, continues: 'After sixty days from such suggestion the suit shall, by order of the court, be dismissed unless before the dismission the plaintiff be proved to be a resident of the state, or security be given.'"

It was held that no other showing than the suggestion on the record in court was necessary to enable the defendant to claim the benefit of this provision for security. Vance v. Bird, 4 Munf. (18 Va.) 364, is to the same effect.

The judgment is reversed, and the superior court is directed to overrule the demurrer.

We concur: FINLAYSON, P. J.; WORKS, J.

52 Cal. App. 695

FAY IMPROVEMENT CO. v. DE BUDGE.
(Civ. 3694.)

(District Court of Appeal, First District, Division 2, California. May 19, 1921. Hearing Denied by Supreme Court July 18, 1921.)

1. Contracts ⊂=195—Owner's contract to pay for street improvement work in front of his "own property" held applicable to adjoining lots of his children.

Owner who included frontage of adjoining lots owned by his minor children in the frontage specified following his name in street improvement contract, was liable for improvements apportioned to lots owned by the children, notwithstanding provision of contract making the parties thereto liable only for the work done in front of their "own property," in view of evidence that both contractor and such owner, in execution of the contract, intended the quoted term to include, as to such owner, the lots owned by his children.

2. Guardian and ward ⊂=58—Guardian entitled to credit for money spent in improvement of wards' property.

A guardian is entitled to credit in his account as guardian for money spent in improving and repairing the property of his wards.

3. Guardian and ward ⊂=48 — Guardian personally liable upon contract made for wards' benefit.

A guardian is personally liable on any contract made for the benefit of his ward.

4. Pleading ⊂=311—Contractor's complaint in action on street improvement contract held sufficient to show foot frontage of defendant's land.

In contractor's action on street improvement contract, complaint having affixed thereto the contract containing the frontage of defendant's lots and alleging that defendant owner agreed to pay to contractor upon the completion of the work his respective pro rata share of the cost of the improvement computed in accordance with the frontage of his lots, and that the total pro rata share of defendant amounted to a specified sum, *held* sufficient, as against contention that the number of feet of land owned by defendant was not pleaded.

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by the Fay Improvement Company against William De Budge. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Stafford and Wm. M. Stafford, both of San Francisco, for appellant.

John R. Daniels, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for $845 for street work done by the plaintiff under a contract with various owners of property fronting on Crescent avenue between Leese and Murray streets, San Francisco, including the intersection of Leese street and Crescent avenue. The appellant owned one lot of land on Crescent avenue, with a frontage of 25 feet. His three minor children owned three lots fronting on the same street and adjoining his property. The improvements were made under two separate contracts, one for the block proper, and the other for the intersection. Copies of these contracts were attached to and made a part of the complaint. The defendant became a party to both contracts, and, according to the testimony, personally affixed the land frontage after his name as 123 feet 5 inches on the contract for the improvement of Crescent avenue and 156 feet and 8 inches for the intersection of Leese street and Crescent avenue. In addition to these improvements the plaintiff repaired a sidewalk and constructed three side sewers at the request of defendant. Recovery for this repair work and sewer construction is included in the judgment, and to this portion thereof the appellant does not object.

In his answer defendant admitted entering into the two contracts sued upon, but denied responsibility for the improvements except those which were apportioned to the 25-foot lot which he personally owned on Crescent avenue. It was admitted that the defendant is the legal guardian of the persons and estates of his three children who owned the three lots on Crescent avenue, having frontages which made up the difference between the frontage signed after the defendant's name in the contracts, and the 25 feet for which he concedes himself to be liable.

It is perfectly apparent from all testimony that the defendant intended to contract for his children's property as well as for his own individual holdings. The evidence is that when Mr. Fay, the agent for the plaintiff, called upon defendant in relation to these contracts—

"He said that the corner was held by the two children, who he was guardian for, and he would sign for them; I says 'Certainly, as long as you have the power to do so, do it.' So he signed the full frontage for them, and then he segregated the side sewers and everything pertaining to the full amount of the property, and left it there, and nothing was said about it until afterwards, when he wanted to discount his bill."

On cross-examination, Mr. Fay testified:

"Q. You stated that he said he owned one lot about the middle of the block and three lots at the corner of Leese were owned by his three children; is that right? A. Yes.

"Q. One lot apiece? A. Yes.

"Q. And he asked you if he would sign for all of them or for one? A. Yes.

"Q. And you told him to sign for all; is that right? A. That is right; yes."

The contract for the work on Crescent avenue contained the following provision:

"And the said parties of the second part, in consideration of the premises, each for himself or herself, and not one for the others, promises to and with the said party of the first part, that he or she will pay to the said party of the first part in gold coin of the United States of America, for the work done in front of his or her own property respectively, and not in front of others, upon the completion thereof, and for such work as may be done in the crossings or intersections for which their property is liable, together with the incidental expenses according to the ratio that his or her frontage bears to the whole frontage here represented, and in accordance with the rule established by the street law."

The contract for the work at the intersection of the streets contains a similar provision.

It is contended by appellant that by this clause the defendant contracted to pay only for the work done in front of "his own property," and not for the work done in front of property owned by any one else. There is nothing definite in the contract about the character of the interest in property which would make such property one's "own" property within the language of this contract. It is not specified whether the ownership is to be a legal or an equitable one, whether it must be an estate in fee simple absolute, a life estate, or a contingent remainder. "Own property" is an inexact and general term, and might be ambiguous if it were shown that the contracting party had a different character of estate in several lots upon the street. However, the parties have shown by their actions just what construction was placed by them upon the terms of the contract and was intended by them in using this language. To ascertain such intention is, of course, the object of our inquiry here.

[1-3] It is shown by the testimony above quoted that both parties intended to contract with reference to the lots held by the defendant in his own name, and also the lots owned by his minor children for whom he was guardian. Although technically these might not all be included in the connotation of the term "own property," nevertheless their inclusion therein was what was in the minds of the parties at the time, as is clearly proven by the evidence in the record. There is nothing strange or unusual about a father undertaking to pay for street improvements in front of the property owned by his minor children, and most especially is this true when he is the guardian of the persons and estates of such children. He would be entitled to credit in his account as guardian for money spent in improving and repairing the property of his wards. Estate of Beisel, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819. A guardian is personally liable upon any contract made for the benefit of his ward. Woerner on Guardianship, § 57, p. 185.

It appears that the agent of the plaintiff and the defendant discussed the question of frontage and estimated the amount for which the defendant intended to contract. The defendant himself wrote after his signature the amount of such frontage as 123 feet and 5 inches in the contract for Crescent avenue and 156 feet, 8 inches, in the contract for the work at the intersection, which is the combined frontages of his own lot and those of his minor children. Under such circumstances there can be no question about the fact that he intended to contract to pay for the improvement of all these lots.

[4] It is contended by appellant that the plaintiff should have set out in his pleading the number of feet of land owned by defendant. The plaintiff pleaded the effect of the contracts, alleging that the defendant agreed to pay to the plaintiff upon the completion of the work, his respective pro rata share of the cost of the improvements, computed in accordance with the frontage of his lots on Crescent avenue and Leese street. Then follows an averment that the total pro rata share of said defendant of the total cost of said improvements under the terms of the contract amounted to a certain sum. The "frontage of his lots under the terms of the contract" is necessarily implied in the foregoing allegations, as it is arrived at by a simple and certain arithmetical process, and we have already discussed the question of what must be included in the term "his lots" for the purpose of this contract, as evidenced by the conversations and acts of the parties. Furthermore, the contracts themselves were attached to the complaint and they contain, after the signatures of the parties, the number of feet frontage for which each party intends to contract. We think this is sufficient.

There are no other points made upon this appeal. The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

53 Cal. App. 85

LOBREE v. L. E. WHITE LUMBER CO. et al. (Civ. 3780.)

(District Court of Appeal, First District, Division 1, California. June 7, 1921. Hearing Denied by Supreme Court Aug. 4, 1921.)

1. Evidence ⟸129(6)—Evidence of similar contract with others held admissible to establish contract.

In an action to compel a purchaser of timber lands to pay the sums which vendor agreed to pay for homestead relinquishments, where the purchaser was in effect a reorganization of the vendor corporation, that the purchaser had paid for homestead relinquishments under another agreement made by the vendor corporation is admissible as a circumstance tending to show it had agreed to assume the obligations of its vendor for such relinquishment, in view of Code Civ. Proc. § 1870, subd. 15, providing that a fact in issue may be proved either by direct evidence or by circumstances from which it may be inferred.

2. Trial ⟸68(1)—Refusal to reopen case to admit portions of written contract held not abuse of discretion.

Where the trial court had properly refused to permit oral testimony as to the contents of a written contract, but defendants did not offer the contract in evidence because they did not desire to make public certain of its terms, it was not an abuse of the trial court's discretion to refuse, after the conclusion of the trial, to reopen the case to permit the introduction in evidence of certain portions only of that contract.

3. Public lands ⟸135(2)—Evidence held to sustain finding purchaser of timber lands assumed vendor's agreement to pay for relinquishments.

In an action to recover the amount agreed to be paid for homestead relinquishments, evidence *held* sufficient to sustain a finding that the appealing defendant, who had purchased the lands relinquished to its codefendant, had assumed the obligation of its codefendant to pay for those relinquishments.

4. Public lands ⟸135(2)—Agreement to use diligence to perform condition implied.

In a contract requiring a lumber company to pay for homestead relinquishments when it secured patents to the lands, but fixing no time for performance, there was an implied agreement that the lumber company should exercise reasonable diligence to procure title within a reasonable time.

5. Public lands ⟸135(2)—Reasonable time for securing patents held to have elapsed so that payments for relinquishments were due.

In a suit to recover payments for homestead relinquishments which were to be paid when defendant secured title, evidence that five years had elapsed since the contract was made, and that defendants had secured patents to other lands acquired under similar circumstances, *held* sufficient, in the absence of a showing of any attempt to secure the title to the lands in controversy, to sustain a finding that a reasonable time to secure the patents had elapsed so that the relinquishment payments were due.

6. Appeal and error ⟸1178(6)—Issues correctly decided need not be retried on reversal for insufficiency of evidence on other issues.

Where plaintiff sued on claim of his own and on claims assigned to him by four others, and recovered judgment which must be reversed because the evidence failed to establish assignments of two of the claims, the case need not be remanded to try those issues which had been correctly decided for plaintiff, but will be remanded, with directions to try only the issue of the assignment of those two claims.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Phil Lobree against the L. E. White Lumber Company and the Goodyear Redwood Company. Judgment for plaintiff, and defendant Goodyear Redwood Company appeals. Reversed and remanded, with directions.

See, also, 197 Pac. 138.

Hale McCowan, Jr., of Ukiah, J. A. Mackenzie, of San Francisco, and Horatio Alling, for appellant.

Robert Duncan, of San Francisco, for respondent.

WASTE, P. J. This is an appeal by the Goodyear Redwood Company, one of the defendants, from a judgment rendered against it and its codefendant, the L. E. White Lumber Company. The plaintiff is one of a number of settlers who relinquished to the L. E. White Lumber Company certain homestead rights and claims to timber lands in Mendocino county. The complaint is in five counts, each of which states a cause of action as against the defendants' general demurrer. In the first, plaintiff seeks to recover upon an alleged oral agreement made by the defendant White Company to pay him $3,750 for a homestead relinquishment, and for services rendered in connection with securing like relinquishments from other settlers, which obligation, it is alleged, the appellant assumed and agreed to pay. The other four counts are based upon assignments to plaintiff by other settlers of similar causes of action against the defendant. The trial court found the allegations of the various counts of the complaint to be true, and entered the judgment in favor of plaintiff, from which this appeal is taken.

The alleged insufficiency of the evidence to support the trial court's finding that for a valuable consideration the Goodyear Redwood Company assumed and agreed to pay to the plaintiff and his assignors the amounts due and unpaid for the various relinquishments obtained from them by the White Company presents the meritorious contention to be considered on this appeal.

In support of the allegation that such was the fact, the respondent was compelled to rely upon testimony produced from the camp of his adversaries, and upon evidence of other facts, which, while not so intimately connected with the transactions in suit as to form part of them, tended in some degree to support plaintiff's cause of action. The defendant offered no testimony on the main point in controversy, and practically submitted the cause on the showing made by the plaintiff.

The record discloses that the L. E. White Lumber Company was engaged in operating a sawmill at Greenwood in Mendocino county. It had acquired by purchase and assignment all the rights of one F. A. Hyde in and to certain timber lands in the vicinity, under selections made by Hyde upon forest lieu scrip held by him. The plaintiff and his assignors, together with many other settlers, claimed rights in the same lands, based upon alleged homestead entries. As a result of the controversy which arose between the Lumber Company and the settlers, and on the eve of a hearing of the respective claims before the United States commissioner at Ukiah, it was agreed that the settlers would relinquish their rights in consideration of various sums paid to the respective homestead claimants. The Lumber Company, by its representative, Mr. Metson, entered into a written agreement to pay G. S. Arnold, representing 11 of the settlers, a designated sum of money for a relinquishment of these 11 claims, the amount to be paid whenever and as soon as the Lumber Company should obtain patents to the relinquished lands under the forest lieu selection then pending before the United States Land Office.

The plaintiff and his assignors were not parties to this agreement, but at about the same time, and growing out of the same controversy, the defendant L. E. White Lumber Company entered into an oral agreement with each of them for a like relinquishment of homestead rights. It paid a portion of the agreed amounts, with the definite understanding and agreement that it would pay the balance to each settler when it obtained title to the land. These respective amounts have not been paid, and are the sums sought to be recovered in this action.

The contract with the settlers was made in 1912. In May, 1916, the appellant Goodyear Redwood Company acquired all the property of the L. E. White Lumber Company in Mendocino county. The exact nature of the transaction between appellant and the Lumber Company does not definitely appear from the record. The respondent suggests that it was in the nature of a reorganization of the Lumber Company and the continuation of its business under a new name. From the personnel, and interrelation of the officers and the attorneys of the two corporations, a very strong inference that such was the fact can be drawn. The appellant took over all the property of every kind and nature of the Lumber Company in Mendocino county, including its rights, whatever they were, to the lands which had been in dispute between it and the settlers, irrespective of whether or not title had been acquired. Part of the assets it acquired was a large amount of Santa Fé scrip the Lumber Company had in its possession, and which would be available for use in securing the contested locations in case the government should reject its claims under application of the Hyde scrip. The former manager of the Lumber Company testified that it was to be used for this express purpose. After the transfer of all of its property to appellant the L. E. White Lumber Company refused to pay the license tax required by the state, for the reason that it was doing no business under its franchise. At the time of the sale the appellant was fully informed by the Lumber Company of all agreements it had with the settlers to pay the balance of the money, for the relinquishments, when patents were issued or title secured. That much is certain. After that time the appellant was the active and interested party. Whatever was done in the matter of securing title to the lands was done by it, the officers of the old lumber company "merely assisting," as from time to time requested. The Lumber Company was under no obligation to make good, or pay anything back to appellant in case of failure to secure title to any of the land. It was "out of it," so to speak.

[1] Notwithstanding the relation thus established between the Lumber Company and the appellant, the president of the Lumber Company testified that the appellant did not promise to pay plaintiff and his assignors, or the other settlers, the deferred payments due under their agreements when patents were secured. To meet this testimony the respondent introduced in evidence the contract between the Lumber Company and Arnold on behalf of the 11 homesteaders, to which we have already referred, and followed this with testimony that the appellant had actually paid several of the settlers claiming under that agreement. Appellant contends that the admission of this evidence was error. We think not. A fact in issue may be proved either by direct evidence of the fact, or by proof of other facts, or circumstances, from which the fact in issue may be inferred. Code Civ. Proc. § 1870, subd. 15; Title Insurance Co. v. Kuchenbeiser, 20 Cal. App. 11, 13, 127 Pac. 1039. Any evidence tending to show the probability or improbability of an issue of fact is relevant to such issue. It follows as a very logical inference, from the fact that appellant recognized itself bound by and paid certain settlers according to the terms of one contract, that it was intended that it should, and we think did, assume on

its part to pay the Lumber Company's obligation on the other contracts of identical import, made at the same time under the precise circumstances, and for the same purposes. Moody v. Peirano, 4 Cal. App. 411, 420, 88 Pac. 380; Bone v. Hayes, 154 Cal. 759, 767, 99 Pac. 172. In the last case cited it was held that, while ordinarily evidence that a certain contract was made with A. is not admissible to show that a similar contract was made with B., such evidence may, in the discretion of the court, be allowed where the circumstances indicate a strong probability that the course followed in one instance would be followed in others.

[2] At the conclusion of the plaintiff's evidence, the appellant moved for a nonsuit, which motion was denied. Mr. Drew, president of the White Lumber Company, was then called for the defendants. He testified that he conducted negotiations on behalf of the Lumber Company that resulted in the sale to the appellant. When asked if there was any agreement on the part of the appellant to be responsible for, or to assume any of the debts or obligations of, the White Company, it appeared that there was such an agreement, that it was in writing, and that a copy of the contract was in existence. Counsel for the plaintiff successfully objected to any testimony as to its contents unless the witness produced the writing, which was not done. After the trial was concluded, but before decision, the defendants moved to reopen the case, the sole purpose assigned being to introduce certain designated portions of this agreement, which, it was alleged, would refute the claim of appellant's liability to the settlers. The court denied the motion. The sole reason given by the defendants for not producing the written agreement when its contents were under discussion and the cause was on trial, and in attempting to give oral evidence as to its contents, was that its introduction was withheld at the urgent request of the appellant that the contents of the contract be not divulged as appellant did not want to disclose the consideration paid by the Goodyear Redwood Company for the transfer of the White Company's property. The excuse was a weak one, and apparently did not appeal to the court. Furthermore, the introduction of the portions of the contract designated without explanatory testimony would have accomplished little. We think there was no abuse of discretion in refusing to reopen the case.

Some point is made by the respondent of the fact that the president of the Lumber Company, while on the stand and while being examined as to the Arnold contract, made an explanation of his previous testimony, from which it may be argued that he testified that the appellant would be compelled under its agreement with the Lumber Company to pay all contracts with the settlers. The appellant disputes the effect of this testimony, but there is room for argument as to what was meant, and the construction to be put upon the explanation of the witness, in view of the circumstances under which it was made, was a matter for the trial court.

[3] On the whole record we think the lower court was correct in reaching the conclusion that it was a part of the transaction between the Lumber Company and the appellant, that the appellant should, and that it did, assume the payment of the obligations of the Lumber Company to plaintiff and his assignors, and that the finding to that effect is sufficiently supported.

Appellant contends that the agreement between the settlers and the White Company was that the former should not be paid the balance of the sum agreed upon for their relinquishments until the Lumber Company should have perfected title to the property; that even if it shall be held that appellant assumed to pay these obligations, the claims have not yet matured, for it does not appear that title to the property has ever been secured. In this connection it objected to the introduction in evidence of certain patents from the United States government to the Santa Fé Pacific Railroad Company, covering portions of the various lands relinquished by plaintiff and his assignors. But the right of the plaintiff to recover in this action does not depend entirely upon a showing that the appellant has secured title to the lands in question.

[4] No time was fixed in the agreement between the Lumber Company and the settlers as to when it should perfect title to the claims and pay the remaining amounts due. It remained, therefore, for the law to annex as an incident to the contract, that the title should be acquired within a reasonable time. Under the facts of this case the court would certainly find no difficulty in reading into the contract between the Lumber Company and the settlers an obligation on the part of the defendants to use reasonable diligence to secure title to the land, upon the completion of which the payment was contingent. Earl v. Sunnyside Land Co., 150 Cal. 214, 225–226, 88 Pac. 920.

[5] A period of five years elapsed between the making of the contract and the bringing of this action. The lower court was undoubtedly of the view, and we think properly, that a reasonable time for securing title had elapsed. The patents already actually procured are evidence of that fact, and also denote that the title to the land can no longer be in dispute. The appellant has not shown, nor attempted to show, but that the title to the land has been secured for it, nor has it assigned any reason for the long delay in seeking to perfect title if it has not done so, or why, if it be a fact, that cannot be done. Consequently, whether or not title

has, as a matter of fact, been acquired by the appellant, we think there is ample reason for holding that payment should now be made to the settlers.

[6] The findings are sufficiently supported by the evidence except in two particulars. The findings that prior to the commencement of this action the settlers E. E. Fitch and J. I. Alander assigned their claims to the plaintiff are not supported. The testimony of the assignor Fitch does not have that effect, and there is no evidence of any kind to prove an assignment by Alander. While for this reason the judgment must be reversed, there is no occasion to order a retrial of the issues which have already been correctly determined. Gray v. Cotton, 166 Cal. 130, 139, 134 Pac. 1145; Fox v. Hale & Norcross Silver Mining Co., 122 Cal. 219, 222, 54 Pac. 731; Tunis v. Lakeport Agricultural Park Association, 98 Cal. 285, 287, 33 Pac. 63, 477.

The judgment is reversed, and the cause remanded, with directions to the trial court to retry the single issue presented by the allegations of the third and fourth causes of action set up in the complaint, and the denials of the answers thereto, and to hear such evidence only as may be offered upon the sole point as to the sufficiency of the assignments of the respective causes of action to the plaintiff before the commencement of this action, and thereupon to enter judgment in favor of plaintiff for the amounts, if any are found due on said causes of action, together with the amounts already found to be due plaintiff on the first, second, and fifth causes of action.

We concur: RICHARDS, J.; KERRIGAN, J.

53 Cal. App. 85

PEOPLE v. WALTON. (Cr. 779.)

(District Court of Appeal, Second District, Division 2, California. May 27, 1921. Hearing Denied by Supreme Court July 25, 1921.)

1. Criminal law ⟸402(1)—Erroneous admission of secondary evidence held cured by subsequent foundation proof.

Error in admitting evidence that the number on the box in which the stolen revolver was purchased corresponded with the number on the revolver sold by defendant after the burglary is cured where the prosecuting witness afterwards testified he had searched for the box and had been unable to find it, so that secondary evidence was admissible; it not being necessary that such evidence be thereafter repeated.

2. Criminal law ⟸1043(3)—Accused cannot raise on appeal question not presented to court below.

On appeal from a conviction of burglary, where it appeared that the identification of a revolver sold by defendant with the one stolen rested on identity of numbers on the revolver and on the box in which it was purchased, and the only objection at the trial was on the ground of secondary evidence, the objection that proof of the number on the box was not proof of the number on the revolver purchased cannot be raised on appeal where it was not presented in any way to the court below, since the purpose of an appeal is to review some action of the trial court.

3. Criminal law ⟸1169(2)—Evidence of identification of property otherwise identified by uncontradicted evidence is not prejudicial.

In a prosecution for burglary, where the prosecuting witness had identified a revolver sold by defendant as one stolen at the time of the burglary by the numbers thereon, and there was no evidence contradicting such identity, the admission of an invoice showing the sale of the revolver by number was not prejudicial to accused.

4. Criminal law ⟸798(1) — Refusal of requested instruction each juror should be convinced is not reversible error.

Though a requested instruction that the jury could not convict if any individual juror was not convinced of defendant's guilt beyond a reasonable doubt was one which should have been given, the refusal to give it is not reversible error, since the instruction is, in effect, simply admonitory and cautionary of the sworn duty of the jurors.

5. Burglary ⟸46(1)—Refusal of requested instructions as to reasonable doubt property was taken from house held not error.

In a prosecution for burglary, it was not error to refuse requested instructions that the jury could not convict if they had any reasonable doubt that the property identified as that stolen from prosecuting witness, and which alone established the corpus delicti, was taken from the house, was not erroneous, notwithstanding the witness' testimony he sometimes kept the revolver in his automobile, where he testified positively the revolver was in the house when it was broken and entered.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Frank Walton was convicted of burglary, and he appeals. Affirmed.

R. D. McLaughlin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

WORKS, J. This is an appeal from a judgment of conviction of burglary. The residence of one Webster had been entered, and various articles of wearing apparel were left scattered about his rooms, but nothing was missing from the place except a certain revolver. Appellant had been seen loitering about the Webster premises, and he later sold a revolver to a merchant. This revolver was produced at the trial from the merchant's possession, and the appeal turns on

the question whether the weapon was the one taken from Webster's residence. It will be observed that the corpus delicti could not have been established except upon a showing of the identity of the revolver missed by Webster with the one produced at the trial. Appellant contends that the trial court committed error in the admission of secondary evidence, over his objections, offered for the purpose of supplying this link in the chain of proof of the corpus delicti.

[1] It was sought by the testimony of Webster to identify the missing revolver with the one produced in court by showing that a serial number on the one was the same as that which appeared on the other. Webster had never seen the number on his revolver, but he was allowed, over the objection of counsel, to state a number which he had seen on the box which contained the weapon when he purchased it. The number mentioned by him was identical with the one on the revolver produced at the trial. It is in the reception of this evidence that it is claimed that the court committed the error to which we have alluded. But, conceding for the sake of argument that the court erred in the ruling under which the statement was received, the error was cured afterward. The court ordered Webster to bring the box into court at the next session. He did not do so, but testified that he had searched for it, and that it could not be found. The testimony as to the extent of the search was scant, but it was probably sufficient to establish the fact that the box was lost. Even if it were not, however, counsel for appellant seems to have been satisfied with it, for after it was in he made no attempt to have stricken from the record Webster's earlier statement of the number appearing on the box. The loss of the box having been proven, Webster could then have been permitted to testify, over the objection that the evidence was secondary, to the figures appearing on it; but, as his evidence on the subject was already in, even if erroneously admitted before proof of loss of the box, it was not necessary to ask him to repeat it after proof of the loss. There was no error in the respect claimed by appellant.

[2] There is a mere mention in appellant's brief of the point that evidence of the number on the box was not evidence that the same number was on the revolver which came to Webster in the box. It is enough to say, as to this point, that it was not made in the trial court. Counsel's only point was that Webster's statement of what the box showed was secondary evidence, and that the box itself should have been produced. As the objection now made was not presented at the trial, it cannot be considered here.

"The purpose of an appeal from a trial court is to review some action of the court, and, as there was no action in this instance, no order which involved the question now sought to be presented, there is nothing to review." People v. Taminago, 35 Cal. App. 238, 169 Pac. 696.

[3] The people sought further to identify Webster's revolver with the one produced at the trial by means of an invoice showing the sale of the revolver to him by number. Appellant contends that no sufficient foundation was laid for the introduction in evidence of this paper, but the point is valueless after what we have said concerning the identification of the pistol by means of the number on the box. We are pointed to no evidence in the record showing that the alleged two weapons were not one. This being so, no further identification was necessary, and the jury could have made but the one finding on the question.

[4] Appellant requested an instruction to the effect that the jury could not convict if any individual juror was not convinced of appellant's guilt beyond a reasonable doubt, and the request was refused. The refusal is complained of as error. It has been decided several times that such an instruction should be given, but the cases in which that rule is announced are also to the effect that a failure to give it is not reversible error, upon the theory that the instruction is "in effect simply admonitory and cautionary of the sworn duty of the jurors." People v. Singh, 20 Cal. App. 146, 128 Pac. 420; People v. Svendsen, 25 Cal. App. 1, 142 Pac. 861.

[5] Finally, appellant complains of the trial court's refusal to give two certain instructions on the question of reasonable doubt. There is evidence in the record, coming from the lips of Webster, to the effect that he sometimes kept the missing revolver in a pocket in his automobile, instead of in the place in the house from which he asserted it was taken. The requested instructions were so framed as to inform the members of the jury that they could not convict of burglary if they had a reasonable doubt upon the question whether the revolver was taken from the place in the house or from the automobile. Laying aside the contention of the Attorney General that the subject-matter of the two refused instructions was contained in instructions which were given, we are satisfied that there was no basis in the record for the two in question. While Webster did testify that he sometimes kept the gun in his car, his whole testimony on the point, taken together, is clearly and positively to the effect that at the time in question here it was in its place in the house. This is made to appear, especially, in the redirect examination of Webster by the district attorney. It was not error to refuse the two instructions.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

53 Cal. App. 112

MERZOIAN v. PAPAZIAN. (Civ. 3737.)

(District Court of Appeal, First District, Division 1, California. June 8, 1921. Hearing Denied by Supreme Court Aug. 4, 1921.)

1. Brokers ⟸54 — Must produce purchaser ready, willing, and able to buy on terms set forth.

Before a broker, employed to sell real property, can be said to have earned his commission, he must have produced a purchaser ready, willing, and able to buy upon the terms set forth in the listing agreement.

2. Brokers ⟸57(1)—Owner assents to differences in contract by not rejecting offer.

Where a broker produces a purchaser ready, able, and willing to purchase land substantially on the authorized terms, and the vendor fails to reject the offer on the ground of its variance from the terms given the broker, such difference will be deemed assented to, and the broker will be entitled to his commission.

3. Brokers ⟸86(5)—Evidence held to sustain finding that purchaser was ready, able, and willing.

In an action for a commission under a contract for the sale of land, evidence *held* to sustain a finding that proposed purchaser was ready, willing, and able to make the purchase on the terms set forth in the listing agreement, though the broker had agreed to give purchaser 20 days within which to make the first payment.

4. Brokers ⟸42—Broker could maintain action without license, where commissioner had not been appointed.

Where commission provided by St. 1919, p. 1259, § 20, providing for real estate broker's licenses, was not appointed until two days after the breaking off of negotiations between landowner and proposed purchaser, it appearing that the constitutionality of the act was questioned by the State Comptroller and the commission was unable to establish an office until five months after its appointment landowner could not challenge the right of broker to maintain an action for his commission on the ground that he had procured no license.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by Aram Merzoian against Peter Papazian. Judgment for plaintiff, and defendant appeals. Affirmed.

Ernest Klette, E. A. Williams, and J. Geo. Ohannesian, all of Fresno, for appellant.

G. L. Aynesworth, of Fresno, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of plaintiff in an action brought to recover a commission alleged to be due under a contract for the sale of real estate.

The contract was dated July 12, 1919, and it appoints the plaintiff as the exclusive agent of the defendant for the period of 20 days to sell the property described in the complaint, which consisted of 60 acres of land with improvements and certain personal property, for the sum of $40,000. By its terms the defendant was "to furnish deed and abstract showing clear title" in himself, and in the event of the plaintiff selling the property or being instrumental in bringing about a sale he was to receive as his compensation 5 per cent. of the purchase price. The terms of payment provided in said authorization were "$5,000 net cash, balance $3,000 out of 1919 crops, including interest, balance $1,500 per year and interest thereafter. * * * interest 7 per cent."

Within the 20 days specified plaintiff procured a purchaser and entered into a contract with him, receiving from the purchaser $1,000 as a deposit and part payment of the purchase price of $40,000, payable $5,000 in cash 20 days after the execution of a good and sufficient contract of sale of said property, $3,000 on or before December 15, 1919, $1,500 on or before December 15, 1920, and a like amount on or before December 15 of each and every year thereafter until complete payment of said price, with interest on all deferred payments from date of said offer at the rate of 7 per cent. per annum payable December 15, 1920, and annually thereafter.

[1] In respect to contracts with brokers to sell real property it is undoubtedly true that before the broker can be said to have earned his commission he must have produced a purchaser ready, willing, and able to buy upon the terms set forth in the listing agreement. 9 Corpus Juris, 599. And defendant here contends that the terms of the offer procured by the plaintiff differ from those contained in his authorization in at least two essential respects, so that he was warranted in rejecting the offer.

It will be noticed that according to the listing agreement $5,000 net was to be paid on the execution and delivery of a sufficient contract of sale and purchase, $3,000 out of the 1919 crop, and balance at the rate of $1,500 "per year and interest thereafter"; while the contract to purchase reads—

"$3,000 on or before December 15, 1919; $1,500 on or before December 15, 1920, and $1,500 on or before December 15th of each and every year thereafter until the entire balance of said purchase price is paid, together with interest on all deferred payments from the date hereof at the rate of 7 per cent. per annum payable December 15, 1920, and annually thereafter." It will also be observed that there is nothing in the listing contract authorizing the agent to give the purchaser "twenty days to pay said sum of $5,000."

As to the first of these claimed variances, it is apparent that the term "crop season"

is indefinite as to time. It may possibly mean the period covered by the actual harvesting of the crop, and it may and probably does mean the point of time when the crop has been sold and paid for. This provision of the contract being indefinite, we are unable to say that there is any difference between the "crop season" of the year 1919 and December 15th of that year. With respect to the time of the payment of the yearly installments of $1,500, the listing agreement is ambiguous; but we are inclined to adopt the view of the trial court that such installments were to be paid yearly from the date of the $3,000 payment and not from the date of the contract of sale.

[2] But granting that these asserted differences exist, still they are of no moment, for it clearly appears that the defendant did not object to the proffered contract on these grounds. The rule is established in this state that where an agent produces a purchaser ready, able, and willing to purchase substantially upon the authorized terms, and the vendor fails to reject the offer on the ground of its variance from the terms given the broker, such difference will be deemed assented to, and the broker will be entitled to his commission. The rule of law applicable in this case is thus laid down in Cal. Land Security Co. v. Ritchie, 40 Cal. App. 246, 180 Pac. 625:

"It has been held, upon the soundest of reason, that where property is sold by a broker to a purchaser able, ready, and willing to take and pay for the property, and any of the terms of the contract as to payment, or the abstract or deed are unsatisfactory to the intending vendor, the latter should object to them on that ground and not refuse absolutely to sell; and that where he fails to make such objection under such circumstances, he will be held liable to the broker negotiating the sale for his commissions if he refuses to accept the purchaser."

[3] As to the third ground of objection to the contract, it is true that the plaintiff had no authority to give the purchaser 20 days within which to make the first payment of $5,000; and as to this variance the defendant did object. He refused to accept the $1,000 check offered to him, claiming that he was entitled to $5,000, and he demanded this sum in gold. But there is evidence tending to show that the purchaser was able to pay this sum, and offered to do so practically at once, saying, "Give me time to step out to the bank and I'll get the money for you." To this offer the defendant replied, "You need not go because I don't want to sell the property under those terms anyway." While the evidence is not strong, and appears to be subject to the criticism made of it by counsel for the defendant, we are constrained to hold that it is sufficient to sustain the finding of the court to the effect that the purchaser produced by the plaintiff was ready and willing to purchase under the terms of the listing agreement. We are also satisfied from a careful examination of the evidence that it is sufficient to support the finding of the court that the proposed purchaser was financially able to make the purchase.

[4] Finally, the defendant challenges the right of the plaintiff to maintain this action for the reason that the plaintiff had not at the time of this sale procured a real estate broker's license, as required by the statute of 1919. Stat. 1919, p. 1259, § 20. It is conceded by defendant that the commission provided for by that act was not appointed until two days after the breaking off of the negotiations between the defendant and the purchaser. It further appears that the constitutionality of the act was questioned by the State Comptroller, and for this reason the commission was unable to establish an office, and it in fact issued no licenses until about five months after its appointment. Under these circumstances it is manifest that it was impossible for the plaintiff to have procured a license at the time of this transaction, which deprives this objection of the appellant of any force.

It follows from what we have said that the judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

53 Cal. App. 207

SCHEIMER et al. v. JAMES. (Civ. 2307.)

(District Court of Appeal, Third District, California. June 15, 1921. Hearing Denied by Supreme Court Aug. 13, 1921.)

1. Evidence ⊂=445(1)—Written contract may be modified by subsequent parol agreement.

Rights under a written contract may be limited by subsequent parol agreement.

2. Appeal and error ⊂=1033(3)—Party may not complain of error favorable.

Any error in admission of evidence cannot be complained of by a party to whom it is favorable, as limiting the lands in which he had given rights by written contract to the other party.

3. Evidence ⊂=442(3)—Parol agreement supplying term as to which writing is silent not inconsistent therewith.

Evidence of a parol agreement supplying a matter as to which a written contract was silent, the quantity of lands which one of the parties was to use, is not inconsistent with the writing.

4. Appeal and error ⊂=1170(5)—Admission of evidence of parol understanding not pleaded held harmless.

Any error in admission of a parol understanding not pleaded, the case having been as

fairly and fully tried as though it were pleaded, is within Const. art. 6, § 4½, providing that a case shall not be reversed for error in pleading unless it can be seen that a miscarriage of justice resulted therefrom.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by J. Scheimer and others against D. J. James. Judgment for defendant, and plaintiffs appeal. Affirmed.

Frank Freeman and George R. Freeman, both of Willows, for appellants.

W. T. Belieu and Claude Purkitt, both of Willows, for respondent.

PREWETT, Presiding Justice pro tem. On February 11, 1919, the parties to this action entered into a written contract establishing a partnership between the appellants on the one side and the respondent on the other. The purpose of the partnership was the propagation of turkeys for the market. The respondent was constituted as the active manager of the business. The appellants filed their complaint, alleging various acts of the respondent as breaches of the partnership contract, and praying an accounting and dissolution. The respondent, by way of answer and cross-complaint, admitted the existence of the partnership, denied the commission of the breaches charged against him, and alleged the destruction by appellants of several thousand turkeys by flooding the land, invading the premises with large numbers of stock, and various other alleged wrongs. He asked for $5,625, and the jury by their verdict awarded him $5,280, which sum the court subsequently reduced to $4,054. The court adopted the verdict found adversely to the appellants on the other issues, and rendered judgment accordingly.

The appellants inserted in the partnership contract certain provisions which, in effect, amount to a lease by them to the respondent or to the partnership of a tract of land, situated in the county of Glenn, containing about 3,600 acres. This leasehold portion of the contract declares that the appellants "give and demise unto the said party of the second part, certain specific rights and privileges as hereinafter mentioned to those pieces or parcels of land," etc., and describing the entire 3,600 acres. It further provides that the respondent—

"agrees to use the above-described land only as a place upon which to incubate, breed or hatch, feed and care for, and prepare for market, fowls commonly known as turkeys."

If there were no other descriptions or limitations in the contract, it would at once be seen that the appellants leased the entire tract of 3,600 acres for above purposes. There is in the contract, however, a limiting provision which reads as follows:

"That he will use diligent care to keep said turkeys off from and away from any and all crops growing on said land."

Small portions of the tract were then bearing growing crops. It is clear that it was not contemplated that the agreement to "use the above-described land" should extend to the whole of it. The respondent does not claim the whole of the tract, but contends that it was orally understood that he should have at least 160 acres thereof, embracing the portion upon which the buildings are located. He further claims that the appellants placed him in possession of the buildings and the surrounding territory, and that he remained in possession thereof until the commission of the wrongs complained of by him.

The appellants concede that respondent was entitled to a reasonable quantity of land for maintaining the turkeys, but they insist that they had a right to move him about on the premises from place to place as the exigencies of farming operations might demand. There were at one time as many as 3,500 turkeys on the place, and it is apparent that, to move these around from place to place, together with their feed, coops, pens, and shelter, and the home outfit of the manager, would be no small undertaking. During the incubating season such removal would have been impracticable, and it cannot have been contemplated by the parties.

The appellants invaded the premises with a vast array of laborers, teams, farming implements and supplies. The teams and men ran over, broke up, and destroyed many of the nests, and killed the young turkeys. The workmen flooded the premises immediately about the buildings with great quantities of flowing water in the prosecution of their operations in growing rice. This caused the drowning of large numbers of the turkeys, and destroyed the feeding grounds of the remainder. The result was the destruction of over 3,000 turkeys, though the jury charges the appellants with the destruction of but 2,400.

The verdict of the jury, the findings of the court, and the practically undisputed evidence in the case establish a most woeful disregard of the rights of the respondent and gross injury to his property. This is the outstanding fact in the case. No important questions of law or fact are involved in this appeal. Practically the entire plaint of the appellants is that the court erred in admitting evidence concerning the alleged oral understanding whereby the respondent was limited to but 160 acres, as being parol evidence to vary the terms of a written contract. This oral understanding was entered into subsequently to the execution of the written contract. In no manner whatsoever does it modify the original contract, except to surrender back to appellants all the land over and above 160 acres.

The trial court held, and in this we agree with it, that the lease conveyed to respondent the right to use the entire tract, less the portion upon which crops were growing. It thus appears that such modification as may have been effected was really a concession to appellants, and it is somewhat difficult to see how they were damaged by its proof. If this oral modification is invalid, as being in parol, the appellants are the ones who are injured by its invalidity. On the other hand, if there was error in admitting proof thereof, the respondent is the one who suffers. However, he is not complaining. He concedes and affirmatively insists that he was limited by its terms.

The appellants make the claim that the oral understanding was invalid, as being a modification of a written instrument, and therefore not provable in any event. They couple this claim with the further point that, even if the oral understanding was valid as supplying an agreement upon a matter as to which the writing was silent, still evidence is not admissible in its support, for the reason that the respondent does not set it up in his pleadings. But this position is unsound.

[1] (a) It was not error to admit evidence of the parol understanding. The respondent was entitled to at least a reasonable quantity of land. The appellants placed him in the peaceable possession of that part thereof upon which stood the buildings. This amounted to a determination by them that the respondent was entitled to that portion of the land, and to a reasonable quantity of land thereabouts. Evidence that both parties were thus willing to construe and limit the written contract, followed by the actual surrender of that portion to the respondent was admissible.

[2] (b) If there was any error in its admission, the error was harmless. It was evidence of a right to less than the written contract accorded to the respondent. A party cannot complain of a ruling which is, in fact, in his own favor.

[3] (c) The appellants admit that respondent was entitled to some part of the land, and he admits that he was not entitled to the portion thereof upon which crops were growing. If he was not entitled to all the remaining portion (which embraces a vast acreage), then it is because the written contract is silent as to quantity. If it was silent, it seems not to be disputed that the omission could be supplied by an oral agreement. The oral agreement is in no way inconsistent with the written contract, if, as appellants insist, the latter does not indicate the quantity to which the respondent was entitled. If any inconsistency can be found it is only to the effect that they were required by its terms to deliver less than they had promised.

[4] (d) The failure to plead the oral understanding is not fatal nor is it a sufficient ground upon which to predicate a reversal. Section 4½ of article 6 of the Constitution provides that no case shall be reversed for mere error in pleading, unless the court can see that a miscarriage of justice has resulted therefrom. This is peculiarly a case for the application of this constitutional provision. No actual harm can have resulted to appellants by reason of this error, if error it be. The case was fully and fairly tried, no evidence was excluded by reason of the alleged defect in the pleading, and each party enjoyed all the rights that would have been his if the oral understanding had been pleaded. The actual grievance of respondent was the destruction of some thousands of turkeys, and that grievance was fully set out in the pleadings and abundantly sustained by the proofs.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

53 Cal. App. 126

STAMPFLI v. STAMPFLI. (Civ. 2246.)

(District Court of Appeal, Third District, California. June 8, 1921.)

1. Divorce ⟹150(2)—Finding that allegations are true no sufficient finding.

Findings in a divorce case "that all the material allegations of plaintiff's complaint are true," and "that all the material allegations of the answer of defendant except as herein otherwise found are untrue," are insufficient as findings of fact.

2. Divorce ⟹135 — Finding of condonation sustained.

In action for divorce, wherein defendant in a cross-complaint set up improper conduct on the part of plaintiff wife in her relations with other men, evidence *held* to sustain a finding that defendant condoned the improper conduct.

3. Divorce ⟹184(10) — Finding in divorce case conclusive on appeal.

Findings of fact of trial court in divorce case on conflicting evidence are conclusive on appeal.

4. Divorce ⟹27(8) — Charges of infidelity gross cruelty.

Charging wife in presence of third persons with improper conduct with other men is gross cruelty, unless justified by the wife's misconduct.

5. Trial ⟹388(4)—No finding required of admitted fact.

No finding is required of an admitted fact.

6. Divorce ⟹150(2)—Finding of ultimate fact held sufficient.

In an action by wife for divorce on ground of extreme cruelty, consisting in part of charges of infidelity, a finding of the ultimate fact that the defendant's conduct was "without any just

cause or reason or provocation," "without any just or any cause," was sufficient without any further special findings as to facts alleged in a plea of justification set up by defendant, which could have been given in evidence under the denials of his answer.

7. Divorce ⊜150(2)—Finding of residence held sufficient.

In an action for divorce, a finding "that plaintiff and defendant now are and for more than one year last past, preceding the commencement of this action, have been residents of the county," was sufficient to show that the parties were residents of the county for one year preceding the commencement of the action.

8. Divorce ⊜240(5)—Alimony held proper.

In an action for divorce, where defendant was making in excess of $100 per month, allowance of alimony in the amount of $30 a month for the support of the wife and $15 a month for the support of each of two minor children *held* proper.

9. Divorce ⊜221—No attorneys' fees for past services.

Court in divorce case is not authorized to allow wife attorneys' fees for past services.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Susie B. Stampfli against W. L. Stampfli. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

L. H. Hughes, of Quincy, for appellant.
M. C. Kerr, of Quincy, for respondent.

FINCH, P. J. The plaintiff was granted an interlocutory decree of divorce on the ground of extreme cruelty, and the defendant appeals. The complaint alleges many specific acts of cruelty. The answer denies some of the alleged acts, and pleads justification of those not denied. With his answer the defendant filed a cross-complaint, charging the plaintiff with extreme cruelty and specifying several instances of improper conduct on her part with one Walter Stampfli, a cousin of the defendant, in support of said charges. The plaintiff answered the cross-complaint denying the alleged improper conduct. Evidence was introduced by both parties in support of their respective allegations and denials. The testimony was of such character as to create a substantial conflict.

The findings of the court upon the charges and counter charges of cruelty are as follows:

"That all the material allegations of plaintiff's complaint are true. That it is true that since the said marriage and for more than one year prior to the commencement of this action the defendant has treated the plaintiff in a cruel and inhuman manner, and that said defendant is subject to violent fits of jealousy and anger, and while so angered, without any just cause or reason or provocation, has violently abused, insulted, and upbraided the plaintiff without any just or any cause, and has accused plaintiff falsely of intimacy with other men without any cause or foundation in fact. That defendant on many and divers occasions has applied vile, obscene, and insulting epithets and names to plaintiff in the presence of their two minor children. That there is not sufficient evidence to establish any theft by said defendant, and the court finds that there were no thefts as set forth in plaintiff's complaint. That such acts and conduct of defendant toward plaintiff has caused plaintiff grievous bodily injury. That plaintiff was guilty of misconduct with one Walter Stampfli, not amounting to adultery, but that said conduct was condoned by defendant prior to the commencement of this action and was not repeated. * * * That all the material allegations of the answer of defendant except as herein otherwise found are untrue. That all of the material allegations set forth in the cross-complaint of defendant except as herein otherwise found are untrue. That it is not true that since the said marriage that plaintiff has treated defendant in a cruel and inhuman manner, and has inflicted on defendant great and grievous mental suffering and anguish, and it is not true that any acts, conduct, and behavior of plaintiff caused defendant great mental anguish and suffering, or has seriously impaired his health. That there was misconduct on the part of plaintiff, but that the same has been fully condoned prior to the commencement of this action. That all the material allegations of the answer of plaintiff to defendant's cross-complaint except as herein otherwise found are true."

[1] The appellant contends that the findings are insufficient to support the interlocutory decree. The findings "that all the material allegations of plaintiff's complaint are true," and "that all the material allegations of the answer of defendant except as herein otherwise found are untrue," are clearly insufficient as findings of fact, and must be dismissed from consideration in determining the question under discussion. On appeal a party is entitled to contest the decision of the trial court that any particular fact in issue is material. Obviously this right would be denied an appellant if a finding that all "material" allegations are true or untrue were held sufficient. There would be no means by which the appellate court could ascertain what facts the trial court held to be material. In the case of Ladd v. Tully, 51 Cal. 277, in passing upon the sufficiency of a similar finding it was said:

"The finding is that all the 'material' facts stated in the complaint are true. But we have no means of determining what facts the court deemed 'material,' and have no information from the findings on this point. So loose a method of finding the facts cannot be tolerated, and would lead to the most serious perplexities."

See, also, Krug v. F. A. Lux Brewing Co., 129 Cal. 323, 61 Pac. 1125.

"The general omnibus finding 'that all the material denials and averments of the answer to the complaint herein are true, and all the material averments of the amended complaint in intervention are true,' is insufficient for any purpose." Holt Mfg. Co. v. Collins, 154 Cal. 276, 97 Pac. 520.

[2, 3] The court did not make specific findings upon the particular facts alleged in the cross-complaint, but found generally "that plaintiff was guilty of misconduct with one Walter Stampfli, not amounting to adultery." The court further found that "said conduct was condoned by defendant prior to the commencement of this action, and was not repeated." This further finding is supported by the evidence. The most serious acts of misconduct occurred, according to the defendant's testimony, on the evening of September 20, 1919. The defendant's testimony relative to subsequent events on the same evening is as follows:

"I told her I would overlook it this time but I didn't want it to happen again. So after we had got into bed, she put her arms around my neck and started to cry. She says, 'Dutch, you won't like me no more, will you?' I says, 'Yes, Suz, I will overlook it this time, but don't let me ever see it happen again.' "

In response to questions propounded by the court the defendant testified that, after the occurrences of September 20th, he and the plaintiff continued to live together as husband and wife up to September 28th, and "got along fine" "never had a word," and that there was no repetition of her conduct with Walter Stampfli. The plaintiff did not plead condonation. In Hunter v. Hunter, 132 Cal. 476, 64 Pac. 773, it is said:

"As condonation is a specific defense to an action for divorce, it should be pleaded like any other defense. It is true that an action for divorce differs from an ordinary proceeding, in that a decree may not be rendered upon the admission of a party, or upon the uncorroborated evidence of either of the spouses. If, therefore, the evidence had shown condonation, it would have been the duty of the court, even without a pleading, to have found to that effect."

Appellant urges that plaintiff failed to comply with the condition subsequent of treating the defendant with conjugal kindness, though admitting that there was no further act of improper conduct with Walter Stampfli. The evidence bearing upon the subsequent conduct of the plaintiff was conflicting, and the court's finding is therefore conclusive.

[4-6] It is alleged in the complaint and admitted in the answer that in July, 1918, the defendant told the plaintiff that he was going to leave her, and did leave their home with his suit case; that he carried his suit case around the town of Crescent Mills, and told several persons that he was going away; that in September, 1919, the defendant, in the presence of their minor children and said Walter Stampfli, accused the plaintiff of having had sexual relations with said Stampfli. The defendant pleads justification of his conduct by alleging that at that time he had gone home and found the plaintiff and said Stampfli in a room together, "caressing, embracing, and kissing each other." It is alleged that at the same time the defendant shoved the plaintiff in a violent manner. The defendant admits that he shoved the plaintiff out of the way in an endeavor to see said Walter Stampfli who, he alleges, was hiding in the room. It is alleged and admitted that on that occasion the defendant looked for his rifle and pistol, but defendant denies that he threatened to use the same or to injure the plaintiff. It is further alleged and admitted that, on the 28th of September, 1919, the defendant accused the plaintiff, in the presence of her sister-in-law and the latter's minor children and within the hearing of a number of persons on the street, of having had sexual relations with said Walter Stampfli, and that he made the same charge against the plaintiff to her mother. The defendant attempts to justify his conduct by alleging that such statements were made in the heat of a quarrel provoked by the plaintiff, and which became violent on the part of both; that on that occasion the plaintiff had gone to the defendant's shop and "started to upbraid and criticize him, and continued to upbraid him to such an extent that he finally referred" to the occurrences of September 20th, involving plaintiff's conduct with said Stampfli. The defendant's conduct, expressly admitted by him, is sufficient to constitute gross cruelty unless justified by the plaintiff's misconduct. No finding is required of an admitted fact. It only remained to find upon the plea of justification. The court found that the defendant's conduct was "without any just cause or reason or provocation"; "without any just or any cause"; that his accusations of infidelity were "without any cause or foundation in fact." Under the authorities these findings are sufficient. The plea of justification did not present any new issue, as the facts alleged could have been given in evidence under the denials of the answer, and it was not necessary to find specially as to such facts. The court found the ultimate fact that there was no cause or provocation for the defendant's conduct. Terrill v. Terrill, 109 Cal. 413, 42 Pac. 137; Howard v. Howard, 134 Cal. 346, 66 Pac. 367; Kepfler v. Kepfler, 134 Cal. 205, 66 Pac. 208.

[7] Appellant contends that the findings do not show that the parties were residents of the county for one year preceding the commencement of the action, citing Coleman v. Coleman, 23 Cal. App. 424, 138 Pac. 363. In

that case the finding held insufficient recited that the parties "have been residents in said city and county and state for a period of more than one year now last past." In this case the finding is "that plaintiff and defendant now are and for more than one year last past, preceding the commencemnt of this action, have been residents of the county of Plumas, state of California." The difference between the two findings is apparent.

[8] Appellant objects to the findings as insufficient to support the allowance of $30 a month for the support of the wife and $15 a month for the support of each of the two minor children. The court finds that said sums are reasonable sums to be paid for the support of the wife and children, and that the defendant is an able-bodied man, and able to earn sufficient to pay the sums allowed. The plaintiff alleges in her complaint that the defendant is making in excess of $100 per month. The defendant does not deny this allegation, but alleges that since the marriage of the parties he has been "continuously" employed at "good wages." The finding is sufficient under the circumstances disclosed.

[9] The interlocutory decree awarded the plaintiff $150 as attorney's fees. The court is not authorized to allow attorney's fees for past services. Loveren v. Loveren, 100 Cal. 494, 35 Pac. 87; Lacey v. Lacey, 108 Cal. 46, 40 Pac. 1056; Wickland v. Wickland, 19 Cal. App. 562, 126 Pac. 507; Sheppard v. Sheppard, 15 Cal. App. 619, 115 Pac. 751. The judgment is modified by striking therefrom the allowance of $150 attorney's fees, and, as so modified, is affirmed, neither party to recover costs of appeal.

We concur: HART, J.; BURNETT, J.

53 Cal. App. 45

PEOPLE v. HOLDER. (Cr. 751.)

(District Court of Appeal, Second District, Division 2. California. June 3, 1921. Hearing Denied by Supreme Court Aug. 1, 1921.)

1. Criminal law ⊂⊃1023(8)—Order denying motion in arrest not appealable.

An order denying defendant's motion in arrest of judgment is not appealable, and an appeal therefrom must be dismissed.

2. Embezzlement ⊂⊃26—Indictment held sufficient to charge offense.

An indictment, alleging that defendant at a specified time and place was a contractor by virtue of a contract with H. S. and A. S. for the erection of a dwelling house, and was by virtue of such contract relation intrusted with and came into the possession, care, custody, and control of $2,000 of the personal property of the said H. S. and A. S., and that after such money had come into his possession, etc., he unlawfully, fraudulently, and feloniously converted it to his own use and to uses and purposes not contemplated by the contract, contrary to his trust and contract and his relation as contractor, servant, and agent of the said H. S. and A. S., was sufficient to charge embezzlement under Pen. Code, § 503.

3. Embezzlement ⊂⊃8—Contractor cannot be guilty with respect to money paid him under contract and which is his own property.

Under Pen. Code, § 503, defining embezzlement as the fraudulent appropriation of property by one to whom it has been intrusted, a building contractor cannot be guilty of embezzling money paid him under the contract, all of which is his own property, as a person's own property is not property intrusted to him.

4. Embezzlement ⊂⊃10—Contractor not guilty of embezzling money paid him under contract, though agreeing to pay for labor and materials.

Under Pen. Code, § 506, as amended by St. 1907, p. 892, providing that every person intrusted with property for the use of any other person who fraudulently appropriates it to his own use, etc., and any contractor who appropriates money paid him for any use or purpose other than that for which he received it is guilty of embezzlement, a building contractor receiving money under the contract, which required him to pay all claims for labor or materials, and orally agreeing to use the money in payment of labor and materials, was not guilty of embezzlement in using the money for other purposes, as the money was not properly intrusted to him or in his control for the use of any other person.

5. Constitutional law ⊂⊃83(3)—Legislation, penalizing the use of money except for payment of debts, is invalid.

Any legislation that makes it a crime for one to use his own money for any purpose other than the payment of his debts violates Const. art. 1, § 15, prohibiting imprisonment for debt except in case of fraud.

6. Constitutional law ⊂⊃83(3)—Nonpayment of debt cannot be made a crime.

Const. art. 1, § 15, prohibiting imprisonment for debt in civil actions, cannot be evaded by making the nonpayment of a debt a crime.

7. Constitutional law ⊂⊃83(3)—Statute punishing contractor for using money paid him violates provision against imprisonment for debt.

Pen. Code, § 506, as amended by St. 1919, p. 1090, providing that a contractor appropriating money paid him for any use or purpose other than that for which he received it is guilty of embezzlement, and that the payment of laborers and materialmen is thereby declared to be the use and purpose to which the contract price received by the contractor shall be applied, if construed as making it embezzlement for a contractor to break his agreement to pay for labor and materials with moneys paid him under the contract, though the title to the moneys is vested in him, violates Const. art. 1, § 15, prohibiting imprisonment for debt.

8. Constitutional law ⊂⊃87, 89(1), 206(1), 258—Statute providing that contractor holds money in trust abridges privileges of citizens, denies due process, and infringes right of property and right to contract.

Pen. Code, § 506, as amended by St. 1919, p. 1090, relative to embezzlement by contractors, if construed to mean that, notwithstanding the provisions of the contract to the contrary, the contractor does not have the absolute unconditional title to money paid him thereunder, but holds it in trust for the payment of laborers and materialmen, abridges the privileges of citizens of the United States, deprives them of property without due process of law, in violation of Const. U. S. Amend. 14, and Const. Cal. art. 1, § 13, and violates Const. Cal. art. 1, § 1, declaring that all men had the inalienable right of acquiring, possessing, and protecting property, and infringes upon the inalienable right of contract.

9. Constitutional law ⊂⊃89(1)—Right to contract cannot be limited.

The right to make contracts common to all legitimate vocations is a property right, the enjoyment of which is guaranteed by the Constitution, and though the Legislature may prescribe the form in which contracts shall be executed in order to be valid or binding, it cannot limit the right of the parties to incorporate into their contracts, otherwise valid, such terms as may be mutually satisfactory to them.

10. Constitutional law ⊂⊃81—Statute requiring contractor to hold moneys in trust not valid exercise of police power.

Pen. Code, § 506, as amended by St. 1919, p. 1090, construed as requiring building contractors to hold moneys received under the contract in trust for the payment of laborers and materialmen, is not a valid exercise of the police power, as there can be nothing so injurious to the public welfare in the failure of a debtor to pay his debts as to require the exercise of the police power.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

W. H. Holder was convicted of embezzlement, and from the judgment and orders denying motions for a new trial and in arrest of judgment he appeals. Judgment and order denying new trial reversed, and appeal from order denying motion in arrest of judgment dismissed. For the allegations of the indictment, see 192 Pac. 90.

John S. Cooper, M. G. Phillips, and Cooper, Collings & Shreve, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

FINLAYSON, P. J. [1] Defendant, who was convicted of embezzlement under an indictment in two counts, similar in form, appeals from the judgment and from an order denying his motion for a new trial. He likewise appeals from an order denying his motion in arrest of judgment, but, as that order is not appealable, the appeal therefrom must be dismissed.

The evidence discloses that appellant, as contractor, had entered into a building contract with each of two lot owners for the construction of a house. Each instrument provided for a contract price to be paid appellant. Certain sums, parts of the stipulated contract price, were paid appellant under each contract, but, instead of expending the money for labor and materials, he appropriated to other uses amounts which, the prosecution claims, should have gone for those purposes. The aggregate amounts so appropriated were, in one instance, $1,500, in the other, $2,670. These two amounts are the sums mentioned in the respective counts of the indictment.

The indictment has heretofore been before this court on an application for a writ of habeas corpus. Ex parte Holder, 192 Pac. 90. The ground there taken by appellant, as petitioner for the writ, was that each count of the indictment charged an offense under Penal Code, § 506, as amended in 1919 (Stats. 1919, p. 1090), and that that section, as so amended, is unconstitutional. We then decided, without determining whether offenses were charged under section 506, that the indictment was sufficient to charge offenses under section 503 of the same Code.

In presenting his argument for a reversal of the judgment, appellant returns to the line of attack adopted by him in the habeas corpus proceeding, contending for the unconstitutionality of section 506 as amended in 1919. The Attorney General declines to follow that argument, and insists upon an affirmance on the ground that under the evidence offenses have been proven under section 503.

[2, 3] The court did not err in overruling the demurrer to the indictment. For the reasons stated in the habeas corpus proceeding (192 Pac. 90), each count is sufficient to warrant a conviction under section 503, and appellant was properly convicted if the evidence adduced at the trial suffices to show a violation of that section. We think it clear, however, that under the evidence appellant is not guilty of the crime of embezzlement defined in section 503 of the Penal Code. The moneys which it is claimed were embezzled were paid to appellant under his respective contracts with the lot owners. No part of the money thus paid to him was the property of another. It was appellant's own property, and his only. Appellant, therefore, could not justly be found guilty under section 503, which defines embezzlement as the "fraudulent appropriation of property by a person to whom it has been intrusted." In no true sense of the words can it be said that that which is absolutely one's own is proper-

ty that "has been intrusted" to him. As the crime of embezzlement is ordinarily understood and defined, one cannot be guilty of embezzling his own property. People v. Goodrich, 138 Cal. 472, 71 Pac. 509; 20 Corp. Jur. 416. The question, therefore, is: Does the evidence justify appellant's conviction under section 506 as it now stands? And if it does, is that section, as thus amended, a valid and constitutional enactment?

The following is the language of section 506 as it now reads:

"Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, and any contractor who appropriates money paid to him for any use or purpose, other than for that which he received it, is guilty of embezzlement, and the payment of laborers and materialmen for work performed or material furnished in the performance of any contract is hereby declared to be the use and purpose to which the contract price of such contract, or any part thereof, received by the contractor shall be applied."

That part of the section which provides that "any contractor who appropriates money paid to him for any use or purpose, other than for that which he received it, is guilty of embezzlement," was added in 1907. Stats. 1907, p. 892. In 1919 the Legislature added to the section the concluding sentence, that providing that—

"The payment of laborers and materialmen for work performed or material furnished in the performance of any contract is hereby declared to be the use and purpose to which the contract price of such contract, or any part thereof, received by the contractor shall be applied." Stats. 1919, page 1090.

[4] It is quite evident that appellant could not rightfully be convicted of embezzlement under section 506 as it read prior to the amendment of 1907. For, since the money, when paid to him, was paid to and received by him under his contract with the lot owner —it was so stated, without contradiction, by the witnesses on both sides—the money was not property intrusted to him or in his control "for the use of any other person." By his contract with each lot owner he did, it is true, expressly agree to "pay all claims of all persons performing labor upon, or furnishing materials for said work or buildings." And at the time when the several sums were paid to him he orally agreed to use them in the payment of labor and material bills. But there is no claim that appellant procured the payment of these sums by fraudulent misrepresentations. That is not the theory upon which the indictment was drawn. The prosecution's theory is that, notwithstanding the moneys, when paid to appellant, were, under the terms and provisions of the building contracts, his own property, he, nevertheless, was guilty of embezzlement under section 506 as it now reads. Though he may have agreed to pay certain of his debts with the moneys that were paid to him under his contract, the title to the moneys so received by him, if the terms of his contract alone be considered, was vested in him absolutely and unconditionally.

It follows from the foregoing that to hold appellant guilty of embezzlement it must be held: (1) That, by reason of the amendment of 1907, a contractor who breaches his agreement to pay certain of his debts with the moneys paid him under his contract is guilty of embezzlement, notwithstanding the title to the moneys is vested in him; or (2) that the amendment of 1919 is constitutional, and that its provisions so enter into and become a part of every building contract that, the terms of such contract to the contrary notwithstanding, the money paid to the contractor under his contract does not become his own property, but is held by him in trust for the uses and purposes mentioned in the 1919 amendment. In our opinion the Legislature is without the power to do either of these things. That is, the Legislature has not the power to provide that a contractor who breaches his agreement to pay a certain class of debts with money that is his own shall, for that reason alone, be deemed guilty of a crime punishable with imprisonment. Nor has it the power so to interfere with the right of contract as to provide, in effect, that money paid to a contractor under his contract shall not be absolutely his own property to do with as he pleases, but shall be received by him in trust to pay a certain favored class of creditors.

[5, 6] Any legislation that makes it a crime for one to use his own money for any purpose other than the payment of his debts is violative of section 15 of article I of the Constitution of this state, which expressly inhibits imprisonment for debt except in cases of fraud. Ex parte Crane, 26 Cal. App. 22, 145 Pac. 733; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105; State v. Paint, etc., Co., 92 Tenn. 81, 20 S. W. 499, 36 Am. St. Rep. 68; State v. Williams, 150 N. C. 802, 63 S. E. 949; Peonage Cases (D. C.) 123 Fed. 685 et seq. The provision in the California Constitution inhibiting imprisonment for debt "in civil actions" cannot be evaded by making the nonpayment of a debt a crime. State v. Paint, etc., Co., supra. See, also, Ex parte Crane, supra; Carr v. State, 106 Ala. 38, 17 South. 350, 34 L. R. A. 634, 54 Am. St. Rep. 19; Kansas City v. Pengilley, 269 Mo. 59, 189 S. W. 380, L. R. A. 1917B, 551. In the Peon-

age Cases, Judge Jones, in a forceful opinion, very pertinently says that—

"When a man's liberties are taken from him because he does not pay a debt, and he is punished if he does not perform a civil contract, * * * he is put in prison bounds, and is imprisoned for debt in the meaning of the Constitution." 123 Fed. 686.

In Ex parte Hollman, supra, the court uses this language:

"It is strenuously argued, however, that the act does not provide for imprisonment for debt under civil process, and that the General Assembly may make an act criminal and punishable by imprisonment which is not fraudulent nor recognized as morally wrong. The power of the General Assembly to make an act criminal which was before innocent is familiar. But the legislative power to make acts criminal and punishable by imprisonment cannot be extended to an invasion of the rights guaranteed the citizens by the Constitution. It is impossible to frame a valid statute punishing by imprisonment the exercise of the right to religious liberty, or the right to petition for the redress of grievances, or the right to be exempt from imprisonment for debt except in case of fraud. These are all constitutional rights which cannot be abridged under the guise of legislation against crime. The exercise of them cannot be crime."

[7] It follows, therefore, that the judgment cannot be upheld upon the theory that, notwithstanding the title to the money paid to appellant under his contract was vested in him, he, nevertheless, could be found guilty of embezzlement because he breached his agreement to use the money to pay certain of his bills.

[8] The sole remaining theory upon which the people may attempt to justify appellant's conviction is that, by reason of the amendment of 1919, the statute itself so enters into and becomes a part of every building contract that, the provisions of the contract to the contrary notwithstanding, the absolute, unconditional title to money paid to the contractor under his contract does not pass to him, but is received by him in trust for certain uses. A statute that consummates such a result abridges the privileges of citizens of the United States and deprives them of property without due process of law. All men have the inalienable right of "acquiring, possessing and protecting" property (Const. Cal. art. I, § 1); and no person shall be deprived of property "without due process of law" (Cal. Const. art. I, § 13; and Fourteenth Amendment). The right of property antedates all Constitutions. Every person has the right to enjoy his property and improve it according to his own desires in any way consistent with the rights of others. This right is invaded if he is not at liberty to contract with others respecting the manner in which and the terms upon which his property shall be improved. The Legislature, therefore, cannot, without invading such right of the property owner, declare that he shall not contract with a builder upon such terms that all moneys paid the latter for his work and skill shall be absolutely his own. And, conversely, the Legislature cannot thus limit the right of contract without invading the contractor's inalienable right to dispose of his labor and skill upon such terms as may be mutually agreeable to himself and the owner of the property.

A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor and to own the fruits of his toil. A statute that, in its practical operation, in effect declares that under any contract between the owner of property and a building contractor the payments that may be made to the latter shall not be absolutely his own to do with as he pleases, but shall be held by him in trust to pay debts due by him to certain preferred creditors, is unconstitutional, in that it is an infringement upon the inalienable right of contract.

[9] The right to make contracts, common to all legitimate vocations, is a property right, the enjoyment of which is guaranteed by the Constitution; and though the Legislature may prescribe the form in which contracts shall be executed in order that they may be valid or binding, it cannot limit the right of the parties to incorporate into their contracts, otherwise valid, such terms as may be mutually satisfactory to them. Stimson Mill Co. v. Braun, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116; Gibbs v. Tally, 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815; Shaughnessy v. American Sur. Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701; Snell v. Bradbury, 139 Cal. 379, 73 Pac. 150; Roystone Co. v. Darling, 171 Cal. 532, 154 Pac. 15; Binford v. Boyd, 178 Cal. 458, 174 Pac. 56; Kelly v. Johnson, 251 Ill. 135, 95 N. E. 1068, 36 L. R. A. (N. S.) 573; George Bolln Co. v. North Platte, etc., Irr. Co., 19 Wyo. 542, 121 Pac. 22, 39 L. R. A. (N. S.) 868.

[10] The right of contract is, it is true, subject to reasonable police regulation. But the amendment of 1919 is not a valid exercise of that power. As said by Mr. Justice Henshaw in the Jentzsch Case, 112 Cal. 473, 44 Pac. 804, 32 L. R. A. 664:

"While the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic, for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the Legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant."

It is well settled that the police power cannot be made a cloak under which to overthrow or disregard constitutional rights. It is only when the general welfare, the inter-

ests of the public as distinguished from those of individuals, will be protected that the right of contract may be limited by a general exercise of the police power. Binford v. Boyd, supra; In re Farb, 178 Cal. 592, 174 Pac. 320, 3 A. L. R. 301. In view of this principle, impregnably established in our jurisprudence, it cannot successfully be contended that the amendment in question is a valid police regulation. The payment of debts that may be due laborers or materialmen is not calculated to conserve the safety, health, or general welfare of the community. There can be nothing so injurious to the public welfare in the failure of a debtor to pay his just debts as to require an exercise of the police power. In all free governments the good sense of mankind, since the day when imprisonment for debt was abolished, has condemned and frowned down any attempt to coerce the performance of civil obligations by criminal penalties. Gibbs v. Tally, supra; Ex parte Dickey, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428; Binford v. Boyd, supra; Ex parte Hayden, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. Rep. 183; Peonage Cases, supra; Bailey v. Alabama, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191; Kansas City v. Pengilley, supra; Toney v. State, 141 Ala. 120, 37 South. 332, 67 L. R. A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319; State v. Armstead, 103 Miss. 790, 60 South. 778, Ann. Cas. 1915B, 495.

For these reasons we hold that the amendment of 1907 is an unwarranted invasion of the rights guaranteed by our state and federal Constitutions, and that therefore the clause added to section 506 by the amendment of 1919 is void and wholly ineffective. This being so, the judgment must be reversed, for the reason that, under the evidence, appellant has not been shown to have violated either section 503 or section 506, shorn of its unconstitutional provisions.

The judgment and order denying appellant's motion for a new trial are reversed. The appeal from the order denying appellant's motion in arrest of judgment is dismissed.

We concur: WORKS, J.; CRAIG, J.

53 Cal. App. 42

BAR ASS'N OF SAN FRANCISCO v. GOLDMAN. (Civ. 3801.)

(District Court of Appeal, First District, Division 1, California. June 2, 1921.)

1. Attorney and client ⇐53(2)—Evidence held insufficient to support disbarment of attorney.

Evidence *held* insufficient to support the disbarment of an attorney for alleged moral turpitude in presenting a false satisfaction in writing to the State Industrial Commission and in giving false testimony before such commission as to the genuineness of such writing.

2. Attorney and client ⇐53(2)—Charges of misconduct by an attorney must be supported by convincing proof.

A disbarment proceeding is quasi criminal, and charges of misconduct must be supported by convincing proof, satisfying the court with reasonable certainty.

Application by the Bar Association of San Francisco for the disbarment of Heim Goldman, an attorney at law. Accusation dismissed.

Edwin L. Forster and Franklin T. Poore, both of San Francisco, for applicant.

Vincent Surr and Douglas A. Nye, both of San Francisco, for accused.

PER CURIAM. This is an application by the Bar Association of San Francisco to remove and disbar defendant as an attorney and counselor-at-law. Two charges are contained in the accusation: (1) Moral turpitude of the accused in filing with the Industrial Accident Commission a document purporting to be a satisfaction and release in full of an award made by such commission, together with a demand for entry of such satisfaction thereon, whereas said award was not satisfied in full but only a part paid thereon; (2) moral turpitude of the accused in testifying under oath before said commission as having paid the award in full, whereas he only paid a part thereof.

[1] The facts giving rise to the accusation may be summarized as follows: On the 17th day of January, 1917, one P. J. Healy, a carpenter, was working on a building owned by I. Goldman, the father of the accused, and during the course of such employment Healy claimed that he sustained certain injuries to his knee. Demand was made by Healy upon Goldman for damages, whereupon Goldman in settlement of the claim paid the hospital and other expenses incurred by Healy, together with certain sums of money, amounting in all to over $300. Notwithstanding this settlement Healy thereafter made further demands upon Goldman who agreed to pay some further sum, but before the matter could be adjusted Healy filed with the industrial accident commission his written claim for compensation for the injuries alleged to have been received. The accused filed an answer on behalf of his father, and thereafter represented him throughout the proceedings before said commission. Healy recovered an award in the sum of $1,290, less the sum of $203, that Goldman was given credit for, leaving a balance of $1,087. Thereafter and upon receiving information

from Healy's physician and nurse that the injury complained of had not been suffered by Healy upon the occasion claimed, but at some previous time, Goldman filed a petition for rehearing before the commission. The petition was granted, but the commission upon rehearing refused to disturb the original finding. Thereafter and upon the conclusion of the case before the commission the accused, as attorney for his father, filed with the Industrial Accident Commission a written document signed by Healy entitled "Satisfaction of Judgment." It was recited therein that payment of the full sum of $1,087 had been made by I. Goldman to Healy in accordance with the award. Thereafter Healy filed an affidavit with the commission, stating that he had in fact settled the case for $800, and had only received that sum instead of $1,087, the amount of the award, and that he had been advised by his attorneys not to regard the settlement as conclusive, and requested that the satisfaction be set aside. The commission set the matter for hearing, upon which occasion the accused testified that he had paid Healy the full sum of $1,087. The commission determined the question adversely to Goldman's contention, and in the exercise of the paternal supervision granted to it under the statute set the satisfaction of judgment aside and awarded Healy the further sum of $287.

The record in the case was thereafter transmitted to the grievance committee of San Francisco Bar Association. Nothing was done by this committee for a considerable length of time until finally in 1920 the committee voted to recommend disbarment proceedings against the accused, and accordingly this accusation was filed in February, 1921, containing the two charges hereinabove recited. Upon the hearing of the charges Healy, notwithstanding his verified acknowledgment that he had been paid the full amount of the award, again testified that the accused had only paid him $800, and that such payment was made in the presence of one C. C. Clark. The accused, to the contrary, testified positively that he paid the full amount of $1,087. There is therefore a direct conflict in the testimony of these parties which is impossible of reconciliation. Recourse must be had, therefore, to the other evidence for a possible solution of the issue.

It may be said at the outset that the testimony of the witness C. C. Clark is unreliable. It appears in evidence that his character was impeached upon the hearing before the Industrial Accident Commission. It was there testified to that he was a vendor of worthless stock and that his reputation for truth was bad. It here appears that he was an intermeddler, carrying tales between Goldman and Healy for the manifest purpose of stirring up strife and litigation between them in the hope of reward. The evidence shows that he sought sums of money from both sides to arbitrate their differences. It further shows that he informed Healy that the Goldmans had made threats against his life and would litigate the case for years unless he settled the same. On the other hand, he informed I. Goldman that Healy would have him indicted, and further that he would sue him for $50,000 and have his son disbarred unless he settled with Healy. These statements so far as the Goldmans were concerned were false. It further appears in evidence that Clark attempted to discourage a witness from testifying before the Industrial Accident Commission, informing such witness that the controversy was between a working man and a rich concern, and that his testimony should not for that reason be against Healy. Under these circumstances the testimony of this witness is certainly discredited. Nor is the testimony of Healy convincing or sufficient to overcome the sworn statement made by him that he received the full amount of the award. In relating the circumstances under which the payment was made both he and Clark testified to the same effect as to certain minor details, some of which were subsequently admitted by Healy to be incorrect. This circumstance strongly indicates a rehearsed story. In contrast to this evidence the testimony of the accused is without contradiction, and is supported by facts and circumstances and presents every appearance of verity. The evidence shows that upon settling the matter he accounted to his father, charging him with the full amount of $1,087. The father testified that he paid this full sum, and his testimony carries conviction. In addition thereto a witness who saw the money paid testified that on that occasion the accused mentioned to Healy the exact sum he was receiving, the amount being paid in cash for the reason that Healy refused to take a check.

[2] We do not deem further discussion of the evidence necessary. The fact that the Industrial Accident Commission refused to accept the statement of the accused as true is not controlling here. A proceeding for disbarment is quasi criminal in its nature. An attorney should not be disbarred on testimony of a doubtful character. The charges should be clearly sustained by convincing proof, which proof must satisfy a court with reasonable certainty, and any doubt arising, as in the present case, should be resolved in favor of the accused.

It might be said in conclusion that the highest evidence as to the good moral character and reputation of accused has been here presented, and he is entitled to the benefit of this proof.

From what has been said it follows that the accusation should be, and it is hereby, dismissed.

53 Cal. App. 132

DWIGHT v. CALLAGHAN et al. (Civ. 3783.)

(District Court of Appeal, First District, Division 1, California. June 9, 1921.)

1. Sales ⊂=62—Contract held not severable, and failure to make deliveries constituted breach of entire agreement.

A contract for the sale of 200,000 oil cases, shipments to commence about 30 days from the day of the contract and the order to be completed at the rate of 15,000 to 25,000 cases monthly as ordered, was not severable as to the deliveries to be made thereunder, and the buyer's averment of a breach of the entire agreement was supported by evidence of the seller's failure to make shipments of any portion of the monthly installments, though the time had not arrived for delivery of some of the installments.

2. Evidence ⊂=142(1)—Sales ⊂=417—Price paid for substitute goods some evidence of market value; buyer held to have sufficiently proved damages from seller's default.

Where a buyer, on the seller's failure to deliver, went into the open market and purchased goods as nearly similar in form and quality as possible to those prescribed in the contract at the best obtainable prices, proof of the prices paid was some evidence of market value in the market nearest the place of delivery and, in connection with the testimony of qualified witnesses as to the market price, complied with Civ. Code, §§ 3308, and 3354, as to the damages for the seller's breach.

3. Sales ⊂=172—War conditions held not to excuse performance as act of public enemy.

The existence of war conditions rendering it difficult for a seller of oil cases to procure the particular wood out of which they were to be made, due to the fact that the United States government was requiring and commandeering a large amount of the same material for use in making aeroplanes did not excuse performance under Civ. Code, § 1511, providing that the want of performance of an obligation is excused when prevented by the act of public enemies.

4. Sales ⊂=422—Finding that seller breached agreement held sufficient without express finding on special defenses.

In an action for a seller's breach of contract, where there was no tangible evidence to support the special defenses that the time for performance had been extended, and that performance had been waived, a finding that defendants breached their agreement was sufficient without any express finding on such defenses, as the finding made negatived those defenses.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Ward A. Dwight, doing business as the Dwight Lumber Company, against Charles W. Callaghan and another, copartners, etc. From a judgment for plaintiff, defendants appeal. Affirmed.

C. W. Durbrow, F. M. Parcells, and Albert Michelson, all of San Francisco, for appellants.

Stoney, Rouleau, Stoney & Palmer, and R. M. J. Armstrong, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor for the sum of $13,955.92 damages for the alleged breach of an agreement for the sale and delivery by defendants to plaintiff of 200,000 inflammable oil cases of certain specified sizes and qualities. The agreement was in the form of an order by plaintiff of the cases in question dated May 28, 1917, and accepted by the defendants on that date. It contained the following clause as to the delivery of the goods, namely, "shipments to commence about thirty days from date, and order to be completed at the rate of 15,000 to 25,000 cases monthly as buyer may order." The complaint set forth the order in terms in the form of an exhibit, and alleged a total breach thereof on the part of the defendants, and that by reason of such failure and refusal on their part to fulfill the terms of said order the plaintiff was obliged from time to time to purchase similar oil cases in the open market at an increased price, whereby he sustained the damages which he sought by this action to recover. The defendants in their answer admitted making the agreement in the form and terms exhibited or embodied in the plaintiff's complaint, and further admitted that they had never shipped to said plaintiff any portion of the 200,000 oil cases called for by said order or any oil cases whatever. They denied for want of information and belief that the plaintiff purchased in the open market any oil cases, or that if he purchased the same he did so at the lowest market price at which they could be obtained; and denied that the plaintiff suffered any damage by reason of the defendants' failure to fulfill his said order. They then proceeded in their said order to set forth three separate special defenses to the plaintiff's action. The first of these was that they were delayed and prevented from executing the plaintiff's said order by the acts of a public enemy of the state of California and of the United States, which rendered it impossible for them to procure the necessary spruce lumber required by the terms of plaintiff's said order. The second special defense was that the plaintiff extended the period for the defendants' compliance with the terms of said order to a time subsequent to the institution of his action; and the third special defense upon which the defendants relied was that the plaintiff waived the performance of the covenants in said order to be by the defendants performed. They also pleaded by way of cross-complaint that the plaintiff was indebted to them in the sum

of $1,022.10 for certain goods, wares, and merchandise sold and delivered to him. To this cross-complaint the plaintiff presented an answer pleading payment of the sum demanded therein in full. Upon the trial of the cause the trial court found in favor of the plaintiff upon all of the issues tendered by his complaint, and also found that the defendants were entitled to recover the sum of $77.43 as a balance due upon their cross-complaint, and it accordingly rendered judgment in the plaintiff's favor for the sum of $14,033.35, less the sum of $77.43 found to be due defendants upon their cross-complaint. The court made no specific findings upon the aforesaid special defenses in the defendants' answer.

[1] The first contention of the appellants upon this appeal is that the contract was as to the deliveries to be made thereunder severable, and hence that the failure of the defendants to make the earlier deliveries required by its terms did not constitute a total breach of the agreement so as to entitle the plaintiff to recover damages as to those deliveries to be made thereunder, the time for which had not arrived at the date of the institution of this action. We are unable to agree with this contention. This case is in that regard in no material respect different from the case of Los Angeles Gas & Electric Co. v. Amalgamated Oil Co., 156 Cal. 776, 106 Pac. 55, wherein the Supreme Court say:

"While there is some conflict among the decided cases, the great weight of authority, at least in the United States, supports the proposition that such agreements are entire and that a refusal without sufficient cause by the seller to furnish, or by the buyer to take or pay for, any installment, justifies a repudiation of the contract by the party not in default."

Following this precedent we are constrained to hold that the plaintiff's averment of a breach of the entire agreement is supported by the evidence showing the failure on the part of the defendants to make shipments of any portion of the monthly installments of material called for by the terms of their agreement.

[2] The next contention of the appellants is that the plaintiff proved and the court applied an improper rule for the admeasurement of damages for the defendants' breach of their agreement. In so far as this contention is based upon the claim that the contract had not been totally breached at the time the action was brought, it is answered by the conclusions above arrived at as to the defendants' total breach of their agreement. As to the measure of damages for such breach the respondent and appellants seem to be in accord as to the application of sections 3308 and 3354 of the Civil Code to the facts of this case. The only dispute seems to be as to the form and sufficiency of proof as to conforming with the requirements of these sections of the Civil Code. Upon the defendants' failure to comply with their agreement by the shipment of the monthly installments of box material, according to its terms, the plaintiff went out into the open market and actually purchased flammable oil cases as nearly similar in form and quality to those prescribed in the defendants' contract as possible at the best obtainable prices, and he made proof of those purchases. The plaintiff thus went further than he was required to do under the terms of the sections of the Civil Code above referred to; and the fact that he made these actual purchases in the open market at the prices paid would be some evidence of the market value of such material in the market nearest the place where the property ought to have been delivered to him. But the plaintiff's evidence did not stop here, for he also produced certain qualified witnesses as to the market price at which such material might have been bought in the San Francisco market at a time shortly after the defendants' breaches of their agreement began. An examination of this evidence sufficiently shows it to have been in compliance with the provisions of the sections of the Civil Code above referred to, and to have been amply sufficient to uphold the findings of the trial court as to the amount of the plaintiff's damages.

The cases of Cal. White Pine Agency v. Penoyer, 167 Cal. 274, 139 Pac. 671, and Fairchild, etc., Co. v. Southern Refining Co., 158 Cal. 264, 110 Pac. 951, construing the foregoing sections of the Civil Code, would seem to be precisely in point in their application to the form of proof presented by plaintiff in the instant case in support of his claim for damages. We find no merit, therefore, in the appellants' second contention.

[3] The appellants' final contention is that the trial court failed to make any findings upon the issues presented by the special defenses in the defendants' answer. The first of these was the defense that the performance of the agreement on the defendants' part had been prevented by the acts of the public enemy of the state or of the United States. The only basis for this defense put forth by the defendants was in the form of certain questions asked of one of them as to the existence of war conditions at the time, which rendered it difficult for the defendants to procure the particular wood out of which the oil cases, which they were to supply under their agreement, were to be made, arising out of the fact that the United States government was requiring, and in fact commandeering, a large amount of the same material for use in making aeroplanes. Clearly this is not the act of a public enemy which would serve to excuse the performance of defendants' agreement under section 1511 of the Civil Code; and, there not only being no other evidence offered by the defendants in support of this particular plea, but on the other hand there being affirmative and un-

disputed evidence that the plaintiff was able to buy, and did in fact buy, similar material in the open market at a time shortly after the breaches of the defendants' agreement by them began, the trial court was not required to make a finding upon this issue, unsupported, as it was, by any evidence sufficient to justify a finding thereon.

[4] As to the other two special defenses pleaded by the defendants upon which the trial court failed to make findings, namely, that the time for the performance of the defendants' agreement had been extended by the plaintiff, and also that its performance had been waived by him, we have failed to find from a careful perusal of the record herein that there was any tangible evidence offered in support of either of these special defenses, but that on the other hand the record amply discloses that the plaintiff, while dealing fairly and even patiently with the defendants with respect to their delay and failure in making deliveries in compliance with the terms of their agreement, was at all times insisting and urging its performance upon them. Upon this state of the evidence the trial court was not required to make express findings as to these particular pleas, since it had already expressly found that the defendants had breached their agreement, which finding would in itself be inconsistent with and would negative the defendants' contention as to any extensions of time for or waiver of the performance on their part. We find, therefore, this final contention of the appellants to be also without merit.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

53 Cal. App. 185

PEOPLE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 3667.)

(District Court of Appeal, Second District, Division 1, California. June 13, 1921.)

Criminal law ⇐302(2)—Indictment and information ⇐121(1)—Court can dismiss prosecution for any reasons in furtherance of justice.

The superior court has jurisdiction, under Pen. Code, § 1385, to dismiss a criminal action for any reason it determines to be in furtherance of justice, so that it can dismiss such action for failure of the district attorney to furnish the defendants with a bill of particulars, even though the court is not authorized to require the furnishing of such bill.

Application by the People for a writ of prohibition to be directed to the Superior Court in and for Los Angeles County, Frederick W. Houser, Judge, to prevent the dismissal of a criminal action for failure of the prosecuting attorney to file a bill of particulars. Petition denied.

Thomas Lee Woolwine, Dist. Atty., of Los Angeles, for the People.

PER CURIAM. Petitioners have applied for a writ of prohibition to prevent respondent court from dismissing a certain criminal action.

It appears from the petition that in response to a motion of the defendants in that action, the superior court, acting through the judge named in the petition herein, has ordered that the district attorney furnish each of the defendants with a bill of particulars covering certain matters described in the motion. The court granted the motion, and further stated that unless the bill of particulars is furnished the court will dismiss the action. The district attorney has declined to comply with the order.

The question whether or not, in a criminal action, the court may require the people to furnish a bill of particulars apparently has not been passed upon in this state, except that in People v. Alviso, 55 Cal. 230, the Supreme Court stated that the furnishing of such bill of particulars is not required by any section of the Penal Code, "and we do not call to mind any rule of law requiring the same to be done." For authorities generally covering this subject see Annotated Cases, 1913A, 1207.

It is not necessary to pass upon the question above stated, and we express no opinion thereon. We think that respondent has jurisdiction to dismiss the action for any reason that it determines to be in furtherance of justice. Pen. Code, § 1385; People v. More, 71 Cal. 546, 12 Pac. 631. For this reason the petition is denied.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

53 Cal. App. 13

McMILLAN v. GREENAMYER et al.
(Civ. 3234.)

(District Court of Appeal, Second District, Division 2, California. May 26, 1921.)

Associations ⟸20(5)—Answer by one of three trustees held to state defense to action on note.

In an action on a note against the trustees of an association doing business under a declaration of trust, where two of the trustees confessed judgment, an answer by the third trustee alleging that there was no consideration or that the consideration had failed to a material extent through plaintiff's manipulations, and that the other trustees were susceptible to plaintiff's will and conniving with plaintiff to wreck the association in order to deprive the answering trustee of his valuable interest therein, stated a defense.

Appeal from Superior Court, Los Angeles County; S. M. Marsh, Judge.

Action by Joseph McMillan against C. V. Greenamyer and others, as trustees, doing business under the name and style of the Mechanical Development Company. From a judgment for plaintiff, the defendant named appeals. Reversed and remanded.

Rupert B. Turnbull, of Los Angeles, for appellant.

W. R. Millar, of Los Angeles, for respondent.

WORKS, J. This is an appeal from a judgment against three defendants upon a confession of judgment filed by two of them. Before the confession was filed the third defendant had interposed an answer to the complaint, and, after it was filed and by leave of court, he presented an amended answer. The trial court, without in any manner disposing of this pleading and without the hearing of any evidence, and without any findings of fact, rendered judgment upon the confession. Respondent moved for a dismissal of this appeal on the ground that an appeal from a judgment by confession does not lie. We denied the motion (McMillan v. Greenamyer, 195 Pac. 734), and determined that the answering defendant had the right to maintain a defense in the action. A more detailed statement of the facts will be found in the opinion then delivered. Appellant presented a brief in opposition to the motion to dismiss the appeal, but has filed none for our consideration in passing upon the appeal on its merits.

On the motion to dismiss we not only determined that the answering defendant had a right to defend, but we had this to say of his amended answer:

"If the statements made therein were substantiated by proof, the court would have been justified in rendering a different judgment than that founded on the confession."

This was, in effect, a decision that the amended answer stated a defense, and the merit of the appeal was thus determined. We have, however, again examined the pleading, and there is no doubt that it puts in issue material allegations of the complaint, and that it properly pleads defensive new matter as well.

The judgment is reversed, and the cause is remanded.

We concur: FINLAYSON, P. J.; CRAIG, J.

52 Cal. App. 639

McCAIN v. CITY OF OAKLAND et al.
(Civ. 3813, 3814.)

(District Court of Appeal, First District, Division 2, California. May 16, 1921.)

1. Appeal and error ⟸854(6)—Order granting new trial, not designating ground, affirmed, if order can be sustained on any ground assigned in motion.

Order granting new trial, made prior to amendment of Code Civ. Proc. § 657, not designating the ground on which the new trial was granted, must be affirmed, if it can be sustained on any one of the grounds assigned in the motion for new trial.

2. New trial ⟸70—Court required to grant new trial, if evidence appears insufficient.

If the evidence appeared to the trial judge to be insufficient, it was not only his privilege, but his duty, to grant a new trial.

3. Appeal and error ⟸979(2)—Order granting new trial for insufficiency of evidence not disturbed, unless court abused discretion.

Order granting a new trial for insufficiency of evidence cannot be disturbed on appeal, unless it appears that the trial judge abused its discretion.

4. Municipal corporations ⟸817(1)—Extent of burden of proof in action against city officer for injuries from defective street stated.

In an action against a city officer for injuries from defects in street, under St. 1911, p. 1115, plaintiff was required to prove that a dangerous or defective condition of the street existed, in consequence of which plaintiff suffered injury, that the officer had actual notice of such condition, that plaintiff used due care to avoid the danger, that the officer had authority to remedy the condition at the expense of the city, and that funds were available for that purpose.

5. Appeal and error ⟸874(5)—Nonsuits as to certain defendants not available on appeal from order granting new trial on motion of other defendants.

On plaintiff's appeal from order granting a new trial after verdict had been rendered for plaintiff against some of the defendants, the action of the court in granting motions of

other defendants for nonsuits was not available, since the proper method of raising the error in rendering the judgment for such other defendants was by appeal from such judgment.

6. Appeal and error ⊂=173(5), 673(2)—Objection not raised in trial court not available on appeal; defense based on bond not in record not considered.

In action against the commissioner of a city and his surety for injuries from defective street, the objection by the surety that the commissioner's bond ran exclusively to the city, and did not inure to one claiming damages against the commissioner, and was not controlled by Pol. Code, § 958 et seq., was not available on appeal, where not raised in the trial court, and where record did not contain the bond, so that court was unable to see whether it contained a provision to effect that it inured to city exclusively.

7. Appeal and error ⊂=910—Where bond not in record, no presumption that it contained provision defeating right of plaintiff to sue.

In action against commissioner of a city and his surety for injuries from defective street, where record on appeal did not contain surety bond, surety's objection that bond did not inure to plaintiff, but to city exclusively, could not be considered, as appellate court would not presume that bond contained a provision that city alone could sue thereon.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Jessie L. McCain against the City of Oakland, Frederick Soderberg, and the Fidelity & Deposit Company of Maryland. Verdict for plaintiff against the two last-named defendants and from the judgment thereon they appeal. From an order granting a new trial, plaintiff appeals. Appeal from judgment dismissed, and order granting new trial affirmed.

Ostrander, Clark & Carey, of Oakland, for plaintiff.

Guy Le Roy Stevick, Alfred C. Skaife, and Redman & Alexander, all of San Francisco, for defendant Fidelity & Deposit Company of Maryland.

H. L. Hagan, City Atty., John J. Earle, Asst. City Atty., and Chapman & Trefethen, all of Oakland, for defendant Soderberg.

NOURSE, J. Plaintiff commenced this action against the city of Oakland, the members of the city council, designated as commissioners, and the Fidelity & Deposit Company of Maryland, surety upon the official bonds of the commissioners. The cause of action was based upon personal injuries received by plaintiff while riding in an automobile along one of the public streets of the city. The injury was occasioned by the collision on the night of September 19, 1917, of the automobile with a bulkhead alleged to have been constructed and maintained by the city authorities in a defective and dangerous condition. Upon demurrer the action fell as to the city of Oakland. At the conclusion of plaintiff's main case all the remaining defendants moved for nonsuits. These motions were denied at the time, except as to the defendant Morse, whose motion was granted. At the end of defendants' case the court, of its own motion, reversed this ruling and ordered nonsuits as to all these defendants, other than Soderberg and the surety company, as to whom the motions were denied. Though it does not so appear in the order, it is stated that the reason for making the distinction between Commissioner Soderberg and the other commissioners was that he was the commissioner having special jurisdiction over the construction of street improvements. The cause then went to the jury as to these two defendants, and a verdict resulted in favor of plaintiff in the sum of $5,149. Thereafter the court granted the motion of these defendants for a new trial.

The case comes before this court on two appeals, presented, by stipulation, on one single record: (1) Plaintiff's appeal from the order granting a new trial; and (2) the appeal of defendants Soderberg and the surety company from the judgment. The latter appeal is not seriously urged; counsel stating in their briefs that an affirmance of the order granting a new trial disposes of their appeal.

[1] The motion for a new trial was made upon eight separate grounds. It was granted November 8, 1918, prior to the amendment to section 657, Code of Civil Procedure. It did not designate the ground upon which it was granted. Hence, if the order can be sustained upon any one of the grounds assigned, it must be affirmed. Gordon v. Roberts, 162 Cal. 506, 508, 123 Pac. 288, and cases there cited. On this appeal defendants place their main reliance upon the insufficiency of the evidence to sustain the verdict, and plaintiff argues that it is apparent from statements made by the trial judge during the course of the hearing on the motion that this was the ground upon which the order was based.

[2, 3] If the evidence appeared to the trial judge to be insufficient, it was not only his privilege, but his duty, to grant a new trial (Green v. Soule, 145 Cal. 96, 102, 78 Pac. 337); and the order so made cannot be disturbed on appeal, unless it clearly appears that this trial judge abused the discretion committed to him (Estate of Wall [Sup.] 191 Pac. 687; Estate of Bainbridge, 169 Cal. 166, 169, 146 Pac. 427).

In the present case plaintiff's cause of action was based upon an alleged statutory liability arising out of the provisions of the act relating to the liability of public officers for damages resulting from defects and dangers in streets, highways, etc. Stats. 1911, p. 1115. The portion of the act material to

this case is the provision that no public officer having charge of the repair of a highway shall be liable for injury arising from the dangerous or defective condition thereof "unless such officer shall have had actual notice of such defective or dangerous condition and shall have failed for a reasonable time after such actual notice to repair the same: Provided, that such officer had authority to remedy such condition * * * and funds were available for that purpose." It is also necessary under the act in order to hold the public officer liable that it shall appear "that such damage or injury was sustained while said street, highway * * * was being carefully used and that due care was exercised to avoid such danger."

[4] Though this statute, in so far as it relates to the liability of public officers, is negative in character, counsel assume that it is sufficient to fix a liability upon the public officers if the conditions specified therein are shown to exist. Both parties rely solely upon this statute as fixing defendant's liability, and, such being the case, it was necessary for plaintiff to prove: (1) That a dangerous or defective condition of the street existed in consequence of which plaintiff suffered the injury; (2) that defendant Soderberg had actual notice of such condition; (3) that plaintiff used due care to avoid the danger; (4) that defendant Soderberg had authority to remedy the condition at the expense of the city; and (5) that funds were available for that purpose. If any one of these conditions was not proved by sufficient evidence, the trial judge was justified in setting the verdict aside. On each one of these five essential elements of recovery the evidence was conflicting and uncertain, and on each one the trial court could have justly held that plaintiff failed to meet the burden of proof.

It was shown that the bulkhead was a solid structure of stone and cement 4 feet high completely across Rio Vista avenue, placed there by the superintendent of streets in accordance with an ordinance of the city council to close the southerly end of the street to traffic. It was a permanent structure, free from defects in construction and from any danger in the daytime. As to the nighttime it might be a source of danger to fast-driving automobilists, unless it could be disclosed by either the light from a street lamp or the headlights of the approaching vehicle. There was evidence that the bulkhead was sufficiently lighted by a street lamp and that it was easily discernible from headlights of an approaching vehicle.

There was no direct evidence that the defendant Soderberg had any notice of any danger resulting from its construction or the manner in which it was maintained. The only evidence as to actual notice on his part was that at some time not stated the superintendent of streets took him over the streets of Oakland, showing him where the witness was engaged in work, and that included in that trip was Rio Vista avenue. The work on this bulkhead was then in course of construction, and plaintiff assumes that defendant Soderberg saw it; but there was no attempt to show that it was then in any dangerous or defective condition, that warning lights were not being used at that time, or that defendant Soderberg was ever informed that the bulkhead was insufficiently lighted in the nighttime.

The evidence relating to the care used in driving the automobile, the authority of defendant Soderberg, rather than the superintendent of streets or other municipal officer, to remedy any dangerous condition, and the availability of funds for the purpose, is of like character. From a review of the record it is apparent that the trial court did not abuse its discretion in granting the motion for a new trial.

[5] Plaintiff assigns as error the action of the trial court in granting the motions of the other defendants for nonsuits. Nothing appears in the record as to these motions subsequent to the order granting them. If judgment followed in their favor, the proper way to raise the error would be by appeal from that judgment. The motions no doubt were granted because there was not a particle of evidence tending to bring those defendants within the terms of the statute of 1911.

[6, 7] The surety company raises by separate brief the question whether it can be liable in any event, as its bond ran exclusively to the city of Oakland, and does not inure to one claiming damages against a commissioner of the city. In this connection it is argued that the bond, having been given under the charter of the city of Oakland, inures to the benefit of the city exclusively and is not controlled by the general Code provisions (section 958 et seq., Pol. Code) relating to bonds payable to the state of California. But this question is not properly before the court on this appeal; it was not raised in the trial court, and the bond is not included in the record. The city charter does not require that the official bonds shall inure exclusively to the city, and, in the absence of a record, the court cannot assume that the bond in this case contained that provision.

The judgment having been set aside by the order granting a new trial, the appeal from that judgment has now become moot. That appeal is therefore dismissed. The order granting a new trial is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

52 Cal. App. 758

PALMER v. HARLOW. (Civ. 2249.)

(District Court of Appeal, Third District, California. May 24, 1921.)

1. Master and servant ⟸39(1) — Complaint held insufficient to show wrongful discharge.

Where a master has wrongfully discharged a servant during the contract term, in an action ex delicto for damages for its breach, plaintiff must directly aver a wrongful discharge, and a statement that defendant has refused to permit plaintiff to proceed with the performance of services and has refused to pay plaintiff under the contract, while sufficient to entitle plaintiff to recover so much of his monthly compensation as may be then due, would not be sufficient to show that he had been discharged.

2. Master and servant ⟸39(1) — Complaint held to state cause of action for money due on contract.

In a servant's ex contractu action a complaint alleging that defendant refused to permit plaintiff to proceed with services under the contract and refused to pay for services, *held* to state a cause of action for money due plaintiff as salary and for rentals which plaintiff was required to pay because of defendant's failure to live up to contract terms to furnish defendant with a place to live, and not subject to a general demurrer.

3. Master and servant ⟸39(1)—General rules of pleading breach of contract obtain.

The general rules of pleading in actions for breach of contracts obtain in actions for breach of employment contracts, and the complaint, containing the essential elements of a good cause of action ex contractu showing the making of the agreement between the parties and alleging the amount of damages to plaintiff from the breach, is sufficient.

4. Master and servant ⟸39(1) — Other employment in mitigation of damages for breach of contract matter of defense.

A servant discharged or prevented by the master's breach of the agreement from performing services is in duty bound to seek other employment and his damages should be diminished to the extent of the compensation received during the term of the contract, but this is a matter of defense which may be pleaded by the defendant in mitigation of damages, and plaintiff need not plead it.

5. Master and servant ⟸39(1) — Complaint for breach of contract sufficient without averment as to location of house secured.

In a servant's action for breach of contract, where the complaint states that plaintiff was required to secure a house other than that with which defendant agreed to furnish him for living purposes during the contract, it is immaterial so far as the pleading is concerned, where the house so rented by plaintiff was situated.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by L. A. Palmer against A. L. Harlow. Demurrer to complaint sustained, and default judgment against plaintiff, and he appeals. Reversed, with directions to allow defendant to answer the complaint adjudged sufficient.

Charles L. Gilmore, of Sacramento, for appellant.

Collier & McNamara, of Yreka, for respondent.

HART, J. The plaintiff brought this action to recover the aggregate sum of $1,846 alleged to be due him from defendant according to the terms of a certain contract into which, it is alleged, he and the defendant entered on the 25th day of July, 1918.

The court below sustained a demurrer interposed by defendant to the complaint upon both general and special grounds. The plaintiff refused to amend his complaint, although allowed by the court 10 days within which to do so, if so advised, and thereupon judgment by default was entered against plaintiff.

The appeal is from said judgment.

The complaint alleges:

"That heretofore, to wit, on the 16th day of July, 1918, defendant submitted to plaintiff a proposition of contract in words and figures as follows, to wit: 'Proposition to L. A. Palmer. Finish house inspected July 15, 1918, and give house rent and water. Furnish office and instruments and tools. Salary $100 a month. Duties, to attend to all of engineering work now constructed and attend to prospective litigation, etc. Free to attend to consulting work at any time. On any new projects that may be worked up together Harlow to finance and Palmer to receive 25 per cent. of net profits for doing engineering. Agreement to run one year after beginning active work. Renewable at option of both. A. L. Harlow, 7/16/18'—that thereafter, to wit, on the 25th day of July, 1918, plaintiff accepted the above and foregoing proposition of contract and agreed to its terms by so informing defendant, in person, and plaintiff did then and there offer and ask to enter upon the services of defendant, and plaintiff was then and there, and ever since has been, and now is ready and willing to perform all of the terms and conditions of said contract on his part to be kept and performed; that defendant has failed and neglected to perform the terms and conditions or any of them of said contract upon his part to be kept and performed, and has failed, neglected, and refused to pay or cause to be paid to plaintiff the salary set forth in said contract at the rate of $100 per month, or house rent, or water rentals ever since the 13th day of September, 1918, on which said date defendant paid plaintiff the sum of $100 * * * as payment of plaintiff's salary for the month ending August 25, 1918, and defendant still fails and refuses to pay said salary or house rent or water rentals, although repeatedly requested by plaintiff so to do; that by reason of the failure, neglect, and refusal

of defendant to perform the terms and conditions of said contract upon his part to be kept and performed, and because of his refusal so to keep and perform his said terms of contract, plaintiff has been forced to rent other and different premises in which to live than those so promised by defendant, and has been forced to pay water rentals for domestic uses in said rented premises to a total cost of $446; * * * that no part of said salary due and payable by defendant from and after the 25th day of August, 1918, to and including the 25th day of October, 1919, and no part of the aforesaid house rent or rentals for water for domestic use in such rented premises from and after the 25th day of July, 1918, to and including the 25th day of October, 1919, has been paid to plaintiff; that no part of said salary, house rent, or water rentals has been paid to plaintiff during any of said months, and there still remains due and unpaid under said contract to plaintiff the sum of $1,846."

The special grounds of demurrer are:

"That said complaint is uncertain in that it does not appear therein, nor can it be ascertained therefrom, whether or not plaintiff was engaged in any employment during the period from the 25th day of July, 1918, to and including the 25th day of October, 1919; nor does it appear therein, nor can it be ascertained therefrom, whether or not plaintiff made any effort to obtain employment; that paragraph 4 of said complaint is uncertain in that it does not appear therein, nor can it be ascertained therefrom, where or in what place plaintiff was forced to rent other and different premises in which to live, as alleged in said paragraph; that said complaint is ambiguous and unintelligible for the same reasons that it is herein alleged to be uncertain."

The pleaded contract, as one for the employment of the personal services of a person, or as to the nature of such services, is not as explicit as it could have been made; nor does the complaint otherwise furnish any explanation of the exact nature of the services to be performed. It is, however, made clear enough to appear by the complaint that the defendant employed the plaintiff to perform for him certain personal services as an engineer for the period of one year, beginning from the date of the acceptance by plaintiff of said contract of employment (July 25, 1918), and, that in return for the services so performed, the defendant was to pay the plaintiff the sum of $100 per month, with house rent and rates for water to be used for domestic purposes free or as a part of the compensation so to be paid plaintiff.

[1] In cases of the character of the one here, where the master has wrongfully discharged the servant before the expiration of the period of time during which the contract by its terms, is to run, the complaint, in an action ex delicto for damages for its breach, must show by a direct averment of some character that there was a wrongful discharge of plaintiff by defendant. In such an action the statement in the complaint that the defendant has refused to permit the plaintiff to proceed with the performance of the services called for by the contract and has refused to pay plaintiff for such services, while undoubtedly sufficient to entitle the plaintiff to recover so much of his monthly compensation as may then be due under the contract, would not be sufficient to show that he had been discharged. Stone v. Bancroft, 112 Cal. 652, 44 Pac. 1069; Stone v. Bancroft, 139 Cal. 78, 83, 70 Pac. 1017, 72 Pac. 717; Winsor v. Silica Brick Co., 31 Cal. App. 85, 89, 159 Pac. 877; Percival v. National Drama Corporation, 181 Cal. 631, 638, 185 Pac. 972.

[2] In the present case, however, the action is upon the contract and was commenced after the expiration of the year during which it was to run; and, while it may be conceded that the complaint would not be accepted as a model pleading, it nevertheless, as against a general demurrer, sufficiently states a cause of action for money due the plaintiff as his salary or compensation for his services under the contract and for the rentals which plaintiff was required to pay for the use of a house and of water by reason of the failure of the defendant to live up to the terms of the contract. It alleges, it will be noted, that the plaintiff accepted the proposition by defendant, that he offered and asked to be permitted to enter upon the performance of the services required by the contract, and that he was at all times "ready and willing to perform all of the terms and conditions of said contract on his part to be kept and performed," but that defendant failed and refused "to perform the terms and conditions or any of them of said contract on his part to be kept and performed," and has refused to pay plaintiff the compensation which by the contract he agreed to pay him, except the salary falling due for the services performed for the first month of the term of the contract. A demurrer upon proper special grounds pointing out the particulars in which the statement of the facts was insufficient might have brought about an amendment of the complaint whereby the facts pleaded would have been stated in clearer language; but this is not to say that the facts, inartificially stated though they are, are not sufficient to disclose a cause of action for money due plaintiff under the contract. To the contrary, as above declared, we think they do constitute a cause of action.

[3] It is well settled that the general rules of pleading in actions for the breach of contracts obtain in actions for the breach of contracts of employment. Thus, in an action upon a contract, the complaint or declaration

contains the essential elements of a good cause of action ex contractu if it shows the making of a contract between the plaintiff and the defendant, and alleges the amount of damages resulting to the plaintiff from the breach. 9 Cyc. p. 711. And, as stated, this rule can be no less applicable in actions on contracts of employment than in actions on any other character of contracts.

As to the special grounds of demurrer set up against the sufficiency of the statement of the facts pleaded in the complaint, it will require but little reflection to convince even the hypercritical that the objections so made are, so far as the matter of pleading is concerned, devoid of substantial, or indeed any real merit.

[4] It is obviously true that the earning and receipt of compensation by a servant for services performed for other persons than the defendant after his (the servant's) discharge or after he has been prevented by defendant from performing the services constitutes an element in the measure of damages in such a case. Seymour v. Oelrichs, 156 Cal. 782, 800, 106 Pac. 88, 134 Am. St. Rep. 154. It is also true that it is the duty of a servant wrongfully discharged by his master to seek other employment, and, if obtaining it, thereby diminish the damages suffered by him from the act of the employer in wrongfully dismissing him from his service. But, as above stated, the action here is upon the contract, and it was sufficient to allege that the defendant had failed or refused to comply with the terms of the contract, and this is shown here by the averment that plaintiff was wrongfully prevented by defendant from performing the services required of him by the contract. "Generally it may be said that the declaration, petition, or complaint in an action for wrongful discharge is sufficient if it contains all that it is necessary for plaintiff to prove under a plea of the general issue." If, therefore, the plaintiff, in other employments, during the term of the contract, and after he was prevented by defendant from performing the services under the contract in question, performed services for some other person or persons than the defendant, for which he received compensation, or if he refused or negligently failed to seek other employment after his discharge, those facts or either of them constituted a matter of defense, which could be set up by the defendant as in abatement of damages or of any sum which it might be shown that the plaintiff would otherwise be entitled to. In Rosenberger v. Pacific Coast Ry. Co., 111 Cal. 313, 318, 43 Pac. 963, 964, the Supreme Court has this to say upon the proposition now in hand:

"The court properly refused the instruction asked by the defendant. While it is the duty of an employee who has been wrongfully discharged to seek other employment, and thus diminish the damages sustained by him, he is not required, as a condition of recovery, to show that he has made such endeavor and failed. The burden is on the defendant to show that he could by diligence have obtained employment elsewhere. Whatever compensation may have been received in such employment is also to be shown by the defendant in mitigation of damages; otherwise the damages will be measured by the salary or wages agreed to be paid. Sutherland on Damages, § 693; Costigan v. Mohawk, etc., R. R. Co., 2 Denio, 609, 43 Am. Dec. 758; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Utter v. Chapman, 43 Cal. 279."

See, also, Nuckolls v. College of Physicians & Surgeons, etc., 7 Cal. App. 233, 94 Pac. 81.

[5] The third and fourth special grounds of demurrer are obviously without force. The complaint states that plaintiff was required to secure a house other than the one with which defendant agreed to furnish him in which to live during the term of the contract, and it is, so far as the matter of pleading is concerned wholly immaterial where the house so rented by him was situated. Indeed, such an averment would involve, if anything, the statement of an evidentiary fact.

We conclude that the demurrer should have been overruled.

The judgment is reversed, with direction to the trial court to allow defendant to answer the complaint, should he be so advised.

We concur: FINCH P. J.; BURNETT, J.

52 Cal. App. 720

MARTIN v. PRITCHARD. (Civ. 2313; Sac. 3134.)

(District Court of Appeal, Third District, California. May 23, 1921. Hearing Denied by Supreme Court July 22, 1921.)

1. Husband and wife ⇐264—Finding of community estate sustained.

In an action involving interest of wife in land, evidence *held* to support a finding that the land in question was community property, although husband and wife designated their relation as a matrimonial partnership.

2. Husband and wife ⇐266—Contracts as to property valid.

A husband and wife may by contract change the character of their property from community to separate estate, and may by contract transmute the separate property of either into community property.

3. Husband and wife ⇐29(5)—May contract concerning property in anticipation of marriage.

Separate property may be by contract transmuted into community property by con-

tract made prior to and in anticipation of marriage.

4. Frauds, statute of ⊂⊃4, 139(2)—Contract transmuting separate into community property required to be in writing.

A contract made prior to and in anticipation of marriage transmuting separate property of the parties into community property should be in writing, but, where it has been fully executed by one party, the case is taken out of the statute, and it is not assailable by the parties thereto or by third parties on the ground that it was not in writing.

5. Vendor and purchaser ⊂⊃35—Agreement to sell implied representation of title.

An agreement to sell land was an implied representation that vendor was able to give a good title.

On Hearing in Supreme Court.

6. Exchange of property ⊂⊃8(3)—Bad faith must be pleaded in action for damages for failure to exchange lands.

In an action for damages for refusal to exchange land, bad faith, if relied upon, must be pleaded.

7. Exchange of property ⊂⊃8(3)—Bad faith held not sufficient allegation in action for damages for refusal to exchange.

In an action for damages for failure to exchange lands, an allegation that defendant refused to perform his contract "without any just reason or excuse" was not a sufficient allegation of bad faith on the part of the defendant in not notifying plaintiff that his wife had some interest in the land.

8. Costs ⊂⊃22—Judgment for nominal damages does not carry.

A judgment for nominal damages does not carry costs, under Code Civ. Proc. § 1022, subd. 3.

9. Appeal and error ⊂⊃1171(6) — Judgment not reversed so as to permit recovery of nominal damages.

A judgment for defendant in an action ex contractu for damages, where it is established that plaintiff is entitled to nothing more than nominal damages, will not be reversed on appeal.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Charles Martin against J. D. Pritchard. Judgment for defendant, and plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Hugo K. Asher, of San Francisco, and Bradley & Bradley, of Visalia, for appellant.

E. I. Feemster and Middlecoff & Feemster, all of Visalia, for respondent.

FINCH, P. J. Plaintiff sued to recover damages alleged to have been caused by the defendant's breach of contract to exchange 20 acres of land in Tulare county, together with farming implements and three horses, for plaintiff's cottage and two flats in Berkeley. Judgment was rendered in favor of the defendant, and the plaintiff appeals therefrom.

The complaint alleges the execution of the contract on August 15, 1917, performance by the plaintiff, and tender of deeds to the Berkeley properties, and that the defendant, "without any just reason or excuse," refused to make the exchange. The complaint further averred that the clear value of the Berkeley property was $4,500, and that of the Tulare property $9,500, and prayed for damages in the sum of $5,000, the difference in value. No other damages were claimed. The defendant admits the making of the contract and its breach, but denies that he refused to make the exchange "without just reason or excuse." He admits that the value of the Tulare property was $4,000 more than that of the Berkeley property. The court found the difference in value between the two properties to be $4,000; that the defendant refused to make the exchange, but that his refusal was not "without just reason or excuse"; that when he signed the contract and long prior thereto he was married to Lena L. Pritchard; that the Tulare property was the community property of the defendant and his wife; that the contract was made without the knowledge or consent of the wife, and that she did not know of the defendant's intention to enter into the contract, or that he was contemplating an "exchange of said property for any other properties"; that when informed of such contract she refused to be bound by it; that she has at all times refused to join in the conveyance of the property to the plaintiff, and that immediately after being informed of the contract she notified the plaintiff that she would not join in a conveyance of the property, and threatened legal proceedings to prevent the exchange; that the defendant was willing and ready to make the exchange, and would have done so but for the objections and threatened legal proceedings of his wife; and that the defendant was not guilty of bad faith in refusing to comply with his contract.

The evidence is not clear as to when and how the defendant acquired the Tulare property, but it appears that he purchased it under contract not later than the year 1907; that at the time of the purchase he paid thereon $12.50 an acre, and was to pay the remainder in installments of $10 a month, the total purchase price not being shown; that at some time thereafter the property was conveyed to him, and in turn deeded to his mother, on conditions not disclosed, and that, after he had fulfilled those conditions the property was conveyed to him about a month prior to his marriage to his present wife; that in the year 1907 the defendant

built a four-room house on the land at a cost of $400 or $500, and made other improvements; that in the year 1908 the defendant planted 5 acres to oranges, and 12 acres two years later.

The defendant and his wife were married in October, 1911. In the latter part of 1910, in contemplation of the marriage, the defendant, his present wife and her parents came to an agreement that the parents would advance certain moneys to the defendant and his wife for the operation and improvement of the place, with the understanding that the wife was to have an interest therein. The defendant testified that—

"It was a matrimonial partnership; that is, it was a joint proposition, that whatever we were interested in, we would be interested in together, we would take all things into account."

Mrs. Pritchard testified:

"I had recently overstudied at college very badly, and the folks preferred we should live on the orange grove on account of my health, and my husband was not sure that he could support the orange grove and a wife, and my father agreed that he would help. * * * My husband objected to taking anything from his future father-in-law and mother-in-law, and my papa said, 'Well, they would get around that question or difficulty by putting it into the place and conveniences on the place,' and wanted to know if my husband would consider we were partners. The idea is that my husband already had a son, the reason that there was such a definite business agreement, how he would regard that the property stood. My husband said that was the only property that he had, and he would be glad to make that arrangement."

Pursuant to this arrangement and within two months thereafter, the father advanced the sum of $350. Later he advanced $450 to enlarge and improve the residence on the place, and about the time of the marriage he gave Mrs. Pritchard $250, which was spent on the place. After the marriage the father expended $250 or $300 in the construction of a garage and implement shed. Other sums were advanced for the purchase of livestock, implements, orange trees, and other expenses in the operation of the place. All told, the father furnished between $3,000 and $3,500 for the care, development and improvement of the property.

1. Appellant contends that there is no evidence to support the court's finding that the property involved was the community property of the defendant and his wife, Lena L. Pritchard. The understanding between the parties as to the ownership of the property in question was not reduced to a formal agreement. It devolved upon the trial court to find, from the evidence bearing upon the question, the character of the wife's interest. In determining the question, the court probably gave consideration to the lack of familiarity of the witnesses with legal terms. Mrs. Pritchard testified that she did not know anything about the legal relationship of partners. The defendant testified that—

"It was a matrimonial partnership; that is, it was a joint proposition, that whatever we were interested in, we would be interested in together."

The evident purpose was to provide against the diversion from the wife's enjoyment of her parent's contribution to the property. This purpose was emphasized by the knowledge that the defendant had a son by a former marriage. The testimony of the defendant and his wife showed that the latter had an interest in the property. The evidence is not such as to require the court to find that her interest was joint, or in common, or a partnership interest rather than that of community property.

[1] That the wife had an interest in the property is very clear. What the character of that interest was is not so certain. The court came to the conclusion, on a balancing of probabilities, that a community interest was intended by the parties. It cannot be said that the court's finding has no support in the evidence.

[2-4] That a husband and wife may by contract change the character of their property from community to separate is well settled. Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 Pac. 190; Fay v. Fay, 165 Cal. 469, 132 Pac. 1040. Likewise they may by contract transmute the separate property of either into community property. Yoakam v. Kingery, 126 Cal. 30, 58 Pac. 324; Carlson v. Carlson, 10 Cal. App. 300, 101 Pac. 923. No sound reason suggests itself why they may not accomplish the same purposes by contract made prior to and in anticipation of marriage. The law requires such contracts to be in writing. Where the contract has been fully executed by one party the case is taken out of the statute.

"As the antenuptial contract is alleged to have been completely executed, the same is not assailable by the parties thereto, or by third parties, on the ground that it was not in writing, as prescribed by statute." Hussey v. Castle, 41 Cal. 242. "A parol agreement to give an intended daughter-in-law a lot of land as a home for the family, if, with her means, a suitable dwelling house was erected on it, which has been done, will be enforced in equity by a decree of specific performance." Neale v. Neale, 76 U. S. [9 Wall.] 1, 19 L. Ed. 590.

In Magee v. Magee, 174 Cal. 276, 162 Pac. 1023, the owner of a lot of land orally agreed to convey it to his brother, in consideration of the latter's erecting on the land and furnishing a house for the use of their parents during their lives. The vendee performed his part of the contract. It was held that such performance took the case out of the statute of frauds.

2. If it be conceded that the land here involved is not community property, but that the wife's interest therein is equitable only, still the husband could not in good conscience convey the same without her consent. It cannot be said that it was the legal duty of the husband to perpetrate a fraud upon his wife in order to carry out a contract which he has improvidently made with a stranger. Further, if the antenuptial agreement be held ineffective for any purpose, then part of the personal property included in the contract to exchange was the wife's separate property, because purchased with funds given to her by her father, and the husband could not dispose of it, and, consequently, he was without the authority to perform his part of the contract in full. It does not appear what the value of such personal property was, or whether the plaintiff would have accepted a conveyance of the other property described in the contract as performance of the terms thereof by the defendant.

[5] 3. The appellant urges that the defendant was guilty of bad faith, and that the measure of damages is the difference in value of the respective properties. Section 3306, Civil Code, provides:

"The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

Bad faith must be pleaded. Yates v. James, 89 Cal. 474, 26 Pac. 1073; Willard v. Smith, 34 Mont. 494, 87 Pac. 613. One may be guilty of bad faith in entering into a contract which he knows he cannot perform or by refusing to carry out the terms of his contract which he can perform. The only allegation of the complaint herein under which bad faith could be proven, is that the defendant refused to perform his contract "without any just reason or excuse." This cannot be taken as an allegation of bad faith on the defendant's part in entering into the contract. The defendant did not inform the plaintiff and the plaintiff did not know at the time the contract was executed that the defendant was married, or that his wife had or claimed any interest in the property, though it is not claimed that the defendant willfully deceived the plaintiff. The plaintiff argues that it was bad faith on the part of the defendant not to disclose his inability to convey the property. His agreement to sell was an implied representation that he was able to give a good title. Bad faith, however, in making the contract, not having been pleaded, cannot help the cause of the plaintiff. If the allegation of refusal to convey "without any just reason or excuse" is a sufficient averment of bad faith, the answer is that there was sufficient reason for the refusal, the bad faith, if any, being in connection with the execution of the agreement, and not in the failure to carry out the provisions thereof.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

Opinion of Supreme Court in bank, denying hearing:

PER CURIAM. [6-9] We concur in what is said by the District Court of Appeal on the question of measure of damages and bad faith. There was no sufficient allegation of bad faith, and therefore no basis for an award as damage of "the difference between the price agreed to be paid and the value of the estate agreed to be conveyed." No damage other than this was alleged. The trial court's finding of no actual damage is fully sustained. Assuming that there was a breach by the defendant of his agreement to convey, plaintiff would be entitled to nominal damages only, and a judgment therefor would not carry costs. Code Civ. Proc. § 1022, subd. 3. And a judgment for a defendant in an action ex contractu for damages, where it is established that a plaintiff is entitled to nothing more than nominal damages, will not be reversed on appeal. See McAllister v. Clement, 75 Cal. 182, 16 Pac. 775; Lick v. Owen, 47 Cal. 252.

In denying the application for a hearing herein we are not to be understood as intimating an opinion as to any other matters discussed in the opinion of the District Court of Appeal.

The application for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District is denied.

ANGELLOTTI, C. J., and SHAW, SLOANE, SHURTLEFF, and LAWLOR, JJ., concur.

52 Cal. App. 727

HIRONYMOUS v. HIATT et al. (Civ. 2277.)

(District Court of Appeal, Third District, California. May 23, 1921.)

1. Cancellation of instruments ⟸4 — Enough that instrument is void or voidable for any reason.

To authorize action under Civ. Code, § 3412, declaring that an instrument, in respect of which there is reasonable apprehension that if left outstanding it may cause injury to a person against whom it is void or voidable, may, on his application, be so adjudged, and ordered delivered up or canceled, it is not necessary that there shall have been fraud, accident, or mistake; but it is enough that the instrument was voidable for any reason, as that it was without consideration, a mere promise of the maker to make a gift.

2. Gifts ⟸49(6)—Lack of consideration sufficiently shown.

Evidence in action under Civ. Code, § 3412, to have plaintiff's note adjudged void *held* to support finding that the note was without consideration, and merely involved a gift.

3. Appeal and error ⟸994(3)—Trial court's determination on credibility conclusive.

Acceptance by the trial court of the testimony of one witness, opposed to that of another witness, notwithstanding a few circumstances appearing to be sufficient to generate a suspicion of fabrication, is conclusive on the appellate court.

4. Gifts ⟸32(1)—Donor's note mere promise to give.

Delivery of the thing sought to be given, being essential under Civ. Code, §§ 1146, 1147, delivery of the donor's promissory note does not constitute an enforceable obligation, being a mere promise to make a gift of money.

5. Cancellation of instruments ⟸34(1)—Limitation of actions ⟸60(5)—Bar of statute or laches not available against action to have note adjudged void as a gift.

The statute of limitations or laches cannot be invoked against one who seeks, under Civ. Code, § 3412, to have his note adjudged void, on the ground merely that it was a mere promise to make a gift.

6. Gifts ⟸41—Facts held not to estop one seeking to have note adjudged void as a gift.

For one to permit his note to remain outstanding for years, or the renewal thereof, or the paying of interest thereon, does not constitute a recognition of its legal integrity that will estop him to maintain an action to have it adjudged void as without consideration and a mere promise to make a gift.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by Alice Hironymous against E. L. Hiatt, guardian, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Grant & Bailey, of Woodland, for appellants.

Jamison & Wylie, of Alturas, for respondent.

HART, J. This action was brought to obtain a decree adjudging void a certain promissory note executed by the plaintiff and still outstanding, as authorized in such a case by section 3412 of the Civil Code, which reads as follows:

"A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

The ward of the defendant guardian is the daughter of a son of the deceased husband of the plaintiff by a former wife. In the month of December, 1904, the plaintiff made and executed her promissory note, in favor of certain trustees, in trust for the said minor, for the sum of $1,000, payable on or before five years after date, with interest at the rate of 6 per cent. per annum from date until paid and payable annually. Attached to said note was a writing disclosing the following conditions to which said trust was subject:

"The trustees above named shall collect the interest upon the above note as the same becomes due, and expend the same as far as it will go in the suitable maintenance and education of the aforesaid minor child. They shall receive the aforesaid principal sum when the same shall fall due, and invest said sum in a safe manner, and apply the interest received therefrom for the benefit of said minor child as above stated, until said minor arrives at legal age, at which date the whole amount remaining in their hands shall be paid to said Jessie Bernice Hironymous. In case of the death of said minor before arriving at legal age, the amount remaining in the hands of said trustees shall, at the date when she would have become of legal age, be paid to the said Hattie Hironymous, to be by her paid in equal shares to any brothers or sisters of said minor (should any survive her) upon their arriving at the age of majority.

"We accept the foregoing trust and hereby agree that we will comply as far as in our power with the conditions therein named. Dated Cedarville, Cal., December 17, 1904."

The foregoing was subscribed to by the trustees, named as defendants herein, but was not signed by the trustor.

On the 28th day of October, 1913, no part of the principal of said note then having been paid, the plaintiff took up said note and executed and delivered to the said trustees, in lieu thereof and in trust and for the benefit of said minor, a note for the principal sum of the former note, payable on or before six years after the date thereof, with interest

at 6 per cent. per annum until said note was paid, the interest payable annually. The conditions of the trust, which was accepted by said trustees, were precisely the same as those above set forth.

The complaint alleges that plaintiff signed said note as a voluntary act, never having received from said defendants or any of them any consideration of any kind or character for the "signing and executing of said note," and that "by reason thereof the same is void." It is alleged that plaintiff has paid to said defendants on said note as interest the sum approximately of $840, and that the interest so paid "is still in the possession of said defendants, and has never been delivered to said Jessie Bernice Hironymous, said minor, or to her said guardian, E. L. Hiatt."

Besides asking for a decree adjudging said note void and that the trustees be required to produce the instrument in court for cancellation, the prayer is also for a judgment for the return by the said trustees of the full amount of interest paid on said note by plaintiff.

A demurrer, upon both general and special grounds, was interposed to the complaint by the defendant Hiatt and overruled. Thereupon the defendant Hiatt, as guardian, and the defendant Penland, as trustee, filed separate answers, denying the vital averments of the complaint, and also alleging that the note in suit was made and delivered to the trustees for a valuable consideration, and further setting up in bar of the action the statute of limitations (Code Civ. Proc. §§ 337, 338, 339, and 344), and laches and estoppel. The last-named defense is stated as follows in each of said answers:

"That by reason of the long delay and the recognizance of said note as a valid obligation, and by reason of renewing the original note of December 17, 1904, and paying the sum of $840 interest on said note and the renewal note in question in this case, plaintiff is now estopped from asserting that said note is invalid."

The court found that the note in suit was by plaintiff executed and delivered to the said trustees, as alleged in the complaint; that the plaintiff had paid to said trustees interest on said note in the sum of $840; that plaintiff received no consideration of any kind or character for said note and its execution and delivery was a voluntary act on her part. No findings were made on the special pleas in bar set up by the answering defendants.

It was concluded from the findings, as a matter of law, that "the said note and the whole thereof is void and of no effect" because of having been given without a consideration, "and that plaintiff is entitled to have said note surrendered up and canceled." The judgment accords with the findings and conclusions of law, and requires the said trustees to deliver said note to the clerk for cancellation, etc. The sum paid to the trustees by plaintiff as interest on said note is awarded to the guardian of the minor for her benefit.

The case is brought here by the defendants on an appeal from the judgment, under the alternative method.

[1] The first assignment of error presented and discussed by appellants involves the claim that the complaint states no cause of action for the reason that, although the action may be based upon section 3412 of the Civil Code, the ultimate relief sought is the cancellation of a written instrument on the ground of want of consideration, in which case, so the argument goes, there must be shown, by both pleading and proof, either fraud or accident or mistake.

It is undoubtedly true that the remedy afforded by section 3412 is of an equitable nature, but we are not altogether in accord with the position of appellants as to the nature of the facts which must exist and be shown to justify resort to and the employment of the remedy so afforded. The section clearly contemplates that any written instrument which for any reason is void or voidable and outstanding, and which by reason thereof may result in serious injury or prejudice to the party as to whom it is void or voidable, may be, upon proper application, adjudged to be void, and ordered to be delivered up and canceled, and all that is required either in pleading or proof is to show the facts constituting the invalidity of the instrument, whether they involve fraud, duress, accident, mistake, or, as in this case, a promise to make a gift and consequently without consideration. If, in other words, the instrument has been procured by fraud or accident, etc., then the fraud or accident or mistake should be pleaded; if the instrument is for any other reason void or voidable, then the facts showing it to be such, whatever be their nature, should be shown, and in such case, if the facts be well pleaded, a case is stated.

The special grounds of demurrer, viz., that the complaint is uncertain in that it cannot be told therefrom how the sum of $840 could have accrued as interest on said note, and that the plaintiff is without capacity to sue, are obviously devoid of merit, and their further consideration herein is not required.

[2, 3] It is next contended that the findings are not sufficiently supported and that the failure of the court to find on the special defenses is fatal to the judgment. The plaintiff, on both her direct and cross examination, repeatedly declared that neither for the original note nor for the note in suit, given as a renewal of the former, did she receive any consideration whatever from the trustees or from any other person. She declared that the note was a gift to the minor. She testified that she was led to make the gift to the minor because—

"I loved the little child and because she was my husband's granddaughter, and I felt sorry for her; the father and mother were not doing anything to take care of this property, and I thought some time in the future she might need some help, and this amount of money when she became of age might help to educate her. It was a voluntary gift on my part."

It appears that the husband of the deceased devised to his son, Frank Hironymous, father of the minor made the beneficiary of the note in suit, a small parcel of land in Modoc county. It further appears that Frank defaulted in the payment of the taxes assessed against said land for several years, and that the property was finally sold to the state and in due legal time purchased from the state by the plaintiff; that thereafter the plaintiff brought an action in the superior court of Modoc county against said Frank Hironymous to quiet her title to said land; that, while said action was pending and before it was brought to trial, said Frank signed and filed in the action a stipulation in writing to the effect that the plaintiff was entitled to judgment in said action quieting her title to said land as against him and all others who might claim any part thereof or interest therein under or through him, and that he would not defend against said suit but would allow plaintiff herein as plaintiff therein to take judgment according to the prayer of her complaint in said action; that upon the filing of said writing or stipulation in said action the plaintiff was awarded judgment therein in harmony with the prayer of her complaint therein. There was no consideration stated in the stipulation for its execution. Said stipulation, together with the judgment roll in said action, was received in evidence in the present action, and counsel for the defendants, on cross-examination, sought to induce plaintiff to say or admit that, in consideration of the execution by Frank Hironymous of the said stipulation, she promised to pay or give her note for the sum of $1,000 to the trustees for the use and benefit of Frank's infant daughter, Jessie Bernice. But the plaintiff, replying to counsel's questions, repeatedly asseverated that the making of the said stipulation by Frank Hironymous had no connection whatever with the making of the note; that when the stipulation was first suggested and finally agreed to and made by said Hironymous nothing whatever was said to her by any person, nor did she say anything about making the note or a promise to give or pay the minor or any other person for her any money or the note in suit.

Smalls and Stanley, two of the trustees, testifying for plaintiff, each stated that he was present in the law office of the attorney conducting the transaction for plaintiff when the stipulation was signed and that he heard nothing said about any consideration therefor.

The deposition of Frank Hironymous, a resident of Sacramento county at the time the deposition was taken on the 14th day of June, 1919 (the trial of the action was begun on the 28th of July, 1919), was received as evidence, and therein the deponent declared that the stipulation referred to was made and executed by him in consideration of a promise by the plaintiff to pay his daughter, the minor herein mentioned, the sum of $1,000, or to give her promissory note therefor. He further testified that the land in dispute between him and plaintiff, and as to the title to which the stipulation mentioned was made by him, was, at the time it was purchased by plaintiff, of the value of about $1,500, but that it had since enhanced considerably in value.

The foregoing embraces a synoptical statement of the evidence received at the trial, and therefrom it is perfectly plain that the finding that the note was made and given without a consideration and therefore involved a gift derives sufficient evidential support to render it impregnable against successful attack. There are, it may be conceded, a few circumstances which, upon their face, appear to be sufficient to generate a suspicion that the claim that no consideration was given for the note is a fabrication. Still it cannot justly be said that those circumstances render the plaintiff's testimony as to the principal issue inherently improbable. It was for the trial court and not this court to consider the circumstances we have in mind and determine whether they were of such force or consequence as to destroy the verity of her story in the main. The acceptance of her testimony by the trial court is therefore conclusive upon us. Moreover, the acceptance of plaintiff's testimony as verity necessarily carries with it a repudiation of Frank Hironymous' testimony between which and the former's a direct and pronounced conflict arose and exists, and that it was within the discretion or the right of the trial court to reject his testimony and accept that of the plaintiff as involving the truth as to the question of consideration is an incontrovertible proposition. Of course from this it is not to be understood that a trial court to whose determination the questions of fact are submitted may arbitrarily reject any witness' testimony, for it may do so only when legally justified after due consideration and comparison of all the evidence, and whether such justification exists is also a matter entirely with that court or the jury if the issues of fact be tried by the latter.

[4] A gift is a transfer of personal property, made voluntarily and without consideration (Civ. Code, § 1146), and a verbal gift, to be valid, must be executed, unless the means of obtaining possession and control of the subject of the gift are given, or, if it is capable of delivery, there be an actual or

symbolical delivery to the donee of the thing sought to be given (Civ. Code, § 1147).

Upon the principles thus enunciated by our Legislature, it is thoroughly settled in this state that a gift by a party of his own promissory note, either inter vivos or causa mortis, does not create an enforceable obligation in favor of the donee against the donor or his estate.

In Tracy v. Alvord, 118 Cal. 654, 50 Pac. 757, the defendants' testator, about a year previously to his death, "made and signed a paper writing having the form of a promissory note for $10,000, payable 60 days from its date to the order of Felix Tracy, the plaintiff." The latter brought an action founded on said note as a demand against the estate of the deceased, claiming that the writing was delivered by the testator to a third person for plaintiff's use, and that a valid gift thereof, either inter vivos or in view of death, was made by the testator to the plaintiff. There was there, as here, no consideration for the note; the plaintiff having first learned of its existence by information from the executors some months after the testator's death. Rejecting the argument advanced by appellant, the court in that case said:

"The court below found that there was no delivery of the note as alleged by plaintiff, and held therefore that the instrument never had effect; whether the evidence justified such finding is made a question in the case, but it is not necessary to be decided. For if it were conceded that delivery was proved, yet, as between the donee and the donor or his estate, the gift of the donor's own promissory note created no enforceable obligation; being a mere promise without consideration to give a sum of money in the future, it was of no legal consequence. The gift of such a note causa mortis is within the rule; besides tending to subvert the statute of wills, it is still but a promise to make a gift, and invalid because the thing promised is not delivered. Authorities are numerous; the following are among the more recent: Bartlett's Petition, 163 Mass. 509; Sanborn v. Sanborn, 65 N. H. 172; Matter of James, 146 N. Y. 78, 58 Am. St. Rep. 774; Shaw v. Camp, 160 Ill. 425; Johnson v. Otterbein University, 41 Ohio St. 527; 1 Daniel on Negotiable Instruments, § 25."

The case of Wisler v. Tomb, 169 Cal. 383, 146 Pac. 876, is, in the facts, quite similar to the case at bar, a promissory note having been made and delivered by the defendant's testator to the plaintiff in trust for the use of a minor, without any consideration, and payable on or before one year after date, with interest at the rate of 6 per cent. per annum. Accompanying the note was a declaration of trust by the maker, explaining the purpose of the note and naming the plaintiff trustee. No part of the principal of said note was ever paid, but interest accruing thereon in the sum of $150 was paid. The maker died before the maturity of the note, and the plaintiff as trustee presented and filed a claim based upon the note against the estate of deceased. The claim was rejected, and action followed. A demurrer to the complaint was sustained, plaintiff refused to amend, and an appeal was prosecuted from the judgment entered upon the order sustaining the demurrer. The judgment was affirmed and the case of Tracy v. Alvord, 118 Cal. 655, 50 Pac. 757, supra, was cited in support of the conclusion arrived at by the court.

Further authorities to the same effect need not be noticed herein. The purported note constituted a mere unexecuted voluntary promise, unsupported by a consideration of any kind or nature, to make a gift of money, and is a nudum pactum, imposing upon the maker no legal or enforceable obligation whatever.

[5, 6] The special defenses, involving the interposition of the statute of limitations, laches, and estoppel, are not well taken in this case. If the invalidity of an instrument in writing outstanding against a person is due to fraud or accident or mistake, we entertain no doubt but that an action under section 3412 might come within the bar of the statute, if it were not brought within the statutory period of limitation after the discovery by the person subject to be prejudicially affected by the instrument of the fraud or the accident or the mistake; and in such case the circumstances might be such as to justify the plea of laches. The present case, however, presents a much different situation. The instrument involved herein was subject to be voided at any time the maker thereof conceived it to be the more consistent with his own interests to recall it. A party might in perfect good faith give to another his note without a consideration and later discover the improvidence of such gift, or the motive or reason immediately prompting the gift might have ceased to exist, or his financial condition, through untoward circumstances arising after the gift, might have become so changed as to make the burden thereof, should he undertake to sustain it, extremely vexatious and embarrassing to him or his business interests. He is under no legal obligation to pay the note, and it is solely up to him to say at any time whether he will or will not satisfy it. It would therefore be absurd to say that either the statute of limitations or laches could be invoked against the maker of such a writing in an action to void it. Indeed, it is difficult to conceive when the statute of limitations would begin to run in such a case as this, or what equitable circumstances could arise therein in favor of the purported donee which would justify the imputation of laches against the purported donor. And what we here say respecting the statute of limitations and laches as defenses to this action is equally pertinent to the claim of estoppel against plaintiff. The mere

conduct of plaintiff in permitting her bare and voluntary promise to give a certain sum of money to the minor at some future time to remain unrevoked for many years does not imply or carry with it a recognition of the legal integrity of the note. Nor does the fact that she renewed the note or the fact that she paid interest thereon have that effect. As evidence upon the question of whether there was a consideration for the note, those circumstances could properly be considered, but the moment the court found that there was no consideration given for the note, that moment their significance for any purpose was entirely destroyed.

It follows from the views thus expressed respecting the special defenses interposed against plaintiff's action that there was no necessity for specific findings upon those special pleas.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

53 Cal. App. 39

PEOPLE v. QUIJADA. (Cr. 549.)

(District Court of Appeal, Third District, California. May 31, 1921.)

Escape ⊂=5½—Prisoner unlawfully going beyond walls guilty of "escape," and not mere attempt to escape.

Defendant, who, with other prisoners in a state prison, unlawfully seized an engine in the prison yard and drove it through a locked gate to a point outside the prison walls, was guilty of an escape within Pen. Code, § 105, relative to escapes from state prison, and not merely of an attempt to escape, though he was captured while within the territory connected with the prison grounds; an "escape" being the unlawful departure of a prisoner from the limits of his custody.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Escape.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Eugene Quijada was convicted of escaping from state's prison, and from the judgment and an order denying a new trial, he appeals. Affirmed.

Merlin W. Stewart, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of escaping from the state prison at Folsom while confined as a prisoner therein under a conviction of robbery. The prosecution was instituted under section 105 of the Penal Code, providing:

"Every person confined in a state prison, for a term less than for life, who escapes therefrom, is punishable by imprisonment in a state prison for a term of not less than one year; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison."

The only point made by appellant is that the evidence is insufficient to show more than "an attempt to escape." In this, however, we think appellant is in error.

There is evidence to show that, while defendant was working in the stoneyard of the prison, a locomotive was driven near the place, and defendant, in conjunction with two other prisoners, boarded the engine and attacked the engineer and fireman and drove them from the engine. Said prisoners then ran the engine through the prison yard and through a large gate, across the track and beyond the wall of the prison. This gate was locked with a large padlock, but they forced the engine through it and proceeded along the track until they came to a tank which is used to store oil for the engine. They stopped the engine there, got off, and set fire to the tank. They started then toward what is known as the old quarry, but were recaptured before proceeding very far, as an alarm had been given. J. W. Drullinger, one of the prison guards, testified:

"These three prisoners had set the tank on fire. They looked up and saw me, and started to run for the bank.

"Q. And this defendant was one of them? A. He was the one behind Clifford; yes, sir.

"Q. And he was through the gate and up at the oil tank when you first saw him? A. At the oil tank; yes.

"Q. And had completely made his escape from the prison proper? A. Outside of the prison wall altogether; yes, sir."

He was further asked if the defendant was out of his sight when the defendant went into the willows, and he answered:

"When he went in the willows he was out of my sight; he went in this bunch of willows; I didn't see him in there. I was taking care of the other men who were under my control until Mr. Eldridge came up there."

Albert Eldridge, another guard, testified as to the defendant:

"I first saw him right in here (showing on the diagram) in some willows, going over here back to an oil car that was in front of this engine.

"Q. Now that is all across the dead line, and out of the prison proper? A. Out through those gates.

"Q. Outside of the prison; away from it? A. Yes, sir; he had completed his escape from the prison proper? A. Yes, sir."

The term "escape" is not defined in the Code, but a definition as clear and concise as any found in the authorities is, "the unlawful departure of a prisoner from the limits of his custody." Among the cases cited

under "escape" in Words and Phrases are Wheeler v. State, 39 Kan. 163, 17 Pac. 856, and Riley v. State, 16 Conn. 47. In the former it is said: "The common legal definition of the term, however, means a violation or private evasion out of some lawful custody," and in the latter it is declared:

"An 'escape' within the meaning of the law which makes it an offense to escape from the custody of the law is any departure from prison, or from the custody of an officer, which is not authorized by law."

There is no doubt that the testimony for the people herein brings this case within the doctrine of these decisions. When the defendant went beyond the prison walls without permission of the authorities he unlawfully departed from the limits of his custody, and it is immaterial that he did not get entirely beyond the territory connected with the prison grounds. It was his duty to remain within the walls as he very well knew, and when he transcended these limits he necessarily "violated his lawful custody."

We can see no merit in the appeal, and the judgment and order are affirmed.

We concur: FINCH, P. J.; HART, J.

52 Cal. App. 622

ARRELANO v. JORGENSEN et al.
(Civ. 3840.)

(District Court of Appeal, First District, Division 2, California. May 13, 1921.)

1. Negligence ⟸56(3)—Violation of law must contribute directly to injury.

An act or omission constituting a violation of law, to render one liable for damages in a negligence case, must contribute directly to the injury, no matter how improper or illegal the act or omission may have been in the abstract.

2. Parent and child ⟸13(1)—Parent not liable for failure to join in child's application for motor license.

Parents were not liable, under Motor Vehicle Act, § 18, by reason of their failure to join with minor child in making an application for a license and in permitting the child to operate his automobile without an operator's license, where there was no evidence to causally connect the fact of the absence of the license with the injury sustained.

3. Municipal corporations ⟸706(5)—In suit for injuries caused by automobile colliding with wagon finding that defendant was negligent and plaintiff exercised due care sustained.

In an action for injuries caused by automobile in a collision with a wagon, evidence *held* to sustain a finding that defendant was negligent and plaintiff exercised due care.

4. Appeal and error ⟸1010(1) — Appellate court bound by findings supported by evidence.

The appellate court is bound by findings of the trial court, where there is evidence in the record to support them.

5. Negligence ⟸142—Finding against contributory negligence sufficient.

A finding in negligence case that plaintiff was giving due care and circumspection was a sufficient finding that plaintiff was not guilty of contributory negligence.

6. Appeal and error ⟸1071(6)—Judgment not reversed for lack of finding necessarily adverse.

A judgment will not be reversed for failure to find upon an issue, if the finding omitted would have been adverse to the appellant.

Appeal from Superior Court, Fresno County; W. B. Wallace, Judge.

Action by Faustino Arrelano against William Jorgensen, a minor and others. Judgment for plaintiff, and defendants appeal. Affirmed as to defendant William Jorgensen and reversed as to other defendants.

W. D. Crichton, of Fresno, for appellants.
F. L. Simons, of Fresno, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them for $537 for personal injuries to the plaintiff and damages to his property caused by a collision between a horse and wagon owned and driven by the plaintiff and an automobile owned and driven by the defendant William Jorgensen. Defendants Carl and Maria Jorgensen are the father and mother, respectively, of William Jorgensen. William Jorgensen was about 18 years old at the time of the accident and had been working for several years and supporting himself, although living at the home of his parents. He owned and drove the automobile which collided with plaintiff. The accident occurred the latter part of January, 1920. William Jorgensen had had an operator's license issued to him for the year 1919, but had neglected to make application therefor in 1920. He was therefore without an operator's license at the time of the happening of the accident.

The theory of the judgment against the parents is that they are liable for permitting the boy to operate the automobile without an operator's license; he being a minor and under their direction and control. The parents denied that the boy was subject to their control, or that they had ability to prevent him from operating the machine without a license, and alleged that the son was operating the machine on his own responsibility, as his own property, in and about his employment, and otherwise, with-

out their knowledge or consent. Upon this question the court found that—

"The parents of said minor had the custody and control of said minor; that they knew that he was operating said automobile without an operator's license, and that they failed to join with him in making an application for said license to the motor vehicle department of the state of California; that he was residing with them, and that they failed and neglected, notwithstanding their ability to do so, to prevent him from operating said automobile without having obtained the license therefor, and that they negligently consented to and negligently permitted the said minor to operate said automobile without having obtained said license."

[1] The Motor Vehicle Act (Act 2331b, St. 1917, p. 408), § 18 provides that it shall be unlawful for any person to cause or knowingly permit his or her child to operate or drive a motor vehicle upon the public highway without having first obtained an operator's license. It is upon this theory that the parents were negligent because of the violation of this provision of the ordinance that the plaintiff relies. But it is well settled that the act or omission constituting the violation of law must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages can be founded upon it. Williams v. Southern Pac. Co., 173 Cal. at page 540, 160 Pac. 660; Driscoll v. Cable Railway Co., 97 Cal. 565, 32 Pac. 591, 33 Am. St. Rep. 203; McKune v. Santa Clara M. & L. Co., 110 Cal. 486, 42 Pac. 980; Fenn v. Clark, 11 Cal. App. 81, 103 Pac. 944; Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663; Berges v. Guthrie, 197 Pac. 356.

[2] There is no evidence in the record to causally connect the fact of the absence of the license with the injuries sustained by plaintiff. By no stretch of the imagination could it be said that the plaintiff would have been saved these injuries had the operator of the automobile renewed his operator's license for the year 1920. Therefore, even if it be conceded that the parents had the full control of the son and consented to his operation of the machine without an operator's license, this violation of law on their part had nothing whatever to do with the injuries for which the plaintiff seeks to recover. As was said in Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109:

"One who violates an ordinance wherein a penalty is fixed for noncompliance with its provisions, may be subjected to the penalties therein prescribed, but he cannot, in addition thereto, be deprived of his civil right to recover damages, perhaps in many thousands of dollars, sustained by reason of the negligence or wrong of another, when such violation bore no relation to the injury and did not contribute in the remotest degree thereto."

This conclusion is, of course, decisive of the appeal of the defendants Carl and Maria Jorgensen, as there is no pretense that they are liable to the plaintiff upon any other theory than the one just discussed.

[3, 4] As to the defendant William Jorgensen, we find no merit in the appeal. It is urged in this behalf that the evidence shows the plaintiff to be guilty of contributory negligence. The court found that the plaintiff was in the exercise of "due care and circumspection," and that the defendant William Jorgensen was operating his automobile carelessly and negligently. These findings are, in our opinion, sustained by the evidence, for the two men on the wagon testified that when they reached the intersection of the two streets the automobile of the defendant William Jorgensen was a block away, and that the plaintiff hurried to cross. Under such circumstances, clearly, the plaintiff had the right of way, being at the intersection at a time when the defendant was a block away. The approximate speed of the defendant's car is deducible from the testimony because the automobile crashed into the plaintiff's wagon before it had crossed the street, striking it at about the front wheel, according to the testimony of the men in the wagon. Any conflict upon this point raised by the testimony of the defendant William Jorgensen does not concern us here, as we are bound by the findings where there is evidence in the record to support them.

[5, 6] Appellant objects that there is no finding upon the question of contributory negligence. The finding that the plaintiff was using due care and circumspection is, we think, sufficient. From that it would follow that he was not guilty of contributory negligence. A judgment will not be reversed for failure to find upon an issue, if the finding omitted would have been adverse to the appellant. Cross v. Thiele, 197 Pac. 974.

The judgment is reversed as to defendants Carl Jorgensen and Maria Jorgensen, and affirmed as to the defendant William Jorgensen.

We concur: STURTEVANT, J.; NOURSE, J.

MILLER v. POWELL. (Civ. 3546.)

(District Court of Appeal, Second District, Division 2, California. June 6, 1921.)

Appeal and error ⊜345(1)—Appeal must be taken in 60 days from entry of judgment, in absence of new trial proceeding in 10 days.

For appeal under Code Civ. Proc. §§ 939, 941b, to be effective, in absence of proceeding for new trial by notice in 10 days, it must be taken in 60 days from entry of judgment.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Edwin S. Miller against F. L. Powell. Judgment for defendant, and plaintiff appeals. Dismissed.

C. E. Burch, of San Diego, E. J. Henning, of Washington, D. C., and W. H. Wylie, of San Diego, for appellant.

Heskett & Sample, of San Diego, for respondent.

CRAIG, J. From the transcript on file in this case it appears that final judgment was entered on or prior to December 31, 1919. The notice of appeal was filed April 24, 1920. The appeal is taken under sections 939 and 941b of the Code of Civil Procedure. Respondent urges a preliminary objection on the ground that the notice was filed too late. In order that an appeal under sections 939 and 941b of the Code of Civil Procedure may be effective, it must be taken within 60 days from the entry of such a judgment. Whiting-Mead Co. v. Bayside Land Co., 178 Cal. 93, 172 Pac. 598.

The appeal is dismissed.

We concur: FINLAYSON, P. J.; WORKS, J.

53 Cal. App. 30

DEAN v. CLARKE et al. (Civ. 3458.)

(District Court of Appeal, Second District, Division 2, California. May 27, 1921.)

1. Schools and school districts ⊜146—Rule of State Board of Education in conflict with statute ineffective.

A rule adopted by the State Board of Education concerning the right of teachers to a retirement salary is of no effect if it conflicts with an act of the Legislature.

2. Schools and school districts ⊜146—Benefits of retirement law not limited to those teaching at date of act.

The benefits of the public school retirement salary law are not limited to those who were members of the teaching force of the state when the act went into effect, in view of section 18, declaring the act binding upon all teachers elected or appointed after approval of the act and who, not being in the service of the public schools at the time of its approval, were not competent to sign or deliver the statutory notification.

3. Schools and school districts ⊜146—Continuous service as teacher for 10 years preceding retirement not required; "immediately."

Under the public school teachers' retirement salary law (section 13), providing that teachers serving as such for 30 school years, at least 15 of which shall have been in the public schools of California, including the last 10 years of service immediately preceding retirement, shall be entitled to retire, it is not necessary that such 10 years should have been continuous, and it is sufficient that the last 10 years taught were spent in California, and that there was no interval between the last 10 years and the retirement; "immediately" importing without any interval.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Immediately.]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Petition by William F. Dean for a writ of mandate directed to E. P. Clarke and others, as members of the State Board of Education and the Public School Teachers' Salary Fund Board. From a judgment awarding a peremptory writ, defendants appeal. Affirmed.

U. S. Webb, Atty. Gen., and Frank English, Deputy Atty. Gen., for appellants.

Middlecoff, Scott & Ham, of Visalia, for respondent.

CRAIG, J. This is an appeal from a judgment awarding plaintiff a peremptory writ of mandate on a petition therefor filed by him in the superior court of the state of California in and for the county of Tulare against appellants as members of the State Board of Education and the Public School Teachers' Retirement Fund Board. The court was asked to direct the Board to grant the application of the petitioner to be retired upon a retirement salary of $500 per annum, under the provision of section 13 of the Retirement Salary Act (Stats. 1913, p. 1423), approved June 16, 1913. The appellants demurred to the petition, and the demurrer was overruled. Appellants refused to answer, and judgment was rendered in favor of the petitioner, and a writ of mandate issued as prayed for with certain differences which it will be unnecessary to mention. For the purpose of this proceeding the facts alleged in the petition will be accepted as true. Those material to the issue involved are as follows: The petitioner, since the 1st day of July, 1878, has been and still is the holder of certificates and diplomas entitling him to teach in the primary grades of the public schools of this state. For 30 years prior to and including the 30th day of June, 1909, as well as during the school year of 1919, peti-

tioner served as a legally qualified teacher in the public schools of this state. When the Teachers' Retirement Salary Act became effective in 1913, he was the holder of a life diploma to teach in this state. He signed and delivered to the superintendent of public schools of the county of Tulare a notification that he agreed to be bound by and avail himself of the benefits of the said act as provided by section 17 thereof. In 1920, after his last year's service as a teacher, he filed with the State Board of Education his application to be retired on the annual salary of $500. The Board denied his application. During the year of 1920 the sum of $1 for each month was deducted from petitioner's salary by the school officials of Fresno county as required by section 5 of the Retirement Salary Act. Petitioner filed with his application for a retirement salary an offer to pay into the appropriate fund the difference between $6 so paid in the county of Fresno and the sum of $360.

[1] The State Board of Education of California had, prior to the filing of the petition, adopted the following rule:

"The service of a teacher who was out of the profession at the time the Public School Teachers' Retirement Salary Law was passed, and who returned to teaching on or after April 8, 1918 (at which time this ruling was made), will not be considered unless such services has been full-time teaching and has been rendered under valid contract for four full school years in the district or districts where employed and at a salary not less than the usual salary of other regularly employed full-time teachers of the county or city and county."

However, this rule is of no effect if it conflicts with an act of the Legislature.

[2] It is first contended by appellants that petitioner is not entitled to relief because he was not a member of the teaching force of this state at the time the act went into effect. Section 18 of this act provides:

"This act shall be binding upon all teachers elected or appointed to teach in the public schools of this state after the approval of this act, who, not being in the service of the public schools at the time of the approval of said act, were not competent to sign or deliver the notification specified in section 17."

In view of this provision, it cannot be said that only those who are members of the teaching force in California when the act in question went into effect are entitled to claim benefits thereunder.

[3] A more difficult question is presented by appellants' second contention, which is that only those teachers are within the scope of the act who have taught for 10 years continuously and immediately prior to the filing of the application for retirement. Section 13 is the one dealing directly with the problem to be decided. It reads:

"Every public school teacher who shall have complied with all the requirements of this act, and who shall have served as a legally qualified teacher in public day or evening schools, or partly as such teacher and partly as superintendent or supervising executive or educational administrator, for at least thirty school years, at least fifteen of which shall have been in the public schools of this state, including the last ten years of service immediately preceding retirement, under a legal certificate shall be entitled to retire."

The phrase whose meaning is determinative of the question under consideration is "including the last ten years of service immediately preceding retirement." It is claimed by appellants that this provision is intended to be construed with the phrase "for at least thirty school years." Respondent insists that the phrase first quoted relates to the one immediately preceding it, which is as follows, "the last fifteen of which shall have been in the public schools of this state." Unless we read into the section language conveying the idea that the "ten years of service" must be successive years, the phrase cannot mean what the appellant contends. Taken literally, as he would have us read it, we have this provision: "The applicant must have served as a legally qualified teacher" "for at least thirty school years," "including the last ten years of service immediately preceding retirement, etc.", "at least fifteen years of which shall have been in the public schools of this state." It is plain that, to even thus rearrange these phrases, the provision still, according to its exact wording, contains no requirement that the 10 years of service must have been continuous. No reason or authority appears for rearranging the language of the law; on the contrary, as we shall point out, such a change would be opposed to the very purpose for which appellants contend, and we think, rightly, that this particular provision was enacted. The reference to "ten years of service" merely designates the number of "years of service." There is nothing in the language of section 13 to indicate that the Legislature meant that these 10 years of service must follow each other without any interrupting period of school years in which the petitioner did not teach.

It is claimed that the word "immediately" indicates that the 10 years of service must have been continuous. "Immediately" imports "without any interval." Cent. Dict.; Howell v. Gaddis, 31 N. J. Law, 313. Hence we must conclude that the Legislature intended that there must be no interval between the teacher's retirement and the last of his 10 years of service; that is to say, there must have been no interval of teaching elsewhere than in the state of California between the 10 years of service and the retirement.

The only other reason suggested by appellants to justify a judicial construction which would insert the word "continuous" into the phrase in question is that the clear purpose of the provision is to prevent a teacher who may have taught as much as 15 years in California, then having gone to another state and having taught 15 years there, returning to California for the mere purpose of securing the advantages of the act. But this purpose would be accomplished no less fully by reading the section literally as by the insertion of the word "continuous." If we hold that the "ten years of service" is to be a part of the period of 15 years which is required to have been spent in the public schools of this state, and that this refers to the "last ten years of service" of that period, the law would effectively carry out the avowed purpose, because it would then provide that these last 10 years of service of the 15 years of teaching in this state must immediately precede retirement. Without the word "continuous" or some other word indicating successiveness, appellants' contention cannot be upheld.

But it must be remembered that, in addition to the reason above assigned for the insertion of the phrase in question, another and the principal object of exacting 15 years of service in this state was to insure that the public would receive a just return for the benefit given the teacher. In regulating this matter, one year of service was adopted as the standard. It was then required that 15 such years of service must have been rendered to the public of the state of California through teaching in its public schools, and that 10 of such years of service must have been the last 10 years of teaching next before retirement.

Teachers often wish to take further work as students in some educational institution. For this purpose they may, for a period of one or more school years, not be actively engaged as teachers in our public schools. To adopt the construction of the law suggested by appellants would penalize any such attempt at self-improvement upon the part of a teacher otherwise entitled to claim the benefits of the Retirement Salary Act, and who would be classified under section 18 thereof. Again it might easily happen that one who had devoted almost all of his life to teaching, who had engaged in that work for 29 years, of which the last 9 had been spent in the schools of California, and which had been successive years, might then, for a period of one year, have been unable to find employment as a teacher in the public schools of this state. If we adopt the construction of the law urged by appellants, such a teacher would be deprived of the benefit of this act. It will be conceded that the plain reason for enacting a law of this character is to secure better public service by encouraging the employees of the public through hope and assurance of a subsistence when age has rendered them unable to earn a living for themselves, to make teaching a life work and give it their undivided attention. This object must necessarily be almost entirely defeated if the teacher were to realize that through inability to secure employment in his latter years of teaching he might lose all claim to this reward.

As we construe the law, all that is required of petitioner is that he shall have taught for 30 years as a public school teacher, that for 15 of these years he must have been employed in the public schools of the state of California, and that of these 15 years of service 10 must be the last 10 years which he taught immediately prior to retirement. If the last 10 years which he taught were all spent in California, it is not to his prejudice that intervals of one or more school years may have elapsed between some of these 10 years.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

53 Cal. App. 14

ECCLESTON v. ROSEBERG. (Civ. 3599.)

(District Court of Appeal, Second District, Division 1, California. May 26, 1921. Rehearing Denied June 22, 1921. Hearing Denied by Supreme Court July 25, 1921.)

1. Judgment ⊂⊃497(1)—On collateral attack judgment must be held valid unless the judgment roll shows it to be void.

On collateral attack a judgment must be held to be valid unless the judgment roll shows it to be void—that is, void on its face.

2. Judgment ⊂⊃499—Extrinsic evidence is not admissible to contradict the judgment roll.

The judgment roll cannot on collateral attack be overcome by evidence outside the record showing that the court rendering the judgment was without jurisdiction.

3. Judgment ⊂⊃497(1)—Judgment roll held to show that trial court had jurisdiction.

Although the judgment roll was incomplete, the summons and return being missing, yet, where the allegation of the amended complaint that a guardian ad litem had been appointed for the defendant was affirmed by the implied findings of the trial court reciting due appointment, etc., the judgment roll must be deemed to show the trial court's jurisdiction; for a guardian ad litem cannot be duly appointed unless service of summons had been made on defendant pursuant to Code Civ. Proc. § 373, subd. 2.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Doris H. Eccleston, by H. W. Eccleston, her guardian ad litem, against Es-

telle Roseberg, to renew a judgment. From a judgment for plaintiff, defendant appeals. Affirmed.

Black, Hammack & Black, of Los Angeles, for appellant.

George H. Shreve and Cooper, Collings & Shreve, all of Los Angeles, for respondent.

CONREY, P. J. The complaint alleged that on the 25th day of April, 1913, a judgment was duly given and made in favor of the plaintiff and against the defendant for a stated amount. This is an action to renew that judgment. By her answer in this action the defendant denied that said former judgment was duly given or made, and alleged that the court in said former action was without jurisdiction to make or enter any judgment against the defendant. Judgment having been entered in favor of plaintiff in this action, the defendant appeals therefrom.

At the trial in this action the plaintiff introduced in evidence the judgment roll in the former action. The summons and return were missing. The original complaint in that action was filed on the 1st day of July, 1911, and alleged that the defendant was then of the age of about 13 years. An amended complaint was filed on the 5th day of October, 1912. Supplemental matter was contained therein, whereby, after stating that on the 9th day of June, 1911, the defendant was of the age of 14 years, it was alleged that S. R. Roseberg, her father, "was on the 18th day of October, 1911, duly appointed by an order of said superior court guardian ad litem for said defendant, Stella Roseberg, a minor, for the purposes of this action, and that he ever since has been and now is such guardian." On October 18, 1911, an answer to the original complaint was filed, purporting to be the answer of the defendant by her duly appointed guardian ad litem, the said S. R. Roseberg. On the 24th day of March, 1913, a stipulation was filed which, like said answer, was signed by Albert Lee Stephens, as attorney for defendant. In that stipulation it was agreed that the answer theretofore filed should stand as the answer to the amended complaint, and that any new matter inserted in the amended complaint in accordance with the stipulation be deemed denied. The judgment, in accordance with the stipulation, in its title referred to the defendant as "Estelle Roseberg, by S. R. Roseberg, Her Guardian ad Litem," and recited that Albert Lee Stephens appeared for the defendant; that, evidence having been introduced and the cause submitted, and findings of fact having been waived, the court finds that the plaintiff is entitled to judgment against the defendant in the sum stated.

At the trial of the present action the defendant objected to plaintiff's offer of the judgment roll in evidence that it was incompetent, particularly for the reason that the summons and return thereon were missing. This objection was overruled. Thereupon, the plaintiff having rested, the defendant over objection from the plaintiff, was permitted to introduce evidence to the effect that no service of summons was ever made upon her in the former action. Nevertheless the court disregarded this evidence and rendered judgment in favor of the plaintiff.

[1] Defendant's attack upon the judgment being collateral, the judgment must be held to be valid unless the judgment roll shows it to be void—unless, as the authorities put it, it is void upon its face. In determining the question, we are restricted to the evidence afforded by the judgment roll. Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 Pac. 880.

[2] The judgment roll cannot, on this collateral atack, be overcome by evidence outside the record thereof showing, as against the record itself that in fact the steps necessary to acquire jurisdiction were not taken.

[3] We are of the opinion that the record of the judgment is sufficient to show that the court had jurisdiction to render and enter the same. The allegation contained in the amended complaint, which allegation was affirmed by the implied finding of the court, stated that S. R. Roseberg had been duly appointed as guardian ad litem for the defendant. Since such guardian ad litem could not have been duly appointed unless service of summons upon the defendant had first been made (section 373, subd. 2, Code Civ. Proc.), the necessary implication of the finding is that such service of summons had been made as alleged. This being so, the judgment contained the recitals of fact necessary to confer jurisdiction. As heretofore shown, such a judgment is not subject to collateral attack by evidence like that herein offered to prove want of service of process.

We find no error in the record in this action, and the judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

52 Cal. App. 650

TUTSCH v. DIRECTOR GENERAL OF RAILROADS. (Civ. 3615.)

(District Court of Appeal, Second District, Division 1, California. May 18, 1921.)

1. Appeal and error ⟸918(1)—Presumed that an amendment was not filed until after trial of issue of law on demurrer.

In view of the presumption against error by the trial court, where plaintiff asserted that she was as a matter of right entitled under Code Civ. Proc. § 472, to amend her complaint once, it will be presumed that the amendment was not tendered until after trial of the issue raised by defendant's demurrer, the amendment being permissible if previously taken.

2. Limitation of actions ⟸124—No judgment can be maintained where action was not commenced or defendant not made party within statutory period unless there was a waiver.

Unless an action is commenced against a party within the statutory period, or unless such party by proper proceedings is made a defendant by amendment prior to the expiration of such period, no judgment can be had against such defendant, unless limitations are waived.

3. Limitation of actions ⟸182(2)—Defense must be pleaded.

The statute of limitations does not ordinarily operate by its own force as a bar, but as a defense, to be pleaded by the party invoking the benefit of its protection.

4. Limitation of actions ⟸182(2)—Government agent may not waive limitations.

Where the agent appointed by the President pursuant to federal Transportation Act, Feb. 28, 1920, against whom causes of action arising out of governmental ownership of railroads were to be brought, was not sought to be made a party until more than one year after accrual of an action arising out of governmental operation, which action, under Code Civ. Proc. Cal. § 340, had to be brought in one year, the agent, not being authorized, cannot waive the defense of limitations; hence plaintiff is not, after expiration of the year, entitled to amend the complaint by making him a party on the theory that the defense was not available unless pleaded.

5. Railroads ⟸5½, New, vol. 6A Key-No. Series—Action against federal agent not maintainable without strict compliance with statute.

Where plaintiff, who asserted a claim arising out of negligent operation of a railroad during governmental operation, attempted to maintain an action against the Director General of Railroads after termination of federal control, and did not seek to make the agent provided for by federal Transportation Act, Feb. 28, 1920, § 206, a party until after expiration of the year period within which the state law made applicable by act of Congress required it to be commenced, plaintiff is not entitled to amend, for, the statute being a special one, strict compliance therewith is necessary.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Marie Tutsch against the Director General of Railroads. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Jack Greenberg, of Los Angeles, for appellant.

Fred E. Pettit, Jr., and E. E. Bennett, both of Los Angeles (A. S. Halsted, of Los Angeles, of counsel), for respondent.

SHAW, J. Plaintiff appeals from a judgment dismissing the action, which followed an order of the court sustaining a general demurrer to the complaint and an order granting defendant's motion to dismiss.

It appears from the complaint that on July 24, 1919, plaintiff, due to the negligence of the Los Angeles & Salt Lake Railroad Company, sustained personal injuries, and for the recovery of damages therefor she, on July 23, 1920, filed a complaint wherein the Director General of Railroads of the United States was made sole defendant. In due time said defendant filed his demurrer and motion to dismiss the action. On the day of the hearing of the demurrer and motion, plaintiff, as shown by the record, without leave of court, filed an amendment to the complaint wherein she alleged:

"That John Barton Payne was, under the Transportation Act of 1920, §§ 205, 206, designated agent by the President of the United States of America, for the purpose of being a party defendant in actions brought against the Los Angeles & Salt Lake Railroad Company, as set forth in the complaint, and that said agent, John Barton Payne be, and that he is hereby, made a party defendant with the Director General of the Railroads of the United States in the above entitled cause."

At the hearing the demurrer was sustained and the motion granted.

The alleged injury was sustained on July 24, 1919, at which time the Los Angeles & Salt Lake Railroad was, pursuant to an act of Congress and proclamation of the President, under federal control, and operated by the Director General of Railroads of the United States. Under an act of Congress adopted February 28, 1920 (Chapter 91, 41 Stat. 456), such control and right to operate the railroad terminated on March 1, 1920. Subdivision (a) of section 206 of this last act provides that actions at law based on causes of action arising out of the possession, use, or control by the President of the railroad or system of transportation of any carrier of such character as prior to federal control could have been brought against such carrier may, after the termination of federal control, be brought against the agent designated by the President for such purpose, which agent shall be designated by the Pres-

ident within 30 days after the passage of this act; and that—

"Such actions, suits, or proceedings may, within the periods of limitation now prescribed by state or federal statutes, but not later than two years from the date of the passage of this act, be brought in any court which, but for federal control, would have had jurisdiction of the cause of action had it arisen against such carrier."

Pursuant to the authority conferred by subdivision (a), the President designated John Barton Payne as the agent against whom actions of the character here involved should be brought. It thus appears that when the complaint herein was filed on July 23, 1920, no warrant of law existed for suing the Director General of Railroads on account of the injury sustained by plaintiff, and hence the complaint stated no cause of action against him. Subdivision 3 of section 340, Code of Civil Procedure, provides that the period for commencing an action for damages sustained by reason of the wrongful act or negligence of another is one year; hence, when plaintiff, on August 17, 1920, sought to amend her complaint by making John Barton Payne the party defendant, more than one year had elapsed subsequent to the date of the injury; and since, by subdivision (a) of section 206, such actions are required to be brought within the period of limitation prescribed by the Code, the action, unless the complaint was subject to such amendment, was, as to such proposed defendant, barred by the statute.

[1] Appellant, basing her claim upon section 472, Code of Civil Procedure, insists that she, as a matter of right, was entitled to file the amendment. This section provides that a pleading may be amended once by the party of course at any time before answer or demurrer filed, or after demurrer filed and before trial of the issue of law thereon. It is a well-recognized principle that every intendment is in favor of the regularity of the court's ruling, and, since error will not be presumed, it devolves upon an appellant to affirmatively show the existence thereof. Hence, assuming (but, since under the circumstances made to appear we entertain grave doubts upon the question, not so deciding) that plaintiff was entitled, under section 472, to amend the complaint as of right by making John Barton Payne in such representative capacity the defendant, thus substituting a new action for that brought against the Director General of Railroads of the United States, her right so to do was by said section of the Code restricted to a time before the trial of the issue of law presented by defendant's demurrer. As appears from the record, the demurrer was heard and the order of dismissal made on August 17th, on which date plaintiff's amendment to the complaint was filed. Whether or not the filing thereof preceded the trial of the issue of law upon defendant's demurrer is not made to appear, and, assuming the correctness of plaintiff's contention as to her right to amend before trial, nevertheless, since we cannot assume the court erred, we must, in the absence of a showing that the filing of the amendment preceded the trial of the issue of law so presented, presume in support of the court's ruling that it was thereafter filed.

[2] It appears that after the judgment was rendered on August 24th plaintiff applied to the court, under the provisions of section 473, Code of Civil Procedure, for an order vacating and setting aside the same, and allowing plaintiff to file the amendment to the complaint, which application was by the court denied. In so ruling it is claimed the court abused its discretion. That the court may in furtherance of justice allow a party to amend any pleading by adding the name of a party is provided by said section. The general rule is that, unless an action is commenced against a party within the statutory period, or unless such party is by proper proceedings made a defendant by amendment prior to the expiration of such period, no judgment can be had against such defendant, unless the statute is waived. Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53; Peiser v. Griffin, 125 Cal. 9, 57 Pac. 690.

[3-5] The rule that the statute of limitations does not operate by its own force as a bar, but as a defense to be pleaded by the party invoking the benefit of its protection, has, in our opinion, no application to a suit of this character. Finn v. United States, 123 U. S. 227, 8 Sup. Ct. 82, 31 L. Ed. 128. While an individual may waive such a defense, no authority, either express or implied, was conferred upon John Barton Payne, as such agent and in a representative capacity, to waive the limitation, and, hence, since the statute constituted a defense which he could not waive, no purpose could have been served by permitting the amendment of the complaint. Moreover, other than as authorized by section 206 of the federal Transportation Act, no warrant existed for suing John Barton Payne as such agent, and, since plaintiff in bringing the action sought to avail herself of the privilege so granted by special act, in order to maintain the same, she must have strictly complied with the terms and conditions embodied in the statute, one of the provisions of which is that such suits must be brought within the period there specified, which, as applied to this case, is one year from the date of the injury. Carr v. United States, 98 U. S. 433, 25 L. Ed. 209; Price v. United States, 174 U. S. 373, 19 Sup. Ct. 765, 43 L. Ed. 1011; section 52, vol. 25, p. 416. Ruling Case Law.

Our conclusion is that no cause of action was stated against the defendant named in the complaint; that no amendment to the complaint was filed under section 472, Code

of Civil Procedure, until after the trial of the issue presented by defendant's demurrer to the complaint; that at the time plaintiff, under section 473, Code of Civil Procedure, applied to the court to set aside the judgment and allow her to file an amendment to the complaint making John Barton Payne a party defendant, the action as to him was barred by the statute of limitations, and, hence, there was no abuse of discretion on the part of the court, and that plaintiff has suffered no prejudicial error by reason of any of the rulings of the court.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

52 Cal. App. 744

HARP v. PEASE. (Civ. 3272.)

(District Court of Appeal, Second District, Division 2, California. May 24, 1921.)

1. New trial ⊜76(2)—Action for money had and received is an "action for damages," within statute authorizing new trial for excessive "damages."

An action in assumpsit for money had and received is an "action for damages," within Code Civ. Proc. § 657, subd. 5, authorizing the granting of a new trial on the ground of "excessive damages appearing to have been given under the influence of passion or prejudice," in view of Civ. Code, §§ 3281, 3300.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Damage —Damages.]

2. New trial ⊜76(1)—Granting of for excessive damages discretionary with court.

The granting of a new trial on the ground of excessive damages, under Code Civ. Proc. § 657, subd. 5, is discretionary with the court.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Walter Harp against Clifford C. Pease. Verdict for plaintiff. From an order granting a new trial, the plaintiff appeals. Affirmed.

Wright & McKee, of San Diego, for appellant.

C. C. Pease and A. T. Roark, both of San Diego, for respondent.

CRAIG, J. The action is in assumpsit for $597.76 for money had and received. Defendant, by way of counterclaim, alleges a contract of employment of himself by plaintiff and a breach of the contract, in that the services rendered had not been paid for. The jury returned a verdict for the plaintiff for the sum of $354.50. Defendant moved for a new trial on all of the statutory grounds. The court set aside the verdict of the jury and granted the motion for a new trial. The order indicates that, among other grounds, it is based upon "excessive damages appearing to have been given under the influence of passion or prejudice." From this order the plaintiff appeals.

[1] It is urged that the action is not one to recover damages, within the meaning of subdivision 5 of section 657, Code of Civil Procedure, and that the trial court had no authority to grant the motion under that subdivision. Appellant cites no authority to sustain this contention. Robinson on Elementary Law, § 262, defines an action in assumpsit as one to recover damages for the breach of an implied contract, etc. Among other implied contracts there mentioned is that of money had and received, which the same author defines as:

"An agreement of one who receives another's money, without giving valuable consideration for it, to pay it over to that other on demand."

These elementary principles are sufficient to establish the proposition that the action in the case at bar is for damages. The Legislature has seen fit in the Code section above mentioned to provide that a new trial may be granted, among other grounds, upon that of "excessive damages appearing to have been given under the influence of passion or prejudice." It is doubtless true that in the great majority of cases, where this ground for a new trial is relied upon, the action sounds in tort, yet, in the absence of any language in the Code section itself which could properly be construed as indicating such an intention upon the part of the Legislature, we would be going far, indeed, to exclude from the scope of the word "damages" all reference to damages arising from breach of contract.

Section 3281, Civil Code, defines damages in the following provision:

"Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called 'damages.'"

Section 3300, Civil Code, provides:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

In the absence of some suggestion in some expression of the Legislature to indicate that in enacting subdivision 5 of section 657, Code of Civil Procedure, it intended to subtract from the content of the word "damages," as elsewhere used in the Codes, all such damages as occur by reason of a breach of contract, it cannot be said that such a limitation was contemplated. It is stated in 29 Cyc. 843:

"In actions for breach of contract, or for injuries for the detention of property, where there

is a definite measure of damages, new trials will be more readily granted on the ground of excessive recovery."

This editorial comment is not quoted from any particular case, but from the author's conclusions from a review of many decisions.

[2] It is not necessary to consider other grounds or to decide whether or not the order of the court was adequate if based upon insufficiency of evidence to justify the verdict. The trial court had the right, in its discretion, to grant the order upon the ground that the damages were excessive. Ingraham v. Weidler, 139 Cal. 588, 73 Pac. 415; Davis v. Southern Pac. Co., 98 Cal. 13, 32 Pac. 646; Etchas v. Orena, 121 Cal. 270, 53 Pac. 798; Angelo-Nevada Assurance Society v. Ross, 123 Cal. 520, 56 Pac. 335. The record shows no abuse of this discretion.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

52 Cal. App. 781

GLOBE OIL MILLS v. VAN CAMP SEA FOOD CO. (Civ. 3609.)

(District Court of Appeal, Second District, Division 1, California. May 24, 1921. Hearing Denied by Supreme Court July 23, 1921.)

1. Sales ⊂=84—Contract for sale of waste held not to obligate seller to remain in business or produce any definite amount of waste.

A contract by a firm for the sale of fish waste, though declaring that it should be in force and effect for 10 years, did not obligate the firm to remain in business for any specified length of time or produce any given quantity of waste.

2. Corporations ⊂=590(2)—Purchase by one corporation of property of another does not of itself impose on purchaser liability for seller's contracts.

Where one corporation purchases the entire property of another, such purchase is not different from a similar contract between individuals, and the purchaser is not liable on the contracts of the seller unless such liability is voluntarily assumed.

3. Corporations ⊂=590(2)—Corporation purchasing property of another held not liable on contract of predecessor.

Where a partnership entered into a contract with plaintiff's predecessor in title for the sale of fish waste for a period of 10 years and a corporation was formed which carried on the business of the firm and accepted the contract, a second corporation which acquired the property of the first corporation is not liable on the contract, not having assumed it either expressly or impliedly.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Globe Oil Mills against the Van Camp Sea Food Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. G. Van Pelt and Bertin A. Weyl, both of Los Angeles, for appellant.

James E. Kelby and Kemp & Clewett, all of Los Angeles, for respondent.

SHAW, J. Action to recover damages for the alleged breach of a contract. Judgment went for defendant, from which plaintiff has appealed.

It appears from the contract, executed on October 17, 1912, a copy of which is set out in the complaint, that the California Tunny Canning Company was engaged in the business of canning fresh fish for market and desirous of disposing of the waste product therefrom, and that John T. Gaffey was engaged in manufacturing fertilizer from such waste product and desired to purchase the same; whereupon the California Tunny Canning Company agreed to sell, and Gaffey agreed to buy, for $1 per ton, all the fish waste, consisting of fish heads, bones, tails, and such other fish waste as was not put into cans by said California Tunny Canning Company, which fish waste, under the terms of the contract, the seller was to place in barges to be furnished by Gaffey, who, after the same were loaded, was to remove the same within 12 hours thereafter, and, in case of failure so to do, the said canning company was authorized, at the expense of Gaffey, to employ a tug to tow the barges out to sea and dump such waste material into the water. While, under the terms of the contract, no obligation was imposed upon the seller of such fish waste to continue the business of canning fish, or, if it did, to produce any specified quantity of such product, it was "agreed that this agreement shall be and remain in force and effect for the period of ten years from the date thereof."

It is alleged in the complaint that plaintiff, by mesne assignments and transfers executed prior to the commencement of the action, acquired all the right, title, and interest of Gaffey in and to the contract, together with all rights, claims, demands, and causes of action growing out of the same, or anything done or to be done thereunder, followed by an allegation that defendant, on or about April 30, 1914, became the assignee and successor in interest of the California Tunny Canning Company in and to said contract, and at said time assumed all the covenants and obligations contained in said contract on the part of said California Tunny Canning Company, and ever since said date, up to about September 1, 1917, defendant performed all the covenants and conditions contained in the contract on the part of said California Tunny Canning Company, but since said September 1, 1917, defendant has,

without the consent of plaintiff, wholly failed, refused and neglected to deliver to plaintiff's predecessor in interest, or to plaintiff, any of the fish waste referred to in the contract, or to perform any of the acts thereby required to be performed on its part as such assignee and in accordance with its obligation so to do, but used the fish waste for its own purposes, business, and profit, followed by allegations as to the amount of fish waste produced by defendant and which it refused to deliver to plaintiff, who at all times on its part was ready, willing, and able to carry out the terms of the contract.

The chief contention upon which plaintiff bases its claim for a reversal of the judgment is insufficiency of the evidence to justify the finding of the court to the effect that it is not true that on April 30, 1914, or at any other time or at all, the Van Camp Sea Food Company, defendant herein, became the assignee or successor in interest of said California Tunny Canning Company in or to said contract, and it is not true that at said time or at any time assumed the obligation to perform all or any of the covenants contained therein on the part of said California Tunny Canning Company as one of the makers of the contract, nor is it true that prior to September 1, 1917, defendant performed or carried out all or any of the covenants or conditions therein contained, or received any of the benefits thereof.

The evidence, as disclosed by the record, clearly tends to establish certain facts, among which are: That at the time of the execution of the contract Paul Eachus and W. F. Wood constituted a copartnership, doing business under the name and style of the California Tunny Canning Company, one of the parties to the contract, and that as made it was with them as such copartners; that on January 8, 1914, a corporation, designated the California Tunny Canning Company, was created, with a capital stock of $50,000, divided into shares of $100 each, and, excepting two shares thereof, the stock was equally divided between Eachus and Wood, theretofore constituting the copartnership. Other than a stipulation "that title passed to the California Tunny Canning Company, a corporation, of all the assets of the California Tunny Canning Company, a copartnership, on or about the 8th of January, 1914," there is nothing whatsoever disclosed by the record showing any transfer, by assignment or otherwise, of the interest of the copartnership in and to the contract in question.

On April 22, 1914, Frank Van Camp, Paul Eachus, and F. H. Ford entered into a contract whereby they agreed to form a corporation for the purpose of conducting a fisheries, canning, manufacturing, and mercantile business, to be named the Van Camp Sea Food Company, with a capital of $200,000, divided into 2,000 shares of the par value of $100 each, and wherein it was agreed that Frank Van Camp should receive, for the use of his name, 1,000 shares of said stock, and that Paul Eachus, who subsequent to the incorporation of the California Tunny Canning Company had acquired the interest therein of W. F. Wood, should turn over to the Van Camp corporation all of the corporate stock of the California Tunny Canning Company, together with the plant and equipment thereof, including all merchandise, accounts receivable, the lease of the ground belonging to the Southern Pacific Company, now held by the California Tunny Canning Company, and all interest in or leases on machinery and equipment belonging thereto, whether the same stands in the name of the California Tunny Canning Company or that of Paul Eachus, "subject to all indebtedness, contracts, or obligations of the said California Tunny Canning Company," for which he should receive 500 shares of the stock of said Van Camp Sea Food Company, and that Frank Van Camp and F. H. Ford should jointly furnish to said last-named company the sum of $50,000 in cash, for which there should be issued to them 500 shares of stock therein. In accordance with this agreement, the Van Camp Sea Food Company, defendant herein, was duly organized, and at a meeting held on April 30, 1914, as shown by the minutes of the proceedings of the board of directors, consisting of Frank Van Camp, Gilbert Van Camp, Paul Eachus, Wilbur F. Wood, and F. H. Ford, the agreement under which said corporation was organized was presented, and a statement made by one of the directors that the corporation was formed and organized pursuant thereto, whereupon the agreement was approved, and the president and secretary ordered to issue and deliver to Frank Van Camp 1,000 shares of the stock of the corporation, and to issue and deliver to Paul Eachus 500 shares upon a transfer of the property to be conveyed by him in accordance with the agreement, and to Frank Van Camp and F. H. Ford 500 shares of stock upon the payment therefor of $50,000, as provided in said agreement.

There were several assignments of the interest of John T. Gaffey in and to the contract prior to July 16, 1917, at which time, by a naked assignment, it was acquired by the Globe Cotton Seed Oil Mills, which, however, assumed none of the obligations imposed by the contract upon Gaffey, and this last-named company, on November 14, 1917, by naked deed of assignment, sold and transferred the same, together with "all rights thereunder against the Van Camp Sea Food Company," to plaintiff, who likewise assumed none of the obligations imposed by the contract upon Gaffey. It further appears from the evidence that at the time of the organization of defendant corporation it had no notice of the existence of said contract, and

that while it did, prior to September 1, 1917, deliver fish waste to plaintiff's purported predecessors in interest in said contract, it at all times denied any obligation so to do, and did for most of the period, up to the time that it ceased such deliveries, exact from plaintiff's predecessors in interest payment therefor at the rate of $2.60 per ton for said fish waste, although in so doing it appears that there existed a controversy between the parties as to their respective rights under the terms of the contract, plaintiff's predecessor in interest therein claiming that it was entitled to the fish waste at the price of $1 per ton, notwithstanding which fact it, in obedience to the demand of defendant, who refused to recognize the contract, paid $2.60 per ton therefor, as a result of which fact it was, on July 10, 1917, agreed between the parties that the rights of neither should be prejudiced by reason of such payments.

[1] As we construe the contract, it imposed no obligation upon the copartnership of Eachus and Wood, as parties thereto, to continue in business, or, if they did, to produce any specified quantity of fish waste. Hence they might, without violating the terms thereof, have ceased doing business the day following its execution, or, if they continued therein, reduced the output to a few pounds per day. In effect, it required them, so long as they conducted the business, to sell such fish waste as they produced to Gaffey for $1 per ton; and while, in case of his default, an action would lie thereon against him for the agreed price, and, in case he neglected to remove it, the additional cost of towing the fish waste to sea, no such right of action existed against the plaintiff for the reason that, under the naked assignment, it assumed none of the obligations imposed upon Gaffey. The California Tunny Canning Company, copartnership, as it had the right to do, ceased operations; and, assuming that under the stipulation of counsel its interest in the contract was transferred to the corporation of like name, this corporation assumed no obligation to perform the conditions thereof; and, assuming further that it was a substituted agency of Eachus and Wood through which to conduct the business, then it had the same right to cease business as did the copartnership. In effect, it exercised such right by ceasing operations and selling its assets to defendant, which, as a corporation organized with a capital of four times that of the California Tunny Canning Company, issued to Eachus, who at the time had acquired substantially all interest in said last-named corporation, 500 shares of its stock in payment therefor, and the conduct of the business and existence of the corporation terminated. Upon these facts counsel for appellant insists that defendant corporation was but a continuance of the California Tunny Canning Company, and, in effect, a consolidation or merger of two corporations, by reason of which facts defendant, under the terms of the contract, was legally bound to deliver to it all the fish waste produced by it during the term specified therein. We cannot assent to this proposition. On the contrary, it clearly appears that a new, separate, and distinct corporation was formed, which, in consideration of the issuance of 500 shares of its stock, purchased the assets of the California Tunny Canning Company, but did not assume the performance of the contract.

[2] In the absence of statutory regulation, "the purchase by one corporation of the property of another is not different in law from a similar contract between individuals. * * * In neither case is the vendee liable for the * * * contractual obligations of the vendor, unless such liability was voluntarily assumed by the former." 7 Ruling Case Law, p. 156. There is neither allegation nor proof of any fraud in the transaction; there was no agreement whatsoever on the part of defendant to assume performance of the contract; and there is nothing in the circumstances surrounding the transaction tending to show a consolidation of the two corporations.

[3] Our conclusion is that the contract imposed no obligation upon Eachus and Wood, as individuals constituting the corpartnership, to continue in business, and that, by the mere naked transfer thereof, no additional obligation was imposed upon the California Tunny Canning Company, which was free to discontinue the business; and, conceding the transfer of assets of the last-named corporation to defendant to have included the contract as part thereof and made "subject to all * * * contracts or obligations of the California Tunny Canning Company," such provision could not be construed as creating an obligation on the part of defendant to deliver all the fish waste produced by it to plaintiff. Moreover, since the obligation imposed upon the California Tunny Canning Company ended with its cessation of business, there was no obligation imposed upon defendant, and hence none to which the transfer was subject.

In our opinion, the facts established warranted the court in making the finding upon which the judgment is founded.

The court also made a finding that, as alleged in the answer, the cause of action was barred by a judgment rendered in a former suit between the parties and involving the same matters here litigated. In view, however, of what has been said, no purpose could be served in discussing this alleged error, since, conceding the insufficiency of the evidence to support it, such fact could not affect the conclusion reached.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

52 Cal. App. 705

PEOPLE v. DE VRIES. (Cr. 950.)

(District Court of Appeal, First District, Division 1, California. May 19, 1921. Hearing Denied by Supreme Court July 18, 1921.)

1. Perjury ⊂⊃19(2)—Indictment held sufficiently specific.

A perjury indictment for defendant's falsely testifying before the grand jury that he did not accept bribes, alleging the transaction to have been "during the year 1919," *held* not invalid for uncertainty, since it set forth the parties paying the bribes, the amounts, and the purposes with sufficient particularity to inform defendant of what was intended, and what evidence might confront him in proof of the falsity of his testimony.

2. Perjury ⊂⊃19(3)—Indictment held defective because of demurrable omnibus clause.

An omnibus allegation in an indictment charging defendant with falsely swearing that he did not accept bribes, alleging that defendant took bribes from "divers persons to the grand jury unknown," and did various other unlawful acts and things, is indefensible, and a demurrer thereto for uncertainty should have been sustained.

3. Criminal law ⊂⊃1169(1)—Testimony, if inadmissible, held harmless, where other evidence required verdict rendered.

In a prosecution for perjury, evidence probably introduced under a defective omnibus clause of an indictment *held* not to require a reversal, even in case it were not admissible under some other part of the indictment, where it tended to prove the falsity of the testimony in question, and there was other evidence from which the jury could have reached no other verdict than that of guilt.

4. Criminal law ⊂⊃1130(2)—Where appellant gave no reasons why his demurrer should have been sustained, the matter need not be decided.

Where appellant has failed to give any reasons why his demurrer to certain counts of the indictment should have been sustained, and they are not subject to the objections he has urged against the first count, and to determine his contention would necessitate an independent examination and inquiry, this court need not decide such matter.

5. Perjury ⊂⊃32(8), 36—In prosecution for defendant's falsely testifying he had not accepted a bribe, evidence need not be rejected for uncertainty as to time of payment, and question was for the jury.

In a prosecution for perjury for defendant's falsely testifying before the grand jury that he had not accepted bribes, *held*, that the testimony that witness had paid defendant money in 1918, together with a bank clerk's testimony that witness drew that amount from the bank early in the next year, was not to be rejected for uncertainty as to exact time when the bribe was paid, as the witnesses may have been mistaken, and such matter was for the jury.

6. Perjury ⊂⊃32(8)—In prosecution for defendant's falsely testifying he had not received bribes, where witness testified he withdrew money from deposit box, bank clerk could testify witness had a deposit box.

In a prosecution for perjury for defendant's falsely testifying that he had not accepted bribes, where a witness testified that he withdrew an amount of money from his safe deposit box and paid it to the defendant on the next day, there was no error in allowing the bank clerk to testify that the witness had a safe deposit box in the bank.

7. Criminal law ⊂⊃829(14), 1173(2)—Refusal to give instruction held harmless, where relating to matters known to jury and covered by charge given.

In a perjury prosecution, defendant was not harmed by a refusal to instruct on counsel's right to object to evidence and move to strike, and that the jury should disregard testimony stricken, where the major part of the instruction related to matters common to the conduct of every trial and with which the jurors were already familiar, while the remaining portion was covered elsewhere in the charge.

8. Criminal law ⊂⊃829(12)—Refusing instruction, sufficiently covered by others, not error.

Defendant appellant's proposed instruction that, if the testimony failed to establish proof of any of the elements of perjury as defined, it was the jurors' duty to acquit, was properly rejected, where fully and fairly covered by other instructions.

9. Criminal law ⊂⊃1172(2)—Instruction to disregard other charges pending against defendant or witnesses held not prejudicial error.

In a prosecution for perjury before the grand jury by defendant's falsely swearing that he had not accepted bribes, an instruction not to consider the fact that there might be pending against the defendant, or any other witnesses, other charges growing out of the same or other transactions, *held* not prejudicial error, in view of the record.

10. Criminal law ⊂⊃1037(1)—Objection to district attorney's conduct, made after he had concluded, need not be reviewed.

Assignments of misconduct by the district attorney in argument, not made until after he had concluded, need not be considered on appeal.

11. Criminal law ⊂⊃721(2), 1037(1), 1171(3)—District attorney's reference to limited examination of defendant held erroneous, but not prejudicial and does not require reversal, where not objected to.

In a prosecution for perjury before the grand jury by defendant's denying that he had accepted bribes, *held*, that the district attorney's remark as to the limited examination of the defendant was clearly error; but since there was no assignment thereon made at the time, and the evidence clearly established defendant's guilt, reversal for that reason alone is not required.

12. Criminal law ⟸1186(4)—Provision that cases be reversed only for miscarriage of justice does not apply to district attorney's intentional misconduct.

Const. art. 6, § 4½, providing that criminal cases need not be reversed, where the error complained of has not resulted in the miscarriage of justice, does not extend to intentional misconduct on the part of a prosecuting attorney.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

John De Vries was convicted of perjury, and from the judgment, and from an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

Frank M. Carr, of Oakland, and Chas. H. Brennan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WASTE, P. J. The defendant was indicted on four counts for the crime of perjury. His demurrer to the indictment was overruled. He was tried, convicted on the first, third, and fourth counts, and sentenced to imprisonment in the state prison. He appeals from the judgment, and from the order denying his motion for a new trial, urging as reasons for a reversal that the court erred in overruling the demurrer to the indictment, in its decisions on questions of law arising during the course of the trial, and that the court misdirected the jury. Alleged misconduct of the district attorney during the course of the trial, and in his closing argument to the jury, is assigned by the defendant as prejudicial error.

The allegation of the first count of the indictment is that the defendant swore falsely as to material matter while a witness under oath before the grand jury of the city and county of San Francisco, in an investigation of the charge that the defendant and others, in their capacity as inspectors for the state board of pharmacy, took and received bribes from, and were guilty of official misconduct with, persons suspected or accused of violating the laws with respect to the use and disposition of narcotics. The alleged false testimony is set out in full in the count. The defendant was not examined as to any specific acts; the questions being directed to the fact if he "ever" received any bribes, or was "ever" guilty of misconduct as charged, to all of which he entered a positive denial. These allegations are followed by the averments that the testimony was and is false, and was known to the defendant to be untrue. In addition to the general assignment of perjury, the count contains a statement of particular facts from which it is made to appear that De Vries did accept money from a number of persons, and was otherwise guilty of the gross official misconduct for which he was under investigation by the grand jury. It was positively alleged that "during the year 1919" L. L. Gantz, Sam Shurgin, and Sam Morlen, alias David Ross, illicit vendors and dealers in narcotics, paid defendant varying sums of money "for the purpose of corruptly influencing and affecting him in the discharge of his duties" as inspector for the state board of pharmacy. There is a further allegation that "said De Vries did solicit, take, and receive money and other valuable divers things from divers persons, to this grand jury unknown," and that said "John De Vries did do and perform various other unlawful acts and things hereinbefore specified."

[1] The defendant interposed a general and special demurrer to this count, upon the ground that it fails to comply with the sections of the Penal Code requiring an indictment to contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. The demurrer was overruled, and appellant renews the objection on this appeal. There is nothing in the contention that the indictment is uncertain in not specifying the exact time and place at which Gantz, Shurgin, and Morlen paid the money to appellant. It was alleged to have been "during the year 1919," it is true; but the parties paying, the amounts, and the purpose for which they were paid, were set forth with sufficient particularity to inform the defendant as to what was intended, and what evidence of particular acts might confront him at the trial in proof of the falsity of his testimony, which was the only offense charged against him by the indictment.

[2] There is more merit in appellant's arraignment of the omnibus allegations that the defendant took bribes from "divers persons to the grand jury unknown," and did "various other unlawful acts and things." Such a plea in an indictment is indefensible, and the demurrer for uncertainty should have been sustained. People v. Bradbury, 155 Cal. 808, 811, 103 Pac. 215. Did the sufficiency of the first count of the indictment depend solely upon that allegation, its uncertainty would be fatal. But, as the other allegations of the indictment meet the requirements of the law, and the record clearly establishes the guilt of the defendant, it is only necessary to determine whether or not the appellant was prejudicially injured by the overruling of the demurrer for uncertainty.

[3] The witnesses Gantz, Morlen, and Shurgin each testified positively to paying money to the defendant, as alleged in the indictment. They were corroborated by the direct

word of other witnesses and circumstantial evidence. There can be no doubt as to defendant's guilt. He complains that he was confronted with a number of other witnesses, whose identity and the nature of whose testimony were not disclosed by the indictment. Two of these witnesses, Miller and Solomon, connected the appellant with Morlen, and their testimony was properly admitted. The witnesses Dolan, Attix and Mrs. Attix testified to matters not specified in the indictment, but which conclusively established defendant's connection with the illicit sale and disposition of drugs. The witness Silverstein, another dealer in drugs and narcotics, testified that for a time he had paid the defendant $60 per month to secure his dismissal upon being arrested, and for further protection in his illegal business. Whether this testimony was admissible under the rule permitting evidence of similar offenses to be received for the purpose of showing guilty knowledge and intent, as contended by the Attorney General, which seems doubtful in this case, or whether it was admitted by the court under an apparent mistake as to the value of the omnibus allegation in the indictment, it seems clear to us that it was but cumulative to other evidence which established the guilt of the defendant beyond all reasonable doubt. Besides, it did tend to prove that the defendant swore falsely before the grand jury. On the whole record we do not see how the jury could have reached any other verdict, even though the testimony had been rejected.

[4] Appellant has failed to give any reasons why his demurrer to counts 3 and 4 of the indictment should have been sustained. They are not subject to the objection urged against the first count, and to determine whether or not there is merit in appellant's contention would necessitate an independent examination and inquiry as to the correctness of the court's ruling, which we are not required to make. People v. Woon Tuck Wo, 120 Cal. 294, 297, 52 Pac. 833; People v. Castro, 183 Pac. 828.

[5, 6] Gantz testified he paid defendant $700 in 1918. The witness Buckley, chief clerk of the Bank of Italy, testified that Gantz drew that amount from his bank account on February 4, 1919. Appellant contends that this last testimony should have been rejected, for the reason that there was uncertainty, and some improbability, as to the exact time the bribe was paid. Both Gantz and the witness Zeh may have been mistaken as to the dates testified to by them. That was a matter for the consideration of the jury. The witness Morlen testified that he withdrew $5,000 from his safe deposit box in the Anglo-California Trust Company on January 6, 1919, and paid the amount to appellant on the next day. There was, therefore, no error in allowing McRow, the clerk of the bank, to testify that Morlen had a safe deposit box in the vaults of the bank, and that he visited it on January 6.

[7-9] The appellant was not harmed by the refusal of the court to give an instruction relating to the right of counsel to object to the introduction of evidence, and to move to strike it out if so advised, and that the jury should disregard any testimony stricken from the record. The major part of the instruction related to matters common to the conduct of every trial, with which the jurors were already familiar, and the remaining portion was covered elsewhere in the charge. Appellant's proposed instruction that if the testimony failed to establish proof of any of the elements necessary to constitute the crime of perjury, as defined by the court, it was the duty of the jurors to acquit him, was fully covered with great particularity in the charge, which was comprehensive and fair. The court instructed the jury that it should not take into consideration, in arriving at a verdict, the fact that there might be pending against the defendant, or any other witness, other charges growing out of the same or other transactions. Just what was the purpose of the instruction and to what point it was considered material is not apparent. Whether directed to the credibility of the witnesses, or to the likelihood of the guilt of the defendant, does not appear. The instruction, however, appears to have done no harm. Appellant has not shown that it did. So far as we are aware, he was under no other charge than the one for which he was being tried, and several of the witnesses were.

[10-12] Complaint is made that the district attorney was guilty of misconduct in the argument to the jury. With one exception, it appears that the assignments of such conduct as error were not made until after the district attorney had concluded. The court is therefore not bound to consider them on appeal. People v. MacDonald, 167 Cal. 545, 551, 140 Pac. 256. We have examined the record, however, and, while it is manifest the district attorney did go afield in his remarks, no flagrant misconduct appears except in one instance—when he referred to the limited examination of the defendant. That was clearly error. People v. McGungill, 41 Cal. 429; People v. Derwae, 155 Cal. 592, 102 Pac. 266. But in view of the fact that no assignment of the remarks as misconduct was made at the time, and in view of the further fact that the evidence against the defendant so clearly establishes his guilt, we feel we should not reverse the judgment for that reason alone. People v. Nakis (Sup.) 193 Pac. 92. The records in appealed criminal cases disclose an increasing persistence on the part of prosecuting attorneys to go beyond the line of proper conduct in their arguments. So frequently is this being

done that, while we disavow any imputation of willful misconduct in the instant case, we are becoming convinced that overzealous prosecutors sometimes do it intentionally, and rely on the appellate court to save a conviction by the application of section 4½ of article 6 of the Constitution. There are bounds beyond which the saving grace of that provision may not pass, and the appellate courts should not be called upon to spread it, like "a mantle of sweet charity" over intentional acts of misconduct. Frequent warnings in relation to the practice proving ineffectual, reversals on appeal must be anticipated if right of defendants to a fair trial is to prevail.

The judgment and the order denying a new trial are affirmed.

We concur: KERRIGAN, J; RICHARDS, J.

53 Cal. App. 1

O'NEILL v. WILLIAMS, City Auditor. (Civ. 3634.)

(District Court of Appeal, First District, Division 1, California. May 25, 1921.)

1. Officers ⟸94—Wrongfully removed public officer entitled to salary during exclusion from performance of duties on reversal of removal.

A public officer or employee wrongfully removed from office is entitled upon the reversal of his removal to the salary of the position during the time he was excluded from the performance of his duties by the erroneous order of suspension.

2. Municipal corporations ⟸184(3)—Adoption of ordinance reducing number of corporals held to create vacancy in position held by corporal.

Where the city charter empowered the council to fix the number of officers in the police department according to its judgment of the needs of the department, the adoption of an ordinance reducing the number of corporals from 14 to 7, pending a corporal's appeal from an erroneous order of suspension, and the appointment of others to the seven positions provided for by such ordinance, created a vacancy in the position held by such corporal, notwithstanding reversal of order of suspension by civil service commission.

3. Municipal corporations ⟸180(3)—Council held empowered to reduce number of corporals.

The city charter, having empowered the council to fix the number of officers in the police department according to the needs of the department, had the right to reduce the number of corporals, though in so doing it created a vacancy in the office of the corporal, who could be suspended only for good cause shown.

4. Municipal corporations ⟸126—Office created by ordinance may be abolished by ordinance.

Generally an office or position created by municipal ordinance may be abolished by ordinance, in which case the incumbent ceases to be an officer, even though by reason of having been appointed for a definite term, or by special statutory provision, he cannot be lawfully removed except for cause after a full hearing.

5. Municipal corporations ⟸126 — Charter provisions restricting power of removal refer to removals for lapse of duty, and do not restrict council's power to abolish offices.

Provisions of city charters restricting the power of removal of public officers and employees refer to removals for lapse of duty and the like, and are not a restriction upon the power of the council to abolish as many of the places or offices once provided for as it chooses, by abolishing the offices or places themselves, provided such action is taken in good faith.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Application by Thomas F. O'Neill for a writ of mandamus against Harry G. Williams, as Auditor of the City of Oakland. Judgment denying the petition and plaintiff appeals. Affirmed.

Ostrander & Carey, of Oakland, for appellant.

H. L. Hagan, City Atty., and T. J. Ledwich and Earl Warren, Deputy City Attys., all of Oakland, for respondent.

WASTE, P. J. The plaintiff sought a writ of mandate to compel the defendant, as auditor of the city of Oakland, to issue his warrant for salary claimed to be due for services as corporal in the police department of that city. The lower court gave judgment for the defendant, and the plaintiff has appealed.

The charter of the city of Oakland provides that the police department of the municipality, other than patrolmen, shall consist of a chief of police, captain of inspectors, and such captains, lieutenants, sergeants, corporals, and bailiffs as in the judgment of the council the needs of the service may require, who shall be appointed by the commissioner of public health and safety, subject to the civil service provisions of the charter. It is not incumbent upon the council, however, either to create or fill all of those positions. Oakland City Charter, art. 14, §§ 87–89. Proceeding under the charter provisions, the Oakland city council from time to time created 14 positions of corporal, one of which was held by the appellant. On May 21, 1919, he was suspended from the department by the commissioner of public health and safety, for alleged cause. His suspension continued until December 9th, following, when, on appeal, it was set aside and annulled by the civil service board.

After appellant was suspended, and before his appeal was sustained, the council passed

several ordinances relating to the police department, which became effective on June 30, 1919. The effect of these ordinances (No. 1612 [N. S.], No. 1617 [N. S.], inclusive), which for the most part were merely amendatory of existing ordinances, was to reduce the number of corporals then existing from 14 to 7. The positions thus provided for were thereupon regularly filled by appointment, and the incumbents continued to serve, and were thenceforth regularly paid their salaries, as corporals.

It is now appellant's contention that the effect of the resolution of the civil service commission, reversing the order of his suspension, was to restore him not only to membership in the police department, but also to the rank of corporal, and that he is entitled to the salary attached to that position for the whole time he was prevented from performing his duties.

[1] As to a portion of that period, appellant's contention holds true. It is a well-settled rule that a public officer, or employee wrongfully removed from office is entitled, upon the reversal of his removal, to the salary of the position during the time he was excluded from the performance of his duties by the erroneous order of suspension. Ward v. Marshall, 96 Cal. 155, 159, 30 Pac. 1113, 31 Am. St. Rep. 198. Consequently, appellant was entitled to salary as corporal from May 21, the day on which he was suspended until June 30, the date on which his position as corporal was abolished. As to that portion of the salary there appears to be no question, for it was apparently paid. Appellant was immediately appointed a sergeant of police upon his restoration to the department. Hence this appeal has to do only with appellant's contention that his status as corporal continued even after June 30th, and until the date of his restoration, and that he should be paid the salary attached to that position during all of that period.

[2, 3] The appellant admits that the number of corporals in the police department may, unquestionably, be fixed by the city council as in its judgment the needs of the service may require. He contends: First, that no vacancy was created in the position held by him by the adoption of the ordinance reducing the number of corporals; and, second, that if such was the result, it was in clear violation of the provisions of the city charter relating to removal from office and employment, and deprived him of the right to appeal to the civil service board. Neither contention is sound. In the first place, the charter itself vests in the council the power to fix the number of officers in the police department, as in its judgment the needs of the service may require. It cannot be supposed that the framers of the charter intended that after the police department was once organized, and its members finally appointed, the number so appointed must continue in office, whether the public needs require their retention or not.

[4, 5] It is a general rule, now well settled, that an office or position created by municipal ordinance may be abolished by ordinance, in which case the incumbent ceases to be an officer. Even when an officer, by reason of having been appointed for a definite term, or by special statutory provision, cannot be lawfully removed except for cause after a full hearing, his office may be summarily abolished whenever the municipal authorities deem it advisable. 19 R. C. L. 936, par. 236. It is equally well established by the decisions of the courts of many states that provisions restricting the power of removal, similar to those found in the civil service provision of the Oakland city charter, refer to removals for lapse of duty and the like, and are not a restriction upon the power of the council to abolish as many of the places or offices once provided for as it chooses, by abolishing the offices or places themselves, provided such action be taken in good faith. Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N. E. 797; People ex rel. Corrigan v. Mayor of Brooklyn, 149 N. Y. 215, 43 N. E. 554; Heath v. Salt Lake City, 16 Utah, 374, 52 Pac. 602.

The ordinance reducing the number of corporals from 14 to 7 resulted in abolishing just that number of positions. State ex rel. Quintin v. Edwards, 40 Mont. 287, 304, 106 Pac. 695, 20 Ann. Cas. 239. It was not pleaded, there is nothing in the record to show, nor do we find it asserted in the briefs, that the Oakland city council was acting in bad faith in reducing the number of corporals, or that the passage of the ordinances, which had the effect of abolishing appellant's position, was a pretext, or device to get rid of him, or any other member of the department. It does not appear that the number of corporals was at once, or ever has been, restored to the number existing when appellant was suspended. No one seems to have succeeded to the positions which were abolished. As was said in another case, it would "be difficult, if not inimical to reasonable deduction, to extract from the record, in the face of the presumption of good faith primarily to be accorded to the acts of the" council that the reduction in the number of corporals was made in bad faith. Venable v. Police Commissioner, 40 Or. 458, 466, 67 Pac. 203.

In answer to appellant's contention that to uphold the judgment of the lower court is to leave every officer and member of the police department at the mercy of a designing and evil-intentioned city council, we need only point out that the element of good faith must ever govern such matters. Fraud, deceit and intrigue, if shown, would defeat the object of any pretended praiseworthy action. An apt quotation from the highest court of

a sister state appeals to us in this connection:

"There is a real and fundamental distinction between the laudable abolition of an unnecessary position and the discharge of a faithful employee in violation of the rights secured to him by statute, and the latter action can neither be concealed nor protected by a pretense that it was an exercise of the former right." Garvey v. Lowell, 199 Mass. 47, 50, 85 N. E. 182, 127 Am. St. Rep. 468.

If fraud was present in the instant case, it has not been shown.

The fact that one of the seven positions of corporal provided by the ordinance in effect on June 30th was filled by certain appointments pending the return to active duty of a member of the department under temporary disability, did not alter the situation. The fact remains that appellant was not appointed to the position.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

52 Cal. App. 699

IBBETSON v. IBBETSON. (Civ. 3836.)

(District Court of Appeal, First District, Division 2, California. May 19, 1921. Hearing Denied by Supreme Court July 18, 1921.)

1. Appeal and error ⊂⊃931(1)—Presumption that every fact necessary to support judgment was proved and found.

Findings having been waived, it is presumed on appeal that every fact essential to the support of the judgment was proved and found by the trial court, and, where the evidence was conflicting, such presumption governs.

2. Husband and wife ⊂⊃264—Finding that there was no community property to divide held warranted.

Finding that there was no community property to divide between spouses on divorce *held* warranted under the evidence.

3. Divorce ⊂⊃312—Decree restraining wife from criticizing husband before children will not be disturbed on appeal no abuse of discretion being shown.

Regardless of whether an appeal may be taken from an order involving the custody of children, as Civ. Code, § 138, gives the superior court jurisdiction to modify it, an order in a divorce decree restraining the wife from criticizing the husband before their children or poisoning their minds against him will not be disturbed on appeal, the matter being left to the sound discretion of the trial court, and the record not showing the result of the court's examination of the children in chambers.

4. Divorce ⊂⊃312—Where trial court had children before it, orders as to their custody will not be disturbed.

Where the trial court had the children of the divorced parents before him in chambers, an order as to custody will not be disturbed on appeal; no abuse of discretion being shown.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action for divorce by Robert Edwin Ibbetson against Maude Rice Ibbetson who filed a cross-complaint. Decree for defendant granting divorce. From the portion of the decree as to division of property and the control of children, defendant appeals. Affirmed.

Newlin & Ashburn, of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

NOURSE, J. Plaintiff and respondent commenced an action for divorce charging desertion by his wife, and defendant and appellant answered, denying the allegations of plaintiff's complaint, and filed a cross-complaint for maintenance charging desertion on the part of plaintiff and alleging that the plaintiff had in his possession a large amount of community property, the nature and value of which she was unable to state. In his answer to the cross-complaint plaintiff denied that he had any community property in his possession, and in this behalf alleged that on the 11th day of November, 1911, plaintiff and defendant entered into a contract whereby the parties agreed upon a division of the community property and granted to each other all of their community rights and agreed that the property so segregated and apportioned to each other should be the separate property of that party, and that all rents, issues, and profits derived by each party from such property should be the separate estate of that party; also that all property acquired by either party thereto subsequent to September 1, 1911, should be and forever remain the separate property of such party. It appears that this agreement was made in pursuance of an order of the superior court made in an action brought by this defendant against this plaintiff for a divorce. This order, which was made on the 16th day of May, 1911, directed the entry of a decree of divorce of these parties, awarding to the husband the custody of the two sons of said parties and awarding to the wife the custody of their daughter, and directing the equal division of the community property. The agreement of November 11, 1911, in addition to providing for a division of the community property, required the husband to support and maintain the two sons whose custody he was given by the order of the court and required the wife to support the daughter. It was further agreed that the children of said parties should always be educated in religious schools at the cost and expense of the party having the custody of said children, as theretofore provided.

During the course of the trial plaintiff proceeded upon the theory that this contract was an executed agreement in so far as the property rights of the parties were concerned, that it was entered into upon the solicitation of the defendant to induce the plaintiff to go back and live with her, and that it was not a separation agreement. In accordance with this theory plaintiff contended during the course of the trial and still insists that the property acquired by him after the execution of the agreement was his separate property and that at the time of the trial there was no community property to be divided between the parties. On the other hand, the defendant proceeded upon the theory that the agreement was an executory contract in the nature of a separation agreement, that it had become abrogated by a later reconciliation, and that all property acquired by plaintiff subsequent to the execution of the agreement belonged to the community.

Though the defendant in her cross-complaint prayed for maintenance only, the court awarded her an absolute divorce, giving her the custody of all the children, with a monthly award of maintenance for herself and the children, but made no division or award of any community property. Findings of fact and conclusions of law were waived by the parties in open court. The defendant accepted the decree of divorce and the award of maintenance, but prosecutes this appeal from certain portions of the decree, assigning three grounds of error: (1) Failure of the trial court to make a division of community property; (2) the inclusion in the decree of an order restraining defendant from criticizing plaintiff before their children or poisoning their minds against him; and (3) the inclusion in the decree of an order permitting plaintiff to take his daughter from the mother's home to places within the city of Los Angeles for a period of six hours every alternate Saturday.

[1, 2] Findings having been waived, the presumption is that every fact essential to the support of the judgment was proved and found by the court, and that accordingly the court found that there was no community property. Bruce v. Bruce, 16 Cal. App. 353, 357, 116 Pac. 994; Dee v. Dee, 34 Cal. App. 658, 168 Pac. 588; Gray v. Gray, (Sup.) 197 Pac. 945. On the issue thus joined there is a substantial conflict in the evidence, with the exception that all the evidence, supports the theory of the plaintiff that the property settlement was made in comtemplation of some reconciliation between the parties, and that it was not a separation agreement. It is admitted, as recited in this agreement of November 11, 1911, that the wife had instituted divorce proceedings against her husband, and that an order of court was made that an interlocutory decree of divorce be entered in favor of the wife and making an equal division of community property. It does not appear that this decree was ever entered. However, acting upon the terms of the order, the parties entered into the agreement providing for the division of the community property and the support, maintenance, and education of the children. It is also admitted that deeds of conveyance passed between the parties in accordance with the terms of the agreement, and it further appears that none of its terms remained unexecuted except in so far as they related to the custody, maintenance, support, and education of the children. Each party took the property and dealt with it from that time on as his or her separate property. The rents, issues, and profits thereof were taken and used as the separate property of the respective parties. The home which by the terms of the agreement was assigned to the wife remained in her possession and the husband entered it by invitation only. Immediately after the execution of the agreement the parties traveled together to San Francisco, taking their two sons to a school in Berkeley, and soon thereafter made an extended trip to New York and through the South, traveling together as man and wife.

The testimony relating to the domestic relations of the parties from that time on is conflicting, but, taking it altogether, it is apparent that the trial court could justly conclude therefrom that whatever efforts were made toward a reconciliation had been unsuccessful. There is no dispute, however, that those portions of the agreement relating to the custody and care of the children were not carried out, but that at all times the wife retained the custody and control of the sons as well as of the daughter. A marked conflict in the testimony arises over the support of the children during this period, but at the close of the trial the court expressly ruled that the wife was not entitled to reimbursement for moneys expended in that connection.

The testimony relating to the properties of the respective parties is in direct conflict both as to the value of the properties held by each party and as to the manner in which respondent's property had been increased since the date of the agreement. Testimony was offered to the effect that appellant's property was of equal value to that held by respondent at the time of the execution of the agreement, and that it had increased proportionately to his since that time. It also appeared from the statement of the court made during the course of the trial that this increase in the value of the properties had occurred at a time when the parties were not living together as husband and wife. The evidence is such, therefore, that, if the trial court had expressly found that there was no

community property at the time of the trial, such finding would have been supported by the evidence. As findings were waived, this court must presume, in view of the rule heretofore referred to, that the court found that to be a fact proved.

[3] Appellant appeals from that portion of the judgment which restrains her from criticizing respondent before her children or poisoning their minds against him. It is argued that no issue was raised supporting this portion of the decree, that no evidence was offered showing the necessity for such injunctive relief, and that it is entirely unnecessary. Without determining that an order of this nature relating to the care and custody of minor children can be made the subject-matter of an appeal, when under section 138 of the Civil Code the superior court is given jurisdiction to modify or vacate it at any time, it is sufficient to say that such an order, being left to the sound discretion of the trial court, should not be disturbed on appeal merely upon the ground that it does not appear to be necessary. The pleadings involved the care and custody of the children and prayed for such relief as might be equitable, and this was sufficient to raise the issue. At the close of the trial the parties stipulated that the court might interview the children in chambers, and this was done. No record of what occurred during the course of such interview is presented, and this court cannot, therefore, say that the necessity for this portion of the order is not shown by the evidence.

[4] Appellant also appeals from that portion of the decree which permits the respondent to take his daughter from her mother's home on stated occasions. It is argued that because of the physical condition of the daughter it is not practicable to permit her to go from her mother's home in the company of the father, and certain testimony of the mother to this effect is referred to in support of the argument that this portion of the decree was an abuse of the discretion committed to the trial court. What has just been said in relation to the last point raised applies equally to this. The orders of the trial court relating to the care and custody of minor children whose parents are involved in divorce proceedings are directed to the best interest and welfare of the children, and are not to be used for the purpose of satisfying the prejudices of the parents. The court, having had these parties before it and having had the opportunity of interviewing the children in chambers in the absence of their parents, was far better able to determine what was best for the welfare of the children than is this court. There is no evidence in the record to support a holding that the court's discretion in this respect was abused.

For the reasons given, the judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 212

RUDIN et al. v. LUMAN. (Civ. 2255.)

(District Court of Appeal, Third District, California. June 15, 1921.)

1. Appeal and error ⊂=994(3), 1011(1)—Findings on conflicting testimony conclusive; inconsistencies in testimony of witness for trial court.

Finding of fact on conflicting testimony will not be disturbed on appeal, though there may be inconsistencies in a witness' testimony, unless they develop a palpably incredible or improbable story.

2. Principal and agent ⊂=146(2)—Undisclosed agent, contracting as principal, liable as such.

An undisclosed agent, contracting as principal, is liable as such.

3. New trial ⊂=89—Testimony reasonably and naturally to be expected in proof or denial of fact relevant to issue not ground of "surprise."

Not alone testimony clearly within the issues presented by the pleadings, but testimony which might reasonably and naturally have been expected in proof or denial of a fact relevant to the issue, as where the issue was whether defendant hired horses of plaintiff, and defendant, claiming the hiring was by T., introduced an order of T. on defendant to pay plaintiff for the hire, and plaintiff denied having seen the order, is not ground of "surprise" within Code Civ. Proc. § 657, subd. 3, as regards new trial; but surprise within the statute must be the result of some fact or circumstance or situation occurring at the trial which could not in the nature of the case reasonably have been anticipated, and is of such importance in its influence on the result arrived at as to have produced injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Surprise.]

4. Appeal and error ⊂=981—New trial ⊂=99—Whether granted for newly discovered evidence discretionary.

Whether new trial will be granted for newly discovered evidence is a matter addressed to the discretion of the trial court, with the exercise of which interference is not justified, unless it clearly appears that the discretion has been abused.

5. New trial ⊂=101—Evidence known of before trial not newly discovered.

Evidence, known of by a party at and before the trial, is not newly discovered as regards granting him a new trial, where the witness who could give the testimony was not present at the trial.

6. Appeal and error ⟸1015(5) — Whether there was proper diligence to secure attendance of witness question for trial court.

Whether there was proper diligence to secure attendance of witness, for whose absence new trial is sought, is a question of fact, under all the circumstances, for the trial court; no legal steps to secure his attendance having been taken, but reliance having been placed on his promise to attend.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Jacob Rudin and another against W. E. Luman. Judgment for plaintiffs, new trial denied, and defendant appeals. Affirmed.

Jerome D. Peters, of Chico, for appellant. J. O. Goldstein, of Chico, for respondents.

HART, J. The plaintiffs brought this action to recover from the defendant the sum of $663.25. The complaint is in two counts, in the first of which it is alleged that the plaintiffs rented and hired to the defendant, between the 8th day of July, 1918, and the 1st day of November, 1918, 14 head of work horses, "at the agreed price and rental of 75 cents per day for each horse; that the said defendant received the said horses on the 8th day of July, 1918, and used and worked them continuously for the period of time" first hereinabove mentioned, and that by reason of the use of said horses so hired to defendant the latter became indebted to the plaintiffs in the sum of $771.75, of which amount the defendant has paid plaintiffs the sum of $140, leaving a balance due and owing to them by defendant in the sum of $631.75. In the second count it is alleged that plaintiffs, between the 8th day of July, 1918, and the 1st day of November, 1918, sold and delivered to defendant a one-half set of harness at the agreed price of $20 and one "Yankee Bridger" at the agreed price of $11.50, making a total of $31.50, which the defendant has refused, and still refuses, to pay. The defendant answered each count of the complaint with specific denials and also set up in bar of the action stated in each count the statute of frauds. Civ. Code, § 1624, subd. 2. Judgment passed for the plaintiffs. Thereafter and in due time the defendant noticed and pressed a motion for a new trial, which motion was denied. Said motion was made upon affidavits and the minutes of the court, the grounds thereof being: Insufficiency of the evidence to justify the decision and judgment; "accident or surprise which ordinary prudence could not have guarded against"; newly discovered evidence material for said defendant, which he could not, with reasonable diligence, have discovered and produced at the trial. This appeal is by the defendant from the judgment.

There are but two points urged for a reversal, viz.: (1) That the evidence does not support the findings; (2) that the court abused its discretion in denying defendant's motion for a new trial. Neither of these points can be sustained.

As to the first point, it is well first to explain that the defendant did not deny at the trial that he carried on and consummated the agreement for the hiring of the horses with the plaintiffs, but claimed that in making the agreement he was acting for one J. W. Taylor, and that he so informed plaintiff Jacob Rudin, between whom and defendant the negotiations culminating in the agreement were had, at the time the negotiations were under way.

It appears that the defendant was, at the time the transaction herein involved took place, a hay and grain broker in the city of Chico, and that he had a contract with the general government to supply it with a certain quantity of baled hay and straw; that among others employed by him to bale hay and straw for that purpose was one J. W. Taylor, who was running or overseeing the work of baling by means of hay presses at what the witnesses designated as the "Nelson" place, in Butte county.

The plaintiff Jacob Rudin testified that, on the 7th day of July, 1918, the defendant called at his ranch and proposed to Rudin to hire or rent a number of the latter's work horses, to be used in the work of gathering and baling hay and straw on the Nelson place. After some discussion of the proposition, Rudin finally agreed to let defendant have 11 head of his horses at the rate of 75 cents per day for each horse. The defendant thereupon employed one Conrad Shepp to take the horses to the Nelson place, and the horses were used from the date of the hiring until about the 29th day of September, 1918. On the 16th day of July, 1918, proceeded Rudin's testimony, the defendant hired from plaintiffs, to be used for the same purpose, three other horses, and used and worked those from the date just mentioned until August 10, 1918. The same price as was agreed to be paid for the use of the horses first obtained was to be paid for the use of the last three hired by defendant. Jacob Rudin testified that the defendant paid him by his (defendant's) check $140 on account, and that after the defendant ceased using the horses and they were returned to him he, on several occasions, demanded of defendant a full settlement of the amount due him, but that defendant, while not denying his indebtedness to plaintiffs for the hire of the horses, would put him off by saying that he was then without sufficient money to extinguish the debt, explaining, however, that the government was indebted to him (defendant) in a large sum, and that when he

received payment from the government he would pay what he owed to plaintiffs.

Said plaintiff also testified that he let defendant have the harness and the "Yankee Bridger" or "breeching" mentioned in the second count of the complaint, but that defendant had never paid for those articles. In this connection it should be stated that, while it is not disputed that the defendant obtained from plaintiffs the articles just referred to, it is not clear from the evidence whether said articles were sold to the defendant or merely loaned to him by plaintiffs. The plaintiff Jacob did testify, however, that he made a demand on defendant for the value in money of the harness and breeching or their return, but that defendant stated that he did not know what had become of them, referred Jacob to J. W. Taylor for information as to their whereabouts, and that they (plaintiffs) had never received them back or their value in money, which he stated were the amounts, respectively, alleged in the complaint.

In his cross-examination of Jacob Rudin, counsel for the defendant undertook to induce him to say that, when defendant hired the horses, the latter stated to him (Jacob) that he (defendant) was acting in the transaction for said J. W. Taylor, and that the latter was to compensate plaintiffs for the use of the horses. Counsel further likewise attempted to show by Jacob that he was paid by defendant the $140 on account upon a written order by Taylor on defendant, requesting such payment. In connection with the latter cross-examination, counsel for defendant exhibited to Jacob a writing purporting to be the order referred to.

In response to the cross-questioning above adverted to, Jacob Rudin positively testified that, at the time the agreement was made for the hire of the 11 head of horses, he did not know nor had he ever heard of J. W. Taylor; that defendant did not refer to Taylor when the negotiations were in progress for the hire of the horses, nor did he state to Jacob that he was acting for any other person but himself; that, as to the written order referred to, and which was given to him for inspection by counsel for defendant, he declared that he had never received such a writing from said Taylor or any other person; that he did not present such a paper to defendant at or before the time the latter paid him by check the $140, and that he had never seen the writing until it had been shown him by defendant's attorney during the course of the latter's cross-examination of him.

John Rudin testified that a few days prior to the day on which defendant hired and took possession of the 11 head of horses defendant approached and asked him whether he would hire the horses to him, to be used for the purpose above explained; that he replied that he did not approve of letting his horses out for such use, but referred defendant to his (John's) brother Jacob.

Conrad Shepp testified that he was employed by defendant to take the horses to the Nelson place; that, after getting the horses to said place, he asked defendant for compensation for the services so performed, and stated that he (Shepp) thought $5 would constitute reasonable compensation for his labor; that defendant protested that the demand was exorbitant, and "kicked about it," but finally paid the witness the amount demanded.

[1, 2] The above is, in substance, the evidence presented by the plaintiff. A different story is told by the defendant, and in a measure it is corroborated by the testimony of other witnesses. It is not necessary to present herein a statement of the facts to which the defendant and his witnesses testified. It is enough to say that the adversary showing thus made had the effect only of producing a conflict in the evidence addressed to the vital points of the controversy and as to conflicts in the evidence upon a disputed question of fact, which are substantial, the rule is too well known and understood to require its repetition here. The reviewing courts, as often it has been repeated, are not charged with the duty of weighing testimony, and thus determining conflicts which may exist therein. The law, with singular wisdom, has committed that responsibility to the trial courts; and this is also true as to any inconsistencies which may appear in the testimony of a particular or any witness. Such inconsistencies, if any there be, are, of course, always to be considered by the trial court in its determination of the question of how much credence, if any, should be given the witness whose testimony is thus characterized, and therefore how much weight his testimony is entitled to. If they do not develop a palpably incredible or improbable story, then the acceptance or rejection of the testimony by the trial court is conclusive upon a reviewing court. In this case, the circumstance of the presentation in evidence of the purported written order of the said J. W. Taylor upon defendant, requesting the latter to pay plaintiffs $140, the said payment to be charged by defendant to the account of Taylor, is strongly emphasized by the defendant here as confirmatory of his contention or defense that the horses were hired by him for Taylor, and not for himself. That circumstance, it may be conceded, reveals rather a strange situation in the case, yet Jacob Rudin, as seen, denied that he ever presented such an order to defendant or that he had ever seen the writing introduced in evidence until the trial of this action was in progress. Thus a question was raised as to whether said Rudin had in fact ever been given such an order by Taylor, and it was for the trial court to determine that question upon the conflicting evidence addressed thereto. More-

over, even if it were true that defendant was acting for Taylor in the transaction eventuating in the hiring of the horses, and that such an order was given Jacob Rudin, and that upon it the defendant paid plaintiffs the $140, still, as may be recalled, Jacob Rudin testified that at no time did defendant inform or say to him that he was acting for Taylor in said transaction. If this is true, then the plaintiffs had the right to act in the transaction upon the assumption that they were dealing directly with defendant, and, besides, having thus held himself out as the principal in the deal, the defendant became liable to plaintiffs for the contract and its legal consequences. We are not able to say that the court abused its discretion in denying the defendant's motion for a new trial.

We have already in the above discussion considered the first ground of the motion, to wit: That the evidence is insufficient to justify the decision and judgment of the court. We now have only to consider the second and third grounds of the motion, viz. "accident or surprise which ordinary prudence could not have guarded against," and "newly discovered evidence material for the defendant which he could not, with reasonable diligence, have discovered and produced at the trial." As stated, the defendant presented affidavits in support of the motion; one of said affidavits being by the defendant himself and the other by the J. W. Taylor referred to above.

The defendant in his affidavit stated that said J. W. Taylor was the party who hired said horses, and that about two weeks prior to the time of the trial of this action he called on said Taylor, "who told him that he would be present at said trial, without need of subpœna, and at said trial would testify that he was the one who had hired said horses through the agency of the defendant, and that he had had money demanded of him for said hire by the plaintiffs, and as a result of one of said demands had given to the plaintiff Jacob Rudin an order in writing upon the defendant W. E. Luman, for a certain sum of money, which said order requested said Luman to pay Jacob Rudin the amount stated therein and to charge the same to the account of J. W. Taylor, which said order is now in evidence presented at the trial of the foregoing case; that relying upon the promise of said Taylor to be present and be a witness, the defendant prepared for trial, and only discovered at the time of the trial that the said Taylor would not be there." The defendant further deposed:

"That he was taken by surprise at the trial by the denial of Jacob Rudin that the order above referred to was presented by said Rudin to the defendant and that the latter accepted the same, and consequently the defendant did not produce any witness to the fact of such presentation of such order by said plaintiff except himself, but at the time of the presentation of such order M. L. Warnick was working in his office and the defendant has discovered since said trial that she remembers the presentation of said order by the said plaintiff Jacob Rudin, and of his accepting a check in accordance therewith."

J. W. Taylor stated in his affidavit that he hired the horses mentioned in the complaint from the plaintiffs for the purpose of running his bailing outfit, and that he was responsible for the hire thereof; that if he had been present at the trial of said action he would have so testified; that the defendant came to him two weeks prior to said trial in Chico, Butte county, and asked him if he would be a witness at the time of said trial on June 8, 1920, and that he told said defendant that he would be such a witness and be present at said time; that subsequent thereto and prior to the date of said trial, and in order to avoid being a witness at said trial, the said affiant without acquainting the defendant with the fact, left the county of Butte and went to the town of Willits, in Mendocino County, Cal.; "that the reason he so left was that he would have had to testify that the horse hire sued upon was his hire, and that he did not wish at that time to testify thereto, owing to the fact that the plaintiffs in said action might have sued him therefor." Taylor also deposed that the order referred to above was actually delivered by him to the plaintiff Jacob Rudin on the date in said order specified, and that it was delivered to Rudin for the purpose of presentation to defendant, to the end that said defendant would pay the amount of said order.

[3] It is well settled that it is no ground for granting a new trial because of surprise, where the "surprise" is caused by evidence which is clearly within the issues presented by the pleadings. Santa Cruz Rock Pavement Co. v. Bowie, 104 Cal. 286, 37 Pac. 934; Francisco v. Benepe, 6 Mont. 243, 11 Pac. 637; Wilson v. Waldron, 12 Wash. 149, 40 Pac. 740; Salida Building & Loan Ass'n v. Davis, 16 Colo. App. 294, 64 Pac. 1046; Washington v. Byers, 7 Kan. App. 812, 53 Pac. 150.[1]

A party to an action, after issue has been joined, is always to be presumed to know precisely what he is expected to prove or disprove to prevail. In other words, presumably he knows what the issue to be tried is, and it is to be assumed that he will not, without protest or objection, enter upon the trial of the issue in the absence of such preparation as he may make to meet such issue or any questions of fact relevantly arising, or which may naturally be expected to arise, under the issue or issues as framed by the pleadings. If, as is often true, testimony in proof

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in the Kansas Reports.

or denial of some important fact or circumstance relevant to the issue is given against a party, and he finds himself unprepared to make a counter showing relative thereto because he did not anticipate that any such testimony would be given, he cannot, if the decision is against him, justly claim that he is entitled to a new trial on the ground of surprise caused by the testimony so given, or the denial so made, unless such testimony or denial is so far afield from what might reasonably and naturally have been expected to be made in view of the nature of the issues to be tried as to place him unexpectedly at a serious disadvantage or to cause him to suffer injury therefrom without any default or negligence of his own, which ordinary prudence could not have guarded against. McGuire v. Drew, 83 Cal. 225, 23 Pac. 312; Brandt v. Krogh, 14 Cal. App. 39, 60, 111 Pac. 275.

In the instant case, the question whether the defendant hired the horses was the sole issue. The precise defense which defendant expected to develop by his proofs was not disclosed by his answer; he merely denying the allegation of the complaint that he hired the horses. He, of course, when he filed his answer, well knew the theory or the facts upon which he expected and intended to rely to defeat the plaintiffs' claim, and knowing all this, as well as the claim set up against him by the plaintiffs in their complaint, he must necessarily have expected that the latter would attempt by proof to negative the effect of any important fact or circumstance which he might undertake to establish in support of the denials of his answer. Of course, he might have been surprised on hearing the denial by Jacob Rudin that he was given by Taylor the order on him (defendant) for money on account of the hire of the horses, or that he (said Rudin) ever saw said order until the trial; but the surprise thus brought to him is not the "surprise" which the statute (Code Civ. Proc. § 657, subd. 3) contemplates shall constitute a ground for the granting of a motion for a new trial. The "surprise" mentioned by the statute must be the result of some fact or circumstance or situation occurring at the trial which could not in the nature of the case reasonably have been anticipated would arise and which is of such importance or magnitude in its influence upon the result arrived at from the trial as to have produced as against him or his rights injury or damage. The mere giving of testimony contrary to the interests of a party, or even the fact that false testimony has thus been given, although wholly unexpected by the party against whom it is given, will not itself always operate as a predicate for the awarding of a new trial of the issue. Of course, if a vanquished party has been misled by a witness as to the nature of the testimony he intends to give, or if perjured testimony has unexpectedly been given, and it may justly be said that in either case such testimony has influenced the decision in any manner or degree, it might be proper to grant a new trial upon a satisfactory showing by such party either that, relying upon the statement of the witness as to what he would testify to, he made no preparation to have at the trial testimony, available to him, which would have tended to overcome the effect of the testimony of such witness, or that the testimony was false or prejured. No such showing was made in this case.

[4-6] As to the other ground of the motion, to wit, "newly discovered evidence," etc., it is also to be remarked that the granting or refusing to grant a new trial on that ground is a matter which is addressed to the discretion of the trial court, with the exercise of which discretion interference is not justified unless it is clearly made to appear that it has been abused. This rule is so thoroughly settled in this state that it has become elementary in our practice, and the citation of authorities to confirm this statement is not necessary. But the "newly discovered" evidence to which the affidavits presented by defendant refer is, as a matter of fact, not newly discovered. Of the existence of that evidence before and at the time of the trial the defendant was, of course, fully aware; and that Taylor's testimony would be of singular importance as tending to establish his defense he also knew, for not only in his affidavit does he depose but at the trial he testified that, some 10 days or two weeks prior to the date fixed for the trial, he verbally informed Taylor of the date set for the trial, and likewise requested him to be present and testify in his (defendant's) behalf. Further than that, defendant made no effort to secure the attendance of Taylor at the trial. He did not have a subpœna issued for him or take any legal steps to secure Taylor's presence at the trial. Moreover, when the case was called for trial his counsel announced that defendant was ready to proceed; no objection to going on with the trial upon the ground of the absence of Taylor having been made by him. It was for the trial court to say, from all the circumstances disclosed, whether the defendant had exercised proper or reasonable diligence in attempting to procure the attendance of Taylor at the trial. As above stated, we are not prepared to hold that the trial court was wrong in deciding that such diligence was not shown, or that, upon the whole record, the court abused its discretion in denying the motion for a new trial upon the ground here considered.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

53 Cal. App. 142

SMITH v. ASSOCIATED OIL CO.
(Civ. 3729.)

(District Court of Appeal, First District, Division 1, California. June 10, 1921.)

1. Negligence ⟸108(1)—General allegation sufficient.

A complaint charging in general terms that the act complained of was done negligently, and caused the injury, is sufficient.

2. Explosives ⟸10—Property owner held contributorily negligent in lighting match near spilled distillate.

A property owner, who knew that distillate was a volatile and inflammable substance, and that defendant's employee had spilled some upon plaintiff's premises in filling a drum, was contributorily negligent as a matter of law in lighting a match within 6 feet of the drum and throwing the match on the ground.

3. Negligence ⟸136(8)—Contributory negligence question of law on undisputed facts.

Contributory negligence is a question of law for the court, where the facts are undisputed and the dictates of common prudence point to only one reasonable conclusion therefrom.

Appeal from Superior Court, Fresno County, H. Z. Austin, Judge.

Action by E. Porter Smith against the Associated Oil Company to recover damages for the destruction of property by fire. Judgment for plaintiff, and defendant appeals. Reversed.

Johnston & Jones, of Fresno, and Edmund Tauszky, of San Francisco, for appellant.

Henry Hawson and M. K. Harris, both of Fresno, for respondent.

WASTE, P. J. The plaintiff brought this action to recover for damages suffered by reason of the burning of his dwelling and other buildings, the cause of the fire being attributed to the negligence of an employee of the appellant in spilling a quantity of distillate upon the ground while engaged in filling a 50-gallon drum placed close to plaintiff's house. The defendant denied any liability in the matter, and as a separate defense alleged that the destruction of the property was caused by plaintiff's carelessness and negligence in lighting a match in proximity to the inflammable substance, and that plaintiff alone was at fault in causing the fire. Trial was had by a jury. At the conclusion of plaintiff's case defendant moved for a nonsuit, which was denied. The jury rendered a verdict in favor of the plaintiff in the sum of $2,283. The appellant moved for a new trial on the ground that the evidence was insufficient to support the verdict, and that it was against law, and that the court had made errors in the conduct of the trial which were excepted to by the appellant. The motion was denied, and defendant appeals from the judgment.

[1] Appellant's first contention is that the complaint does not state facts sufficient to constitute a cause of action. The negligence was charged in general terms, it being alleged that the filling of the distillate drum by appellant's employee was done negligently by him, and caused and contributed to the injury to plaintiff's property. The demurrer to the complaint was therefore properly overruled. Hughes v. Warman Steel Co., 174 Cal. 556, 559, 163 Pac. 885.

The testimony as to what occurred in connection with the fire which destroyed respondent's buildings is clear, and presents no material conflicts. The appellant regularly supplied customers in the vicinity of Fresno with gasoline and distillate. The respondent, a general contractor and builder, was at the time engaged in farming. He had had 15 years' experience in the use of gasoline engines and with automobiles. He was familiar with the engine distillate and knew that it was volatile, explosive, and highly inflammable. He had three engines on his place, in one of which he was using distillate on the day of the fire. It was supplied from a tank partly buried about 10 feet from the engine. A reserve supply of distillate was kept in a drum, placed on a rack about 2 feet high, situated in a passageway about 10 feet wide, between the dwelling house and the tank house. This space was roofed over, but open at the ends. The distillate for the engine running low, the respondent drew out all there was in the reserve drum, and replenished the engine tank. Just then the appellant's supply wagon came along, driven by its employee, Thomas. The respondent told Thomas that he had just emptied the reserve drum, and requested him to put 35 gallons of distillate in the tank which was feeding the engine and to put 50 gallons into the reserve drum—"to fill them up." There was some conversation between the two men as to the exact number of gallons the drum would hold, but the fact remains that respondent directed appellant's employee to fill both tanks. Thomas proceeded to fill the tanks, carrying the distillate from the supply wagon in 5-gallon buckets, and pouring the contents into the tanks by means of a large funnel. As he was filling the reserve drum in the passageway the fire occurred. Just how and why it occurred is best told by the most interested witness, the respondent himself. He testified:

"He (Thomas) filled up—put the 35 gallons in the other tank, and then was filling this one, and as he came on with his last gasoline. I didn't know, of course, what had been put in—taking in the last cans anyway— We walked in together, and I had my pipe in my mouth all the time, and I was just fixing to light it as we walked in with the cans of gasoline, the last

he put in the drum, and as he walked in— this drum that he was filling was sitting at the corner of my house, and I walked over deliberately to the tank house where I struck the match. I struck the match against the tank house, to light my pipe—had got there on the side of the tank house, and was holding the match at my pipe like this (indicating), and Mr. Thomas said he had got too much. He said, 'Gee, I have got more now in that than it will hold,' and I turned— I was standing more or less with my back toward him, and as I turned there was a flash of flame. I saw the gas running over and I threw the match away, and a flame came—came all at once. * * * The drum that was being filled was in the sun. A kind of a slow breeze was blowing directly from the tank toward me—where I was standing. The distillate had run on the ground quite a bit. * * * It was streaming down on to the ground. * * * There was a flash, and then there was quite a number of places caught fire on the ground between me and the tank."

We think little more need be said in reversing the judgment in this case. The respondent was able to get by the demurrer to his complaint, because he alleged that the distillate gas was ignited by contact with the flame of a match, lighted by him without knowledge, and in ignorance of the fact that that any distillate had been spilled, or was overflowing on the ground. He has proved himself out of court. When he threw the lighted match away, he knew the distillate was overflowing the tank and streaming over the ground. He said on the stand that he was from 12 to 15 feet away. In his complaint he placed the distance at 10 feet. Thomas testified he was but 6 or 8 feet away. The respondent made no investigation when he went into the passageway to ascertain whether any distillate had been spilled in the process of filling the drum. Yet he testified that he knew it would be dangerous to light his pipe if any had overflowed. Aside from the common knowledge of the dangers attendant upon lighting matches near such highly inflammable and volatile substances as distillate, the respondent had the more intimate knowledge and experience already alluded to.

[2] Under all the circumstances of the case we conclude that the respondent, in lighting his pipe and in throwing the lighted match away, after he was aware that distillate was flowing on the ground, did not act in the exercise of that due care required of a man of ordinary experience and sagacity. It was not to be anticipated that such an act would follow the spilling of the distillate. The proximate cause of the loss of the respondent's property was his own negligent act, and he cannot recover for the resulting damage.

[3] When evidence is conflicting, the question of the contributory negligence of a plaintiff is one for the jury to determine under proper instructions from the court. But where, as here, the facts are undisputed, and the dictates of common prudence point to only one reasonable conclusion, the question is then one of law for the court. Catlin v. Union Oil Co., 31 Cal. App. 597, 609, 161 Pac. 29; Glascock v. Central Pacific R. R. Co., 73 Cal. 137, 141, 14 Pac. 518.

The motion for a nonsuit was erroneously denied. The motion for a new trial should have been granted.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

53 Cal. App. 147

KORKMAN v. HANLON DRY DOCK & SHIPBUILDING CO. (Civ. 3533.)

(District Court of Appeal, First District, Division 2, California. June 10, 1921. Hearing Denied by Supreme Court Aug. 8, 1921.)

1. False imprisonment ⟸15(3)—Arrest by corporate officer held within scope of employment.

The president and general manager of a shipbuilding corporation who was charged with the duty of keeping the work going, and whose decisions in that respect were final, acted within the scope of his employment in causing the arrest of a carpenter who had reported to his union that machinists were doing carpenters' work on the ships, where the arrest was made for the purpose of preventing the carpenters from being called off the work.

2. False imprisonment ⟸15(3)—Corporation liable for arrest by officer to prevent interference with business.

A corporation is liable for a false imprisonment caused by its president, acting within the scope of his authority, for the purpose of preventing interference with the corporation's business, though it would not be liable for such imprisonment caused for the purpose of punishing an offense committed against the corporation's property.

3. Appeal and error ⟸994(2)—Explanation of cause of arrest disbelieved by jury need not be considered.

On appeal from a judgment for plaintiff, in an action for false imprisonment, the court need not consider the explanation for the arrest given by defendant's president, which was evidently not believed by jury.

4. False imprisonment ⟸39—Whether president acted as corporate agent, and not as deputy sheriff, in making arrest held question for jury.

In an action against corporation for false imprisonment where the evidence showed plaintiff was arrested by defendant's president, who also held a commission as deputy sheriff, but there was evidence that the president ordered the arrest to prevent interference with the progress of shipbuilding, it was a question for the jury to decide whether the president was

acting as peace officer or as defendant's agent, and it was wholly immaterial how much of defendant's capital stock the president owned, and what his intention was in making the arrest.

5. False imprisonment ⊜40—Refusal to give instructions as to intention to act as deputy sheriff held not error.

In an action for false imprisonment, where it appeared that defendant's president who caused the imprisonment was also a deputy sheriff, it was not error to modify a requested instruction that if the president intended to act as deputy sheriff the corporation was not responsible for his act by substituting the word "acted" for the words "intended to act," since a finding as to his legal intention is included in a finding as to his act.

6. False imprisonment ⊜22—Facts held not to raise presumption that defendant's president acted as deputy sheriff in making arrest.

Though there is a presumption that a peace officer, whose principal occupation was such, acted as an officer in making an arrest at the direction of a corporation, and even if he was at the time a special agent of the corporation, there is no such presumption where the arrest was made by the president of corporation to prevent interference with its business, though the president was also a deputy sheriff, who, however, had made no arrests theretofor during the five years he had held his commission.

7. False imprisonment ⊜40—Instruction on duty after arrest held correct under evidence.

In an action for false imprisonment an instruction as to the duty of one making an arrest to take the person arrested immediately before a magistrate, as required by Pen. Code, § 849, was properly given where it appeared plaintiff was confined for 25 hours without a hearing as a direct result of his arrest, though that section would not have applied if the confinement had been the result of an independent investigation by the police officers subsequent to the arrest.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by E. F. Korkman against the Hanlon Dry Dock & Shipbuilding Company to recover damages for false imprisonment. Judgment for plaintiff, and defendant appeals. Affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

W. F. Sullivan and W. G. Holmes, both of San Francisco, and Stetson & Thompson, of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against it for $1,500 for arrest and false imprisonment of the plaintiff. The plaintiff alleged that on May 8, 1918, the defendant, by and through its agent and servant D. J. Hanlon, its president, at the place of business of the defendant corporation, caused the plaintiff to be arrested without warrant; that at the instigation and request of defendant, through its said agent, plaintiff was taken to the city prison of Oakland and there imprisoned without warrant, and without any charge being made against him; that he was restrained of his liberty for 25 hours, and was then released without any charge being made against him, and without any hearing before any court or magistrate. Plaintiff then alleged that said arrest and imprisonment were malicious and without probable cause.

Defendant denied the allegations of the complaint, and as a separate defense set up that D. J. Hanlon, the president of the defendant corporation, was at all the times mentioned a duly appointed and acting deputy sheriff of the county of Alameda, and that said D. J. Hanlon made the arrest of plaintiff, as such peace officer, for reasonable and probable cause, and immediately turned the plaintiff over to the police officials of the city of Oakland, and to the Department of Justice of the United States; that said D. J. Hanlon had no authority at any time from the defendant to make or cause the arrest of the plaintiff, or any other person; that it was not within the scope of the employment or authority of said D. J. Hanlon, as president and manager of said defendant company, to cause the arrest of plaintiff.

The cause was tried before a jury, which found for the plaintiff, and assessed his damages at $1,500.

The first objection made by the appellant is that the record does not disclose facts showing Mr. Hanlon's authority to represent the corporation in arresting plaintiff. There was no evidence of any express authority, and the trial court so instructed the jury. Nor was there any claim that there had been a ratification of his act. The case was submitted to the jury upon the theory that it was justified in finding that Mr. Hanlon was impliedly authorized as the agent of the corporation to make the arrest and to cause the imprisonment.

Our first inquiry is as to whether the action of Mr. Hanlon in causing the arrest of plaintiff was committed in the scope of his employment, and as a part of the transaction of the business of the principal. Johnson v. Monson (Sup.) 190 Pac. 635. This makes necessary a somewhat detailed discussion of the facts. Mr. Hanlon was the president of the defendant company; he owned 88 per cent. of its stock. He testified that he was always at the shipyards to "meet" trouble there; that he was the "boss" at all times; that his decision was final upon questions "put up" to him; that he saw what was necessary to be done for the welfare of the business and ordered it done, and saw that his orders were carried out. The plaintiff was a carpenter working on the

Santa Flavia, a boat being constructed by the defendant corporation. He was an officer of his trade union, and as such entered into some controversy with the foreman of the machinists working on the ship as to whether the work of boring holes for davits was properly the work of carpenters or machinists. The plaintiff insisted that the work should fall to the lot of the carpenters; the foreman of the machinists insisted upon having the machinists do this work. The evidence is conflicting as to what was said in this argument. There is testimony that plaintiff said he would report to his union, and that he would have all the carpenters called from the work by the union.

This trouble was reported to Mr. Hanlon by the superintendent. Mr. Hanlon, who was a director of the company, and Mr. Foard, another director, went down to the ship. Mr. Hanlon made inquiries as to the name of the carpenter causing the trouble. He testified that he knew that if this man reported to his union that machinists were doing carpenter's work that the union would call off all the carpenters, as it was a rule of the union that no one other than a carpenter was to be permitted to do ship carpenter's work. When asked why the superintendent was not asked to look after this trouble, Mr. Hanlon testified that he had been called upon because it was known that he might have a little more authority than the superintendent in case of a row; that he was a "little better equipped" for trouble. He further testified that if there was going to be any trouble at any time at the yards he always wanted to know if he was "going to be allowed in it, or not."

Mr. Hanlon carried out his purpose in the following manner, according to the testimony of the plaintiff:

"On the 8th day of May, in the afternoon there was a gentleman from the yard come on board of the ship at 4:10 in the afternoon and he told me I was wanted on the telephone in Mr. Hanlon's office. There was a telephone, he said, for me. So I got off the ship and was going up to the office and I met a deputy sheriff. I don't know his name. He wore a deputy sheriff's badge. I met him about halfways on the road to the office. When he met me he said: 'Come along with me,' and I thought I was going for the telephone message, and I followed him up. I thought he was going to direct me to the office, which he did, and when I came up there he brought me into Mr. D. J. Hanlon's office where I saw Mr. Hanlon. Mr. Hanlon asked me what business I had to interfere with certain machinists doing certain kind of work on board the ship, and I answered Mr. Hanlon that I did not interfere with them, with these certain machinists doing that kind of work. Mr. Hanlon said 'Well, you have brought it up to the union headquarters, or informed your business agent that they were doing it,' and I said 'Yes, I have.' And so Mr. Hanlon said, 'I am going to send you where you belong, and all such like as you,' and Mr. Hanlon hollered, 'Get the wagon; get the wagon,' and he told the deputy sheriff, 'Take him back to the ship and get him his coat and hat;' and the deputy sheriff took me back to the ship, and I got my coat, and he took me back to the office, and when I got back the Oakland city police patrol wagon was outside of Mr. Hanlon's office, and this deputy sheriff."

On the witness stand, Mr. Hanlon was asked if he thought that arresting the plaintiff was necessary to hasten getting out the Santa Flavia. To this question, he replied:

"I do because when we got him out of there we didn't have any trouble. We could get the work to go ahead, and if he was left there the work would stop."

[1] From these facts it appears clear that Mr. Hanlon was acting within the scope of his employment, and in pursuance of the object for which he was at the shipyards, which he stated was to give directions about anything necessary for the welfare of the business, and see that his orders were carried out. The fact that he committed a tort —that he did something which his principal could not legally—do does not change the rule under modern decisions. Johnson v. Monson, supra.

[2] Appellant cites numerous cases holding that an agent can have no implied authority to institute criminal proceedings for a corporation, as the institution and prosecution of criminal proceedings are not in aid of the transaction of the corporate business. We have carefully read all of the cases cited, but find that there is a clear difference between such cases and the present one. That difference is the one emphasized in the case of Allen v. London, etc., L. R. 6 Q. B. 65, which is the leading case on the subject, and which is cited in practically all of the cases relied upon by appellant here. The distinction is that where one, to prevent or terminate a present interference with the business or property of his principal, takes a certain step, such as ordering the arrest of a person, that is in furtherance of his duty as manager of the business, or custodian of the property; but where one causes the arrest of another for an offense that has already been committed, such arrest cannot aid in the business of the principal nor serve to protect the principal's property. When the offense has been already committed, punishment therefor is entirely disassociated from the conduct of the principal's business. In the case of Allen v. London, etc., supra, it said:

"There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done."

In the present case the conduct of the plaintiff, to which Mr. Hanlon objected, was continuing, and it was in an effort to stop this

that the arrest was made. If the plaintiff had caused his union to call a strike in the shipyards, and had thus stopped the work upon the ships, and, thereafter, Mr. Hanlon had sought him out and had him arrested, such arrest would clearly not have been in furtherance of the work of the company nor within the scope of Mr. Hanlon's employment, but would have been merely an act to avenge a supposed wrong. Daniel v. Atlantic Coast R. Co., 136 N. C. 517, 48 S. E. 817, 67 L. R. A. 455, 1 Ann. Cas. 718. This would not have been an object within the scope of the duties of any agent of the corporation.

The distinction above pointed out is clearly stated also in the last-cited case, which is one of those relied upon by the appellant. It is there said:

"A servant entrusted with his master's goods may do what is necessary to preserve and protect them, because his authority to do so is clearly implied by the nature of the service; but when the property has been taken from his custody or stolen, and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation or protection. This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property, or tend in any degree to preserve or protect it."

In the present case, the injury to the business of the corporation had not yet occurred. The arrest of the plaintiff was a preventive measure. It was in aid of the effective conduct of the business. There was no prosecution of any kind; there was no charge made against the plaintiff. Defendant's activity through its agent was only to the extent of removing the plaintiff from a situation where he could do harm to its business. See B. C. & A. Ry. Co. v. Ennalls, 108 Md. 75, 69 Atl. 638, 16 L. R. A. (N. S.) 1100, at page 1102.

[3] It is unnecessary to discuss Mr. Hanlon's explanation of his purpose in arresting the plaintiff. This testimony was before the jury, which was instructed that, if it believed that Mr. Hanlon had reasonable cause for believing the plaintiff to have violated the terms of the Espionage Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919 §§ 10212a–10212h), that Mr. Hanlon was authorized as a deputy sheriff to make such arrest, and such arrest would not be wrongful, and could not be made the basis of an action for damages. The jury, however, did not take this view, from the evidence before it, and so we are unconcerned with testimony regarding this phase of the defense.

[4] The appellant contends that the wrong, if any, was the act of Mr. Hanlon as a deputy sheriff, and not as the agent of the defendant. It was admitted that Mr. Hanlon was an agent, but there was a dispute as to the scope of his agency. It appears from Mr. Hanlon's testimony that Olson, foreman at the defendant's plant, reported plaintiff's conduct to Mr. Hanlon; also, that Upjohn, superintendent of the machinist department, reported to him and asked him "if I could not go down and straighten the thing out the best I could, so he could go ahead with the work." In response, Mr. Hanlon went to the place where Korkman was working. Later the arrest was made. If Mr. Hanlon's act had not been "in the transaction of the business of the agency" the defendant would not have been liable. Civ. Code, § 2338. However, it is patent from the foregoing testimony that Mr. Hanlon under his agency had authority to go to the ship, and that he did go there, to stop the trouble. The arrest followed. The doctrine of respondeat superior applies. Boswell v. Laird, 8 Cal. 469, 489, 68 Am. Dec. 345. Cases similar in principle are Rice v. Harrington, 38 R. I. 47, 94 Atl. 736; Kusnir v. Pressed Steel Car Co. (D. C.) 201 Fed. 146; Rucker v. Barker (Tex. Civ. App.) 151 S. W. 871. Conceding that the interests of all Americans were involved, nevertheless, under the foregoing facts, the interests and business of the defendant were specially involved. Under these facts, it was a question for the jury to decide whether the person making the arrest was acting as a peace officer or as defendant's agent. This proposition is flatly decided in a long line of cases. Kusnir v. Pressed Steel Car Co., supra, 201 Fed. at page 151; Hobbs v. Ill. Cent. R. Co., 182 Iowa, 316, 165 N. W. 912, 917; Hirst v. Fitchburg & L. Street R. Co., 196 Mass. 353, 82 N. E. 10. This being so, it follows that it was wholly immaterial how much of defendant's stock was owned by Mr. Hanlon, and it also follows that neither the intention of the defendant nor the intention of Mr. Hanlon was an issue.

[5] In this connection, appellant objects to the refusal of the trial court to give an instruction stating that, if Mr. Hanlon intended to act in his capacity as deputy sheriff, then the corporation is not responsible for his act. The trial court changed this instruction by inserting the word "acted" for "intended to act." A finding as to his legal intention to act in a certain manner is included in a finding that he did actually act in that manner. The jury has found, under proper instructions, that Mr. Hanlon acted for the corporation. His testimony that he did not intend to so act, together with his positive testimony that he acted under a belief that the plaintiff had violated the provisions of the Espionage Act, was outweighed with the jury, evidently, by the force of the other facts before it. We find no error in the refusal of the court to give this instruction.

[6] Appellant also complains of the refusal of the trial court to give an instruction that:

"When an arrest is made by a peace officer, the presumption is that he acted in his official capacity, and not in behalf of any one by whom he is employed."

Reliance is placed upon the case of Jardine v. Cornell, 50 N. J. Law, 485, 14 Atl. 590, the particular language which appellant contends is applicable here being:

"Upon an undisputed statement of the facts the question presented is for the court. Where a police officer takes a disorderly person from the scene of his disorder to the police station, it will be presumed to have been done in his official character, unless such presumption is repugnant to some rule of law, or is rebutted by the facts of the case."

We think the situation in the present case is decidedly different from the situation in the New Jersey case. Mr. Hanlon is not a police officer. He was, it is true, a duly appointed deputy sheriff for the county of Alameda, and, although he had been such since 1913, he testified that this was the first arrest he had ever made. His business was that of president of the defendant corporation, and as such he looked after the welfare of its business giving his personal attention to the details of its management. In the New Jersey case, relied upon by appellant, the officer making the arrest was a police officer whose sole business was that of enforcing the peace. He had no general duties with reference to the conduct of the business of the defendant corporation. He was called in by a conductor upon the cars of the railroad company to aid in ejecting a passenger and for the purpose of arresting such passenger. The court said:

"The act of the police in removing the plaintiff from the train to the station house was a continuous one. It was their duty as officers of the law to do so, and it was not within the scope of their employment in enforcing the regulations of the railroad company."

In cases where the agent is not employed in the general conduct of his principal's business, but only for some single special purpose, the liability of the principal will be strictly confined. 11 R. C. L. § 23. And even in such a case it is said that the presumption that the agent acted in his capacity as a police officer only exists where not rebutted by the facts of the case. Jardine v. Cornell, supra. The facts of the present case, we think, are such as to indicate that Mr. Hanlon's action was taken in aid of the successful conduct of the defendant's business, in which he owned a large majority of the stock. At least, there is sufficient evidence of that fact to overcome any presumption which might have existed without such evidence.

[7] Objection is made to the instruction given by the trial court as follows:

"The duty of one making an arrest without a warrant to bring the person before a proper magistrate or prosecuting officer that proceedings for the trial of the person may be instituted, and that he may have an opportunity to give bail or otherwise procure his release, is imperative, and if the prisoner is released without being brought before such magistrate, the officer or private person who made the arrest becomes a trespasser from the beginning."

This instruction is almost identical with the statement of the law appearing in 11 R. C. L. § 16, and is sustained by the following citations of authority: Brock v. Stimson, 108 Mass. 520, 11 Am. Rep. 390; Kroeger v. Passmore, 36 Mont. 504, 93 Pac. 805, 14 L. R. A. (N. S.) 988; Leger v. Warren, 62 Ohio St. 500, 57 N. E. 506, 51 L. R. A. 193, and note pp. 216 and 217, 78 Am. St. Rep. 738. It is also the statutory rule in this state. Section 849, Pen. Code. See, also, Harness v. Steele, 159 Ind. 286, 64 N. E. 875.

The cases cited by appellant, Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43, and Kalish v. White, 36 Cal. App. 604, 173 Pac. 494, are not applicable in the present case. In the case of Gisske v. Sanders, supra, the court held that the arrest of the plaintiff was justified; also that plaintiff consented thereto, and voluntarily accompanied the arresting officer to the station, where the sergeant made an independent investigation, and his incarceration was at the instance of the sergeant. It is said in that case:

"The rule as to the responsibility of the arresting officer is otherwise where he has authority to and does direct the confinement of the prisoner, or where confinement is the direct result of the arrest."

In the present case it appears that, as a direct result of the arrest of the plaintiff by Mr. Hanlon, he was taken to the station and held in confinement without any examination, and that the next day, after examination by the police officers, he was released because there appeared to be no sufficient cause to hold him.

In the case of Kalish v. White, supra, the arrest was made upon the authority of a warrant, and section 849, Penal Code, has no application to such a case. However, the trial court in the present case met the situation presented by the cases of Gisske v. Sanders and Kalish v. White, supra, by another instruction stating the rule of those cases in the event the jury found facts justifying the arrest of the plaintiff, which would make the rule of those cases applicable. These instructions might have been more clearly differentiated, perhaps, but we do not think the possibility that the jury might have been confused thereby sufficiently great to warrant a reversal of this judgment. The court premised the one upon a finding that the arrest was justifiable, and the other upon a finding that the arrest was without a warrant.

We find no prejudicial error in the record, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

53 Cal. App. 17

VAN CAMP v. VAN CAMP. (Civ. 3603, 3604.)

(District Court of Appeal, Second District, Division 1, California. May 26, 1921. Hearing Denied by Supreme Court July 25, 1921.)

1. Divorce ⊂=184(10)—Trial court's determination on conflicting evidence conclusive.

In considering the question of whether the evidence is sufficient to sustain the findings of the court as to the facts upon which the divorce decree is based, the appellate court will not weigh the testimony and determine as to where the preponderance lies, where the evidence is conflicting, the determination of the trial court in such case being conclusive.

2. Divorce ⊂=184(10)—Evidence viewed from standpoint giving it strongest weight in sustaining findings.

The evidence on appeal must be viewed from the standpoint that will give to it the strongest weight in sustaining the findings of the court.

3. Divorce ⊂=27(1) — Husband's conduct toward corespondent may constitute cruelty.

A husband's acts toward a corespondent may cause a wife sufficient mental torture to constitute extreme cruelty on his part.

4. Divorce ⊂=27(5)—Conduct of husband or wife causing other mental torture may be extreme cruelty, depending on degree of refinement or affection of offended party.

Acts and conduct of either spouse unjustifiable under a reasonable rule of marital behavior, which in any case may cause great physical suffering or mental torture, are sufficient to sustain a charge of extreme cruelty, although conduct which might amount to cruelty in case of a refined or loving wife would not be cruelty in case she were not such.

5. Husband and wife ⊂=262(1)—Property in possession of either husband or wife deemed community estate.

All property in the possession of either husband or wife, is deemed to be community estate of the parties, notwithstanding Civ. Code, § 163, making husband's property owned before marriage, with rents, issues, and profits thereof, his separate property, but such presumption is disputable, and may be overcome by evidence to the contrary.

6. Husband and wife ⊂=257—Income from husband's separate property not community property.

Where the husband at the time of his marriage was a man of large means, which included cash, notes, real estate, and corporate stock, and where during his married life he devoted his attention exclusively to the management of a corporation for which he received a very substantial salary, and an additional sum to meet his expenses incurred in connection with the business, the husband's income during his married life outside of salary and expense money, so received, was not community property, but constituted the rents, issues, and profits of the husband's separate property, owned at the time of his marriage, though some of the income so received was from stock in such corporation, and was the result of his successful management thereof.

7. Husband and wife ⊂=268(4) — Community earnings of husband and wife chargeable with family support.

In the absence of any evidence showing a different practice, the community earnings of husband and wife are chargeable with the family support, and any amount expended for such purpose by either spouse during the existence of the marital relation is presumed to have been paid out of the community estate.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by Euphrasia Van Camp against Frank Van Camp. From decree awarding plaintiff a divorce, and from that portion of the judgment awarding to her a specified sum, the defendant appeals, and from the judgment in so far as it fixes the value of community property, the plaintiff appeals. Divorce decree affirmed, and judgment as to amount and value of community property and as to disposition thereof reversed, and cause remanded for new trial.

Kemp & Clewett, of Los Angeles, for Frank Van Camp.

Fredericks & Hanna, of Los Angeles, for Euphrasia Van Camp.

PER CURIAM. This is an action for divorce. Defendant Van Camp has appealed from a decree dissolving the marital bonds, and also from that portion of the judgment awarding to the plaintiff the sum of $60,000, and determining that certain real and personal property is the separate property of the wife. The judgment in favor of the wife for $60,000 was made upon the finding of the court that the community property was of the value of $90,000, and that the plaintiff was entitled to two-thirds thereof. There is a separate appeal taken by the wife from the judgment in so far as it fixes the value of the community estate, it being the contention of the plaintiff that the latter was of a value greatly in excess of $90,000. As the defendant's appeal involves contentions opposite to that of the plaintiff respecting the property judgment, we will consider the appeals together when that feature of the decree is given attention.

In her complaint the plaintiff first charged (on her information and belief) that the husband had committed adultery with a person who was named as corespondent, on two specific occasions, and at other times the dates of which were not stated. A course of improper conduct as occurring between the defendant and the corespondent was described in a separate cause of action and made the ground for a charge of extreme cruelty. As a part of this alleged cause of action it was

also set forth that upon one occasion defendant had struck the plaintiff and called her "a damn fool." By reason of the acts and conduct of the defendant, as so described in the second alleged cause of action, plaintiff asserted that she had been caused "great and grievous mental suffering and anguish," and had been caused to "brood and worry to the point of distraction," and "that such mental suffering, anguish, brooding, and worry have seriously impaired the plaintiff's health and vitality." The court in its findings determined that the acts of adultery had not been committed, but added to the findings touching these matters that "the plaintiff had probable and reasonable cause to believe" that defendant did commit the acts charged. It is urged that the findings are not sustained by the evidence, either upon the divorce issues or as to the value of property belonging to the marital community. These contentions will be considered in the order named.

In the year 1914 defendant Van Camp came from Indianapolis to Los Angeles. His family then consisted of a grown son. He was a man of large affairs, and had been the directing head of an extensive packing establishment in Indianapolis bearing his name. He brought to California property of great value, consisting largely of cash and stock securities. After his arrival in Los Angeles he organized the Van Camp Sea Food Co. The company was capitalized with 2,000 shares of stock at a par value of $100 each. He became the president and general manager of the corporation, and received up to January, 1918, a salary of $1,000 per month. This salary was increased on January 1, 1918, to $1,500 per month, and so remained at all times subsequent thereto. The packing plant was located at the seaport town of San Pedro. More particular consideration will be given to the details of defendant's capital, his investments, earnings, and income when we later take up the points raised as against the finding of the court as to the value of the community holdings. We will here pass that subject with the observation that the packing company organized by Van Camp was a successful venture, and produced large returns. In March of 1916 defendant Van Camp married the plaintiff, who was or had been an employee in the post office at San Pedro. Plaintiff was then 21 years of age; the defendant was about 54 years old. Immediately upon the marriage, defendant purchased a home in the city of Los Angeles, expending therefor about the sum of $15,000, and the deed to the place was made to the wife. Not long thereafter defendant delivered to the wife a certificate of deposit representing a cash credit of $10,000 and a deed to a lot at San Pedro. Defendant further provided each month for the plaintiff a cash allowance for household expenses which, at the time of the commencement of this proceeding, was $450; he also provided plaintiff with an automobile. The evidence goes to show that defendant was in the main liberal in the direction of gratifying all the wishes of his wife as to things desired for her pleasure and comfort. The mother of plaintiff resided at San Pedro and received partial support, at least, from the exchequer of Van Camp.

[1, 2] Considering the question as to whether the evidence is sufficient to sustain the findings of the court as to the facts upon which the decree of divorce is based, we are not permitted to weigh testimony and determine as to where the preponderance lies, for, in the presence of a conflict such as appears here upon most of the issues, the determination of the trial judge as to facts must be deemed conclusive. The evidence then must be viewed from the standpoint that will give to it the strongest weight in sustaining the findings of the court. The record of the evidence is of large volume, and in support of the plaintiff's case it shows that several years after the marriage of the parties, particularly in the year 1919, defendant Van Camp was often seen in the company of the corespondent, who was employed in the office of the Van Camp Company; that the two would be together in the automobile of defendant, and that the frequency of their association in that manner was brought to the attention of plaintiff's family and others, and also reported to the plaintiff; that upon one of the earlier occasions plaintiff remonstrated with her husband, and he admitted the wrongfulness of his conduct, and promised not to repeat it; notwithstanding that promise he continued to conduct himself in the same manner with the corespondent; that he neglected the plaintiff in the home, became irritable, and upon one occasion, when she took a paper from his hand and requested him to talk to her, struck her and called her "a damn fool"; that upon another occasion he drove in his automobile with the corespondent away from the traveled highway and into a thickly-wooded grove, where he remained for considerable time alone with the corespondent; that plaintiff at this time, in company with her mother and another person, pursued defendant into the grove and upbraided him with accusations of improper conduct, to which accusations he made the response that he had nothing to say; that plaintiff, prior to the alleged misconduct of the defendant, had been well, and not affected by illness of any kind, but that the knowledge of the alleged misdoings of the defendant so preyed upon her mind that she became nervous and ill; that she was unable to sleep, and cried a great deal.

[3] There was sufficient corroboration of the particulars furnished to satisfy the requirement of the Code. Defendant admitted the occurrence in the grove, when he was accosted by the wife. He claimed that he had

merely stopped to eat fruit with the corespondent, but expressly declined to make any explanation as to why he had selected a secluded place away from the main thoroughfare. Appellant makes the point that all of the acts found by the court to have been committed by him which tended to show improper relations with the corespondent were acts showing, if anything, only an adulterous intent, and that they were not available to the plaintiff for the purpose of establishing any cause of action except that of adultery. This contention rests upon the early cases of Haskell v. Haskell, 54 Cal. 262, and Waldron v. Waldron, 85 Cal. 251, 24 Pac. 649, 858, 9 L. R. A. 487. These decisions do give decided aid to the contention, but are not now the law. See Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Wolff v. Wolff, 102 Cal. 433, 36 Pac. 767, 1037.

[4] Acts and conduct of either spouse, unjustifiable under a reasonable rule of marital behavior, which in any case may cause great physical suffering or mental torture, are sufficient to sustain a charge of extreme cruelty. We state that as a general proposition, but it is subject always to the qualification that conduct which may in one case cause such suffering may not, in another, have the same effect. Thus the use of vulgar and profane epithets may, in the case of a highly cultured, refined, and sensitive woman, produce an effect of great mental anguish; while the same conduct may not, in the case of a woman of no refinement and of coarse nature, have any such effect at all. Hence, in the first case the charge of extreme cruelty might be sustained by the evidence; in the second case it would not be.

"Whether in any given case there has been inflicted this 'grievous mental suffering' is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party; and no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given." Barnes v. Barnes, supra.

In the case before us, where a girl of 21 is shown to have married a man of 54, we would be inclined to be very skeptical as to the truth of any claim that, by reason of the alleged acts of defendant toward the named corespondent, plaintiff's mental suffering was in anywise attributable to the fear alone that the bond of affection between her and her husband might be ruptured. The story, as it is told in the printed pages of the record, suggests strongly a marriage of convenience so far as the plaintiff is concerned.

However, there are other factors to be considered, and under one phase of the case it cannot be said that the court was without warrant in finding that the plaintiff had suffered in the manner described in the complaint and findings. She presented a state of facts showing that the actions of defendant with and toward the alleged corespondent were noted by her family and others, and created comment and gossip, and that she was humiliated thereby and caused to suffer greatly in her mind. Whether or not her feeling toward her husband was one of lively affection, she was satisfied in her marital relations, her home was established, and her future comfort apparently assured. The conduct of the husband, as the evidence shows and the findings determine it to have been, might well be said to have rendered intolerable a continuance of the marital partnership, and to have caused the plaintiff to be humiliated and consequently disturbed in mind. That question was one peculiarly within the province of the trial judge to determine. The demeanor, appearance and mental makeup of the complainant were all factors which would be proper to be considered, none of which can find much expression in the narrative of the testimony as it appears in cold type. And so we think, as we have already stated, that the case in its facts is put without the province of this court to draw conclusions on the question of cruelty different from those which have been assigned by the trial judge.

In the foregoing we have made no attempt to set forth with any degree of detail the substance of the testimony which was presented at the trial. A much lengthier statement would be required if we were to make that effort, and, furthermore, it is only necessary that enough be stated to show that there was some substantial evidence presented by the plaintiff in support of the charge of cruelty as made in her complaint. We attach no significance to the phrase used by the trial judge in qualifying the finding negativing the adultery charges, which stated that while those charges were untrue plaintiff had reasonable cause to believe that they were true. This language was probably incorporated in the findings for the purpose only of showing that the adultery charges made by the plaintiff were not made with the idea of willfully imposing upon the court. The qualifying words might be eliminated from the findings altogether without affecting the conclusions in any respect. No errors of a substantial nature were committed by the lower court in receiving or rejecting evidence.

The community property allotment: It appears that during the existence of the marital relation, defendant transferred and conveyed to plaintiff certain real estate of the value of $33,000, a certificate of deposit of $10,000, and a Liberty bond of the denomination of $5,000, making a total of $48,000, which property, together with certain personal property and household furnishings, the court found

was the sole and separate estate of plaintiff. While there is a conflict in the testimony touching the question, the evidence was sufficient to show that all of said property so found to be the separate estate of plaintiff became such by gifts from defendant to plaintiff. As before stated, the court found that there was community property of the plaintiff and defendant Frank Van Camp of the value of $90,000, and by the judgment awarded plaintiff two-thirds of said sum.

[5, 6] Defendant, as appellant, attacks this finding upon the ground that the evidence is insufficient to support the same, and plaintiff, on her appeal, insists that the evidence shows that the value of the community property of the parties was largely in excess of the amount found by the court. Section 163, Civil Code, provides that—

> "All property owned by the husband before marriage * * * with the rents, issues and profits thereof, is his separate property."

Notwithstanding this declaration, the rule is that all property in the possession of either husband or wife is deemed to be community estate of the parties. Freese v. Hibernia, etc., Society, 139 Cal. 392, 73 Pac. 172; Estate of Pepper, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092. Since, however, the presumption attending such possession is a disputable one, either spouse claiming to the contrary may controvert the presumption and offer evidence to overcome the same. From the evidence offered touching the question, it appears without dispute that at the time of his marriage to plaintiff defendant was a man of large means, which included cash, notes, real estate, and corporate stock; that at the time he was president and manager of a corporation known as the Van Camp Sea Food Company, to the management of the affairs of which he devoted his exclusive attention, and for the services so rendered to said corporation received therefrom, up to January, 1918, the sum of $1,000 per month, which, commencing with January, 1918, was increased to $1,500 per month; that, in addition to such salary, he received from said company during the period of the marital relation an additional sum of $12,203 for the purpose of meeting expenses incurred by him in connection with the business; that during the period in question he was engaged in no other business whatsoever, and, excepting the money so received from said corporation, he had no income other than that derived as rents, issues, and profits from the property owned by him at the time of his marriage. The total amount received by him from said corporation on account of salary and expense money during the existence of the marital relation was the sum of $69,203. It therefore follows that all other income, large or small, and regardless of the amount thereof, must necessarily have been derived from the property which he owned at the time of his marriage.

[7] In the absence of any evidence showing a different practice (and there is none) the rule is that the community earnings of husband and wife are chargeable with the family support. Estate of Cudworth, 133 Cal. 462, 65 Pac. 1041. Hence any amounts of money expended for such purpose by either spouse during the existence of the marital relation are presumed to have been paid out of the community estate. It appears that during such period defendant expended for the support of his family, and for income tax and premiums on policies of life insurance wherein his estate was made the beneficiary, the sum of $84,576. The premiums on his life insurance so paid were not a charge upon the community estate. Neither was the entire sum of $18,380 paid by defendant on account of income tax, a charge thereon. Just what proportion of said income tax should be charged to defendant's personal earnings is not made to appear; but, conceding for the purpose of the argument that the community estate be deemed free from such burden, and the entire sum so paid be imposed upon defendant's other income, and deducting both the life insurance premiums and income tax, the aggregate of which is $23,946, from the total of $84,576 so expended, leaves a balance of $60,630 as the amount actually expended for the community benefit and chargeable to his community earnings of $69,203. This leaves to the credit of the community estate the amount of $8,573, which sum, however, should be further reduced to the extent of the amount chargeable against it on account of its proportion of the income tax so paid by defendant. It thus appears that the evidence is insufficient to show the existence of a community estate of plaintiff and defendant of the value of $90,000, and, since his earnings from personal service rendered did not exceed the sum of $69,203, the balance of his income, whatever it may have been, was necessarily derived from the rents, issues and profits of the property which he owned at the time of his marriage. In our opinion, the evidence is as conclusive of that fact as though defendant had, upon proof of the property owned by him at the time of his marriage, shown the exact income derived therefrom.

Hence, conceding, as argued by counsel for Mrs. Van Camp, that defendant at the time of the trial admitted the possession of cash, bonds, and other property acquired during the marriage, the value of which was in excess of the large income admittedly received during said time, nevertheless it cannot be said to have constituted community estate of the parties, but, for the reason that, as heretofore stated, his personal earnings having been conclusively fixed, any excess in value of property so acquired must be accredited to

the income received from rents, issues, and profits of the separate estate, rather than to the income of the joint efforts of the community. And further, conceding that Van Camp, according to figures tabulated by counsel for the wife, accumulated (in addition to the amount received for his services from the corporation during the marriage and, as shown, exhausted in the payment of household expenses) property, other than that owned at the time of the marriage, of the value of $241,000, such sum is largely offset by $141,000 received in dividends from the Van Camp Sea Food Co. alone, while $48,000 was given to his wife, and a large sum on profits derived from sales of stock in said company, making a total approximating, if not equal to, the amount so claimed by plaintiff to have been received by him; all of which appears to have been the result of investments from his separate estate. Hence, assuming that defendant did not fully disclose the full amount of his separate income, which was in excess of that stated by him, and that he had acquired other property with such undisclosed income during the marriage, such property, since it was not acquired with his earnings, cannot be deemed community estate.

It is insisted by counsel for Mrs. Van Camp that the Van Camp Sea Food Company, if not a myth, was a mere agency through which defendant conducted his business, and, since its enormous income was due to the skill and ability with which defendant conducted the business, the community estate should be accredited with all the profits derived therefrom in excess of 7 per cent. interest upon the capital which defendant had invested therein. In support of this contention she cites Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107, wherein it appeared that the husband at the time of the marriage had a separate estate of $15,500 invested in a business conducted by him. The trial court held that all moneys and profits derived by defendant after marriage through his personal management of such business belonged to the community estate. On an appeal by the husband, the Supreme Court, in discussing the question, said:

"This capital was undoubtedly his separate estate. The fund remained in the business after marriage and was used by him in carrying it on. The separate property should have been credited with some amount as profit on this capital. It was not a losing business, but a very profitable one. It is true that it is very clearly shown that the principal part of the large income was due to the personal character, energy, ability, and capacity of the husband. This share of the earnings was, of course, community property. But without capital he could not have carried on the business. In the absence of circumstances showing a different result, it is to be presumed that some of the profits were justly due to the capital invested. There is nothing to show that all of it was due to defendant's efforts alone. The probable contribution of the capital to the income should have been determined from all the circumstances of the case, and, as the business was profitable it would amount at least to the usual interest on a long investment well secured."

In our opinion, the circumstances attending the Pereira Case are not applicable to the facts involved herein. While it may be true that the success of the corporation of which defendant was president and manager was to a large extent due to his capacity and ability, nevertheless without the investment of his and other capital in the corporation he could not have conducted the business; and while he devoted his energies and personal efforts to making it a success, he was by the corporation paid what the evidence shows was an adequate salary, and for which another than himself with equal capacity could have been secured. Had such course been pursued and defendant contented himself merely with the receipt of dividends from the business, the character of the dividends as separate property could not have been questioned. Instead, however, of doing this, he entered upon the duties as manager of the corporation, gave his exclusive time and efforts thereto, for which he received first $12,000, and later $18,000 per year. The case presented is not unlike that involved in Estate of Pepper, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092, wherein it was held that the profits and earnings made by the husband after marriage in conducting the business of a nursery upon property owned by him at the time of his marriage was his separate property, notwithstanding the success of the venture required industry, skill, and attention.

"It is * * * impossible," said the court, "to apportion the crop so as to determine what share of it has come from the soil and what share from the exertions of man. The product must be treated as a whole, and, if it is the growth of land separately owned, it is the separate property of the owner of the land"—citing Diefendorff v. Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549.

So in the instant case, it is impossible to say what part of the enormous dividends paid by the Van Camp Sea Food Company should be apportioned to the skill and management thereof and what part should be apportioned to the investment of the capital and the favorable conditions under which the business was conducted. Furthermore, there is no merit in the contention that the corporation was a myth, or that it was a mere instrumentality through which defendant conducted his business. It was organized in June, 1914, long before defendant's marriage, with a capital of $200,000, consisting of 2,000 shares of the par value of $100 each, of which stock Van Camp at the time acquired 1,300 shares, Paul Eachus 500 shares, and F. H. Ford 200 shares, besides two shares

distributed to others, who, with the persons named, constituted the five directors of the corporation. Subsequently, for the sum of $20,000, defendant acquired the 200 shares of stock issued to Ford, and in March, 1915, for $35,000, he bought the stock issued to Paul Eachus. Later he sold 83 shares of his stock to Wilbur Wood, and, prior to his marriage, sold to his son 300 shares thereof for the sum of $45,000. At no time did he own more than 1,499 shares of the stock. The corporation was duly organized and constituted an entity separate and distinct from that of defendant. Even were it otherwise, and, as claimed by plaintiff, a mere instrumentality for conducting defendant's business, nevertheless, in view of the fact that he was adequately paid by the corporation for his services, such compensation, under the holding in the case of Estate of Pepper, supra, must be deemed the extent of his personal earnings, and the balance of the profits derived from the business accredited to the use of the capital invested therein, in the same manner as though he had not been employed by the corporation.

The judgment as entered on the divorce issues is affirmed.

The judgment as to the amount and value of the community property and as to the disposition thereof between the parties is reversed, and the cause is remanded for a new trial upon that issue alone; appellant Frank Van Camp to have his costs of appeal.

53 Cal. App. 157

KING v. TARABINO. (Civ. 3550.)

(District Court of Appeal, Second District, Division 2. California. June 11, 1921.)

1. Alteration of instruments ⟸27(3) — "Execution" in statute relative to altered instruments means "signing" or "signature."

The word "execution," in Code Civ. Proc. § 1982, providing that the party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration, means "signing" or "signature."

[Ed. Note.—For other definitions, see Words and Phases, First and Second Series, Execution (Writ of); Sign—Signature.]

2. Alteration of instruments ⟸27(3) — After signing casts burden to explain on party producing it.

Where, after the drawer of a check wrote at its bottom "Owen Aparment, By John Tarabino," some person expunged the first line of the signature, leaving standing only the words "By John Tarabino," there was a plain alteration of the instrument after execution within Code Civ. Proc. § 1982, casting the burden on the party producing it to account for such alteration; the alteration being material to the question, as after it the check was being pressed against the estate of John and not the funds in the name of the Owen Apartments.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by E. M. King against Barney Tarabino, executor of the estate of John Tarabino, deceased. From judgment for plaintiff, defendant appeals. Judgment reversed, and cause remanded.

Arthur W. Eckman and T. K. Hulme, both of Los Angeles, and Frank Snyder, of Glendale, for appellant.

Mattison B. Jones, of Los Angeles, and Linneman & Linneman, for respondent.

WORKS, J. This is an action to recover on a check for $5,000. Defendant appeals from a judgment for plaintiff. The cause was tried by a jury.

Two brothers, John and Barney Tarabino, owned and operated an apartment house known as the Owen Apartments, John, although a man of little education, being the manager of the place. The funds of the business were deposited in bank in an account against which checks were drawn over the signature, "Owen Apartments, By John Tarabino." John Tarabino also carried an account in bank in his own name in which his individual funds were deposited. The check which is the basis of the action was originally signed, in the handwriting of John Tarabino, as follows: "Owen Aparment, By John Tarabino." All other written matter on the instrument, the date, respondent's name as payee, and the amount, both in figures and words, was in the handwriting of respondent. The words "Owen Aparment," in the signature, were stricken out by several straight lines drawn longitudinally through them, so that the signature was finally left, below the expunged words, thus: "By John Tarabino." John having died, the check was, two months after that event, presented for payment by respondent at the bank in which his individual account was kept, but payment was refused. A creditors' claim, based upon the paper, was next presented to the executor of John's estate, and was rejected. The present action was then commenced against the executor. Under stipulation of the parties we have before us the original check, a photographic enlargement of it showing a surface about 1½ times its length, and a second photographic enlargement to about twice its length.

Upon proof of the genuineness of the signature, "By John Tarabino," and without any explanation of the alteration by means of which the words "Owen Aparment" had been expunged, and over the objection of appellant, the trial court received the check in

evidence. It is contended that the ruling was error.

In most jurisdictions the question whether an alteration of a written instrument must be explained before it is admissible in evidence depends upon the time when the alteration was made, having regard to the *delivery* of the instrument, although in the law of those places the time spoken of is the time of the *execution* of the instrument, the latter term generally being held to include both *signing* and *delivery* (2 C. J. 1223); and "in many states it is held that an apparent alteration is presumed, in the absence of any explanation, to have been made simultaneously with or before the delivery of the instrument and hence no explanation is required. In other states it has been held that there is no presumption either way; and in still others that the presumption is that the alteration was made after delivery." Meyer v. Lovdal, 6 Cal. App. 369, 92 Pac. 322. All of these rules of law have been supplanted in this state, formally, by section 1982, Code Civil Procedure; and we say "formally" because the extent to which they have been supplanted, actually and substantially, depends upon a construction of the section. The enactment provides that—

"The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration."

After setting out several ways in which an alteration may be accounted for, the section concludes with a provision that, if the party producing a writing does account for an alteration in it, "he may give the writing in evidence, but not otherwise."

The facts of this case require us to determine whether the Legislature intended the word "execution," as employed in section 1982, to include delivery, or whether it intended the expression as synonymous with signing, only. The word "execute," in strict legal parlance, usually, but not always, includes delivery; while, in ordinary lay language, "to execute" is often regarded as the equivalent of "to sign." Words and Phrases (1st and 2d Eds.) tit. Execute. Which sense did the legislature intend in section 1982? A potent guide to a solution of the question will be found in this undoubted fact: If it were intended that the time of the alteration, with reference to the execution, were ever to be ascertained from the face of an instrument alone, then "execution," in the section, means "signing." This is necessarily true, for the actual *time* of delivery of an instrument, whatever recitals it may contain as to delivery, cannot by any possibility be determined from an inspection of it. That circumstance always must be ascertained through the medium of evidence extraneous to the writing. Further, even if evidence dehors a given writing were received for the purpose of fixing the time of its delivery, we can conceive of no circumstances under which an inspection of it would show whether an alteration of its language were made before or after the time of delivery thus ascertained.

With this irrefragable premise in mind, let us take a glance at the section itself, in an endeavor to ascertain whether, inherent to it, there may be found an index to its construction. The enactment deals with two classes of instruments, those which have been altered after their execution and those which *appear* to have been altered after that event. A certainty of alteration after execution is contemplated in providing for the first class, but only the appearance of alteration in naming the second. Is not the section so framed as to indicate that the "appearance" is to be gathered from the face of the paper? The language of the law is not so couched as to give strength to the view that the possibility of alteration is to appear from extrinsic evidence. But there is another clause of the enactment which conduces to the view which we are inclined to take of its meaning from its very terms, unaided by other considerations. Where the instrument appears to have been altered after execution, the party producing it "must account for the appearance." Does not that language show that the thing he is to account for is the "appearance" on the face of the writing?

There are, however, most weighty considerations, apart from the language of the section itself, leading to the conclusion that the Legislature intended the word "execution" as the equivalent of "signing." While the question has never been directly decided, the courts of review of the state have often indicated that to be the proper construction of the law, and we propose to refer to the many cases bearing on the question, even if some of them do touch but lightly on the point. Taking them all, it will appear that a mass of matter has been accumulated upon the subject. Wherever italics are used it will be understood that they are our own.

We first cite a case which antedates the Code, Roberts v. Unger, 30 Cal. 676. A change had there been made in the description in a deed. "The plaintiffs then introduced evidence tending to show that the erasure and interlineation had been made at the time the deed was drawn and before *signing*." The syllabus is to the effect that—

"An alteration in a deed by an erasure of a figure and the interlineation of another is not sufficient to prevent it from being received in evidence where testimony is introduced tending to show that the alteration was made before the deed was *signed*."

The weight of this case is very slight, almost negligible, but we note it as a part of the judicial history of the state on the question. The syllabus, while it is, of course, in no sense authority, has stood all these years, however, as suggesting to bench and bar that

the signing is the thing. The reference is not to delivery, nor even to signing and delivery.

We next mention Corcoran v. Doll, 32 Cal. 82. In this case the whole tenor of the opinion, taken in connection with the statement of facts, seems to indicate that the court used the word "execution" as synonymous with "signing." In addition, the situation seems to have been gathered from the face of the note, there in question, where nothing concerning delivery appeared or could have appeared.

In Sedgwick v. Sedgwick, 56 Cal. 213, the opinion is not clear, but it tends to show that the time of signature is the period to be considered in determining whether an alteration appears, within the terms of section 1982. The signature to the instrument was proved, and it was then offered. This was followed by an objection to its admissibility on the ground that it appeared on the face of the paper and from the testimony of the witnesses that it had been changed after its execution. The report does not show what, if any, testimony there was on the subject, and the syllabus, while not authority, is to the effect that the question was determined from the face of the writing alone.

Miller v. Luco, 80 Cal. 257, 22 Pac. 195, is decidedly in point, though the report on the subject is not full. A tax deed had been offered in evidence. The Supreme Court said:

"The plaintiffs objected to the deed being received in evidence, on the ground that it appeared on the face thereof to have been altered in a material respect after its execution, and the court sustained the objection. We see no error in this ruling. It was fully justified by section 1982 of the Code of Civil Procedure."

The syllabus, not, however, treating it as authority, is to the effect that—

"A tax deed which appears upon the face thereof to have been altered in a material respect after its execution is not admissible in evidence to show title in the holder thereof."

The language of both opinion and syllabus is striking when we remember that nothing more could have appeared from the face of the instrument than that it was altered after *signature*.

In Burdell v. Taylor, 89 Cal. 613, 26 Pac. 1094, the court said:

"The further point is made that the court erred in admitting in evidence the record of survey No. 61, because it appeared to be interlined, and no sufficient explanation given thereof. Even conceding that the objection made was sufficient, although not pointing to the particular respect in which the document was inadmissible, by stating that it was because of an interlineation, still it appears that Easkoot, the maker and recorder of the survey, showed that the interlineation was made before *execution* thereof *by him*. This was sufficient. Code Civ. Proc. § 1982; Sedgwick v. Sedgwick, 56 Cal. 213."

This case is deprived of much of its weight because of the fact that the writing in question was not one which became effective upon delivery; but the fact is noteworthy that the court used "execution" as the equivalent of "signature," and did so immediately preceding a citation of section 1982. It is also to be noted that Sedgwick v. Sedgwick is cited in support of the text.

The question of the application of section 1982 next arose in Manuel v. Flynn, 5 Cal. App. 319, 90 Pac. 463. The court there took the extreme ground that alterations appearing from the face of an instrument to have been made after it was completely written must have been explained before the writing could be received, apparently laying aside all question of either signature or delivery. It was said:

"The written agreement to which we have referred as having been entered into, * * * and which was received in evidence, was objected to by appellant because it had been altered in some respects. The instrument upon its face presented evidence of having been at some time altered *after it was written*. This objection having been made, the burden was upon plaintiff to explain or account for such alterations, if they involved a part thereof material to the question in dispute. Code Civ. Proc. § 1982."

Of all the cases bearing upon the construction to be placed on the word "execution" in section 1982, Meyer v. Lovdal, 6 Cal. App. 369, 92 Pac. 322, comes nearest the mark. The following appears in the course of the opinion:

"It is urged that the court erred in receiving in evidence the note over defendant's objection. The note * * * reads: 'Thirty days after date without grace I promise to pay,' etc. The words 'Thirty days' show that a pen was drawn through them and directly thereunder the words 'Six months' written. * * * The only objection argued in the brief at this point is that plaintiff should have explained the alteration as to the maturity of the note before offering it, and that it was error to admit it without such explanation. * * * In the present case it is alleged in the answer that the alteration was made after delivery, and that plaintiff took the note after its maturity, i. e., more than 30 days after its execution. The alteration then was material to the question in dispute. We find no case in our reports, and none is cited, where the meaning of this section [1982], in the particular now under consideration, is clearly stated. When the instrument is offered without explanation as to an *apparent* alteration, how is it to be known whether or not it 'appears to have been altered after its execution' unless this may be determined, in the first instance, *by an inspection of the instrument itself and the alteration shown therein?* The trial judge must, it seems to us, determine when the offer is made whether the alterations are such as, in his judgment, call for explanation. If he admits the instrument and nothing appears in the record to show that the judgment exercised by the trial judge was improper or not

justified, it is the duty of the appellate court to accept his conclusion. *We must assume that he had the instrument before him and scrutinized its appearance in order to determine whether it was altered after its execution*, and unless the record brought up for review shows that he acted without warrant his determination is conclusive upon us. We have nothing before us but a photographic copy of the note, and *we can discover nothing from it* that would suggest unauthorized action by the trial judge."

It is evident from the court's use of the word "apparent," in this opinion, that the view of section 1982 which we have suggested above in our scrutiny of the language of the enactment was entertained by the court; that is, that the "appearance" to be accounted for by one offering an apparently altered writing is the "appearance" on the face of the writing. In fact, that view is reflected throughout the excerpt we have made from the opinion. In view of the premise we have laid down above, it is especially to be noted that the "appearance" is to be ascertained, at least in the first instance, from an inspection by the trial judge of the writing offered. The controlling effect of this position is manifest when we remember, to repeat, that such an inspection can never aid in determining whether an instrument has been altered after *delivery*, but that it will often indicate whether an alteration has been made after *signature*.

We mention, in passing, Cavitt v. Raje, 29 Cal. App. 659, 156 Pac. 519, and Johnson v. Cordes, 33 Cal. App. 619, 165 Pac. 1040, although they have no bearing upon the particular question under discussion. They do, however, both of them, indicate with what freedom the word "execution" is used, even by the courts, as synonymous with "signing," or "signature." That use is particularly noticeable in Johnson v. Cordes.

The last case we shall notice is Dozier v. National Borax Co., 35 Cal. App. 612, 170 Pac. 638, for it is the latest and only remaining one on the subject. In speaking of an alteration in an agreement for the sale of stock the court said:

"The interlineation of these words in this writing * * * *was an afterthought to its creation*, and also * * * works a most material alteration in its terms; and having been confessedly inserted *after the execution of the writing by Dake*, the burden of accounting for it was cast upon the plaintiff producing the writing and relying upon it as genuine under the express terms of section 1982 of the Code of Civil Procedure."

Such language necessarily conveys the idea that the court viewed the word "execution" in the statute as the equivalent of "signing."

[1, 2] We conclude, not merely from the language of section 1982, but from the construction tacitly placed upon it by the courts in so many instances—and there are no cases indicating a contrary view—that the Legislature intended the word "execution," as used in the enactment, as the equivalent of "signing," or "signature." What, then, is the situation in the present case? Following the guide furnished by Meyer v. Lovdal, the trial judge made an inspection of the check in order to solve the question which the objection of counsel presented to him; but he scanned it with an improper purpose in view, a purpose impossible of accomplishment. He endeavored to ascertain whether the check had been altered after its *delivery*. An inspection for such a purpose was a futility. But what does the face of the paper show upon the really material question: Was the check altered after it was *signed*? There can be but one answer. John Tarabino wrote at the bottom of the paper, "Owen Aparment, By John Tarabino," thus completing, so far as the judge could ascertain from inspection, his work upon the instrument. That, but for the palpable alteration, was the signature to the check, the signature contemplated by section 1982. After that work was done some person expunged the first line of the signature, leaving standing only the words "By John Tarabino," thus, to our minds, showing a plain alteration of the instrument after execution, under the terms of the section.

In looking to the language of section 1982 to the effect that, to require explanation, an alteration must be material to the question in dispute, we have no difficulty in concluding that the one before us is within the terms of the enactment. As originally signed the check was drawn against the funds in bank of the Owen Apartments, the funds of John and Barney Tarabino. As altered, the instrument is being pressed against the estate of John. It is obvious that the alteration was a most material one.

Several other points are made by appellant, but they need not be considered. In fact, most of them depend upon the question which we have discussed above.

The judgment is reversed and the cause is remanded.

We concur: FINLAYSON, P. J.; CRAIG, J.

52 Cal. App. 603

PEOPLE v. ALBA. (Cr. 761.)

(District Court of Appeal, Second District, Division 2, California. May 11, 1921.)

1. Larceny ⊂=56—Evidence held to show corpus delicti.

In a prosecution for grand larceny of a horse, evidence *held* to show the corpus delicti.

2. Criminal law ⊂=563—"Corpus delicti" may be established by some evidence tending to establish a criminal agency.

"Corpus delicti" consists of two elements, the facts forming its basis and the existence of a criminal agency, as the cause of them, and is sufficiently established if there is some evidence tending to establish a criminal agency; it being unnecessary to establish the corpus delicti beyond a reasonable doubt.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corpus Delicti.]

3. Larceny ⊂=56 — Evidence tending to show criminal taking of property necessary to establish corpus delicti.

In prosecution for larceny, the evidence to establish the corpus delicti must tend to show a criminal taking of the property.

4. Criminal law ⊂=413(2)—Testimony that defendant had told witness that another man had stolen horse and had sold it to defendant held admissible.

In a prosecution for larceny of a horse, found near defendant's camp, in which there was evidence sufficient to establish the corpus delicti, testimony that the defendant had told witness that another man had stolen the horse, and had sold it to him, *held* properly admitted.

5. Criminal law ⊂=554, 555—Jury need not believe testimony given by defendant and his wife and child.

The jury was not compelled to believe the testimony of the defendant, his wife, and little boy.

6. Larceny ⊂=77(1) — Instruction on unexplained possession of property as circumstance showing guilt held not erroneous.

In prosecution for grand larceny, instruction as to unexplained possession of stolen property as a circumstance showing guilt *held* not erroneous.

7. Criminal law ⊂=822(1) — No error, if instructions as a whole correctly state law.

Instructions must be read as a whole, and if, when so read, they state the law correctly, no error is committed.

8. Larceny ⊂=77(3)—Evidence held to justify instruction on unexplained possession of stolen property.

In prosecution for larceny of a horse, evidence *held* to justify instruction on unexplained possession of recently stolen property as a circumstance tending to show guilt.

9. Criminal law ⊂=1186(4)—Error to warrant reversal must have resulted in miscarriage of justice.

Under Const. art. 6, § 4½, it is not sufficient to warrant a reversal to show that error was committed, but the appellate court must be of the opinion that the error has resulted in a miscarriage of justice.

10. Larceny ⊂=65 — Evidence held to sustain conviction.

Evidence *held* to sustain a conviction of grand larceny of a horse.

11. Criminal law ⊂=561(1)—Jury required to convict, if convinced beyond reasonable doubt after considering all evidence, including defendant's.

It is the duty of the jury to weigh all the evidence, and if, from the entire evidence, including that given by the defendant, they were convinced of defendant's guilt beyond a reasonable doubt, the jury should convict.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Jose Alba was convicted of grand larceny. From a judgment of conviction, and from an order denying his motion for new trial, he appeals. Affirmed.

Banta & Banta, of El Centro, for appellant.
U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

CRAIG, J. The defendant was charged with the crime of grand larceny. He was tried and convicted. An appeal is taken from the judgment and from the order denying motion for a new trial. The principal question presented upon the appeal is based upon the contention that the evidence did not establish a corpus delicti, and that the horse may have wandered away instead of being stolen.

[1] The material facts of the case are as follows: Pete Cooper, an Indian, was the owner of a mare, which has been his since 1914. At the trial he testified that on the night of November 18, 1920, he had this mare on his place in Imperial county, near Yuma. He staked her out, but on the following morning she was not there. He examined the stake hole and it was straight. He knew the mare's footmarks, and followed them for about 7 miles; they led in the direction of Holtville. There were also buggy tracks and the marks of another horse's hoofs, and all of these led directly from the witness' house. On the next day the witness found the horse in the corral in Holtville, where it had been taken by the town marshal. Gillette, the town marshal of Holtville, testified that on the 19th day of November he drove from Holtville on the Yuma road, and about a mile and a half outside of Holtville on the road he found a mare, which proved to be Pete Cooper's, tied in the bushes near the defend-

ant's camp. Defendant's two children were there, and a few minutes later the defendant and his wife drove up in a buggy. The mare in question was sweating. It appears that the camp where the horse was found was about 40 miles from Cooper's place, and about 24 hours had elapsed in making the journey. These facts are sufficient to constitute a corpus delicti.

[2-4] Appellant is wrong in his claim that the corpus delicti must be established beyond a reasonable doubt. It consists of two elements: First, the facts forming its basis; and, second, the existence of a criminal agency as the cause of them. It is sufficient if there is some evidence tending to establish a criminal agency. People v. Jones, 123 Cal. 65, 55 Pac. 698. In the case of larceny there must be evidence tending to show a criminal taking of the property in question. The corpus delicti having been established, the court properly admitted the testimony of Marshal Gillette that the defendant had told him that another man stole the horse and sold it to him.

[5] The defendant testified in his own behalf; his wife and little boy were also witnesses. Briefly, the defense as given by them was that defendant had bought the mare from a man named Theodore. The defendant had known this man for a long time. He knew that he lived in a town called Bard. Defendant had asked for a bill of sale, and it was agreed between them that upon defendant's return from his trip to Imperial Valley Theodore would supply it. The jury heard this evidence but were not compelled to believe it.

[6] Appellant complains of the following instruction:

"The mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction; it is merely a guilty circumstance, which, taken in connection with other testimony, is to determine the question of guilt. Yet, if you believe from the evidence that the defendant was found in the possession of the property described in the evidence, or claiming to be the owner thereof, this is a circumstance tending in some degree to show guilt, but not sufficient, standing alone and unsupported by other evidence, to warrant you in finding him guilty. There must be, in addition to proof of possession of property stolen from the premises described in evidence, proof of corroborating circumstances tending of themselves to establish guilt. These corroborating circumstances may consist of acts, or conduct, or declarations of the defendant, or any other circumstances tending to show the guilt of the accused.

"*If the jury believes, from the evidence, the property mentioned in evidence was stolen from the premises described in evidence, and was seen in the possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and accused is bound to explain the possession, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence disclose such.*"

The part objected to we have italicized. Instructions almost identical in language and containing a statement of the same legal principle have been approved in many California cases. Some of these are as follows: People v. Velarde, 59 Cal. 457; People v. Etting, 99 Cal. 577, 34 Pac. 237; People v. King, 8 Cal. App. 329, 96 Pac. 916; People v. Abbott, 101 Cal. 645, 36 Pac. 129.

In the case of People v. Abbott, 101 Cal. 645, 36 Pac. 129, the exact instruction complained of in the instant case was given. It is true that in the Abbott Case it does not appear that defendant attempted to explain his possession of the property; but the court treated the language of the instruction given as the statement of a principle of law, and not as an assumption of fact. Again, in People v. Etting, 99 Cal. 577, 34 Pac. 237, we find the precise language used in the case of People v. Abbott, supra, and in the case at bar, although here, also, it does not appear from the opinion whether or not the defendant offered any explanation of his possession of the goods which had been stolen.

If appellant's criticism of this instruction is meritorious, the same objection applies to the language of the first paragraph of the instruction, especially as contained in the first sentence, for it may be said that the words "unexplained by the defendant" assume that the defendant has not explained his possession of the stolen property. However, this exact language was used in the case of People v. Velarde, 59 Cal. 457, and in that case the defendant did offer an explanation after admitting his possession of the property. In the case of People v. King, 8 Cal. App. 329, 96 Pac. 916, the instruction given in the instant case is used, with the exception that there the instruction refers to "a defendant," instead of "the defendant." While the article "a" is preferable to the article "the," in view of another instruction, given at defendant's request, it can hardly be said that the jury was misled by this slight difference in the wording of the two instructions.

[7] This instruction was that the possession of stolen property is a circumstance—

"which, if unexplained, might tend in some degree to show guilt, but is not sufficient, standing alone, even though unexplained and unsupported by other evidence, to warrant you in finding him guilty."

The instructions must be read as a whole, and, when so read, if they state the law correctly, no error is committed. People v. Etting, 99 Cal. 577, 34 Pac. 237. With the

elucidation contained in instruction D–9, where the true rule, which the law required should be applied for measuring the value as evidence of an explanation offered by the defendant of his possession of stolen property, is clearly and correctly stated, it cannot be doubted that the jury was not misled by the inaccuracy of the language of instruction No. 13.

[8] In the case under consideration there was evidence from which it might be inferred that the mare had been feloniously taken. She was found in the possession of the defendant. Under these circumstances, the evidence justified the giving of the instruction. But appellant attempts to differentiate the cases in which the instruction in question has been approved from the one on appeal, because he asserts that in each of them the defendant offered no explanation of his possession of the stolen property. However, in People v. Velarde, supra, the opinion reads:

"If either of the facts stated by him, to wit, that he had raised the cattle, or that he had bought them, were true, it followed as a consequence that he was not guilty of the crime with which he was charged. It was only in connection with other facts, established by the evidence in the case, that they became matters of evidence against the defendant. He attempted to account for the possession of stolen property, but the account given by him was a false one, and was shown by comparison with other facts proved in the case, and it thereby became a circumstance unfavorable to the hypothesis of defendant's innocence."

[9, 10] Section 4½ of article 6 of the Constitution of the state of California provides:

"Unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," no new trial shall be granted in any criminal case on the ground of misdirection of the jury.

Under this provision it is the duty of the appellate court to review the evidence to determine whether or not a miscarriage of justice has resulted from any error committed. It is not sufficient to warrant a reversal to show that error was committed, but the appellate court must be of the opinion that the error has resulted in a miscarriage of justice. People v. Bartol, 24 Cal. App. 659, 142 Pac. 510. From an examination of the evidence in this case we are satisfied of the defendant's guilt, and that to uphold the verdict of the jury, rather than to set it aside, will best subserve the ends of justice.

[11] Complaint is made that the court erred in refusing to give certain instruction asked by the defendant. Defendant's offer No. 3–D was properly refused. The offered instruction was as follows:

"The burden of proof is upon the prosecution throughout this case to prove every element of the offense as charged beyond all reasonable doubt. The defendant is not required to produce any evidence in his own behalf, but may rely upon the weakness of the case as presented by the prosecution. *Any evidence introduced by this defendant does not relieve the prosecution from this burden*, nor is the defendant required to prove anything to be entitled to an acquittal at your hands." (That portion of the instruction which we have italicized renders the instruction erroneous.)

If the defendant wished to take the stand that the prosecution's evidence was insufficient, he could have rested without the introduction of evidence. However, it was the duty of the jury to weigh all of the testimony and if, from the entire evidence, including that given by the defendant, they were convinced of the defendant's guilt beyond a reasonable doubt, it was the duty of the jury to so find. The court fully instructed the jury upon its duty on the doctrine of reasonable doubt and the burden of proof, upon the effect of the possession of stolen property as an item of evidence, and upon the circumstantial evidence rule. It was not necessary that the further instruction offered by appellant upon these matters should be given. Without taking up each one of the instructions offered by appellant, and refused, and which it is contended should have been given, it is sufficient to say that a careful examination of the record satisfies us that each one which contains a correct statement of law was covered by some one of the instructions given.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

52 Cal. App. 765

PEOPLE v. DELANEY. (Cr. 748.)

(District Court of Appeal, Second District, Division 2, California. May 24, 1921.)

1. Witnesses ⟸79(3) — Four year old boy may be competent witness.

Under the statute creating a presumption that a witness who has reached the age of 10 years is competent, and making a witness below that age competent unless it is shown to the trial judge that he is incapable of receiving just impressions of the facts, or of relating them truly, the extreme youthfulness of a four year old child is not per se sufficient to exclude him from the witness stand.

2. Witnesses ⟸79(2)—Competency of child should be determined from answers and appearance.

The competency of a 4 year old child to testify as a witness should be determined by the trial judge, not only from his answers to the questions asked on his preliminary examination, but also by his appearance and manner.

3. Criminal law ⟸1173(2)—Competency of child witness rests largely in trial court's discretion.

Because the trial judge has an opportunity to observe the child and listen to his manner of answering questions, the competency of the child is a question resting peculiarly in the trial court's discretion, and his ruling thereon will not be reversed unless there has been a clear abuse of discretion or manifest misapprehension of some legal principle.

4. Witnesses ⟸45(2)—Competency of child does not depend upon understanding of religious sanction of oath.

Under Const. art. 1, § 4, and Code Civ. Proc. § 1879, providing that no person may be excluded from the witness stand on account of his religious beliefs, the competency of a child as a witness does not depend upon his understanding that the force of an oath is rooted in religious sanctions.

5. Witnesses ⟸79(3)—Court's ruling as to child's capacity is conclusive on jury.

The ruling of the trial judge that a child is a competent witness to testify is conclusive on the jury as to the child's capacity, though the jury can determine the weight to be given his testimony.

6. Witnesses ⟸77—Refusal to permit accused to examine child witness held error.

Even though accused does not in all cases have a right to examine a child as to his competency as a witness after an examination by the court, the court's ruling in refusing to permit such examination where his own examination was too brief to afford any test of the child's intelligence was such an abuse of discretion as to require a reversal, where the child's testimony was the only testimony to sustain a conviction, and especially where the child's testimony at the preliminary examination disclosed a lack of competency.

Concurring Opinion.

7. Witnesses ⟸40(1)—Ability of child to observe facts depends on intelligence at time of event and ability to relate facts depends on intelligence at trial.

Under Code Civ. Proc. § 1880, subd. 2, making children incompetent as witnesses if it appears that they are incapable of receiving just impressions of the facts or if they are incapable of relating those facts truly, both tests are satisfied through the ability of the child to narrate the facts, considering the physical manifestations accompanying the narration, but the ability to receive just impressions must relate to the date of the occurrences which are under inquiry, while the ability to relate truly must relate to the date at which the child is offered as a witness.

8. Witnesses ⟸78—Testimony of child at preliminary examination indicates ability to receive true impressions.

In determining whether a child offered as a witness had the ability to receive true impressions of the facts, the testimony given at the preliminary examination, which was less remote from the time of the happening of the events described, is a better indication of whether the witness had received true impressions than his testimony at the trial 3½ months later.

9. Witnesses ⟸40(1)—Ability to relate facts is not ability to repeat relation by others.

The ability truly to relate facts, which is the test of the competency of a child under 10 years of age, depends upon his natural power of narration, exercised through his unprompted relation of such facts, and not upon a factitious ability to recite what he may have heard by frequent repetition from others.

10. Criminal law ⟸783½—Witnesses ⟸79(2)—Child witness manifesting incompetency to be removed from stand, and jury instructed to disregard testimony.

It is the duty of the trial judge who has permitted a child to be sworn as a witness, at any time to change his mind upon due occasion therefor, to remove the child from the stand, and to instruct the jury to disregard his testimony.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Earl F. Delaney was convicted of lewd and lascivious conduct, and he appeals from the judgment, and from an order denying his motion for a new trial. Reversed.

George H. Shreve and Cooper, Collings & Shreve, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant was convicted under an information charging him with lewd and lascivious conduct upon the body of a boy. At the time of the offense, the child victim was not quite 4 years old; at the date of the trial he had reached the age of about four years and two months. Defendant appeals from the judgment and an order denying his motion for a new trial.

It is objected that the court erred in permitting the boy to testify as a witness in the case, the claim being that, by reason of his immature years, he was incompetent under section 1880 of the Code of Civil Procedure, subsection 2 whereof provides that "children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," cannot be witnesses.

The examination of the boy upon his voir dire, conducted by the court without the assistance of counsel, was meager to a degree. The record shows that the boy was called to the witness stand by the prosecution, and that the following then ensued:

"Q. (by the Court). Do you know me? You do not know me, do you? What is your name? A. My name is Junior Seiler.

"Q. How old are you? A. I am 4 years old.

"Q. Have you ever been in court before?

A. Yes. (Referring, evidently, to the preliminary examination of defendant before the committing magistrate.)

"Q. Do you go to Sunday School? A. Yes.

"Q. Whom do you live with? A. With my mother.

"Q. Does your mother teach you to tell the truth? A. Yes, sir.

"Q. What happens to boys who do not tell the truth? What do they do to boys who do not tell the truth? A. Put them in jail.

"Q. Have you ever been in jail yet? A. No.

"Q. Do you know what it is to tell the truth? A. M'h'm.

"Mr. Shreve: If your honor please, before your honor finishes, I would like to have an opportunity of asking the child some questions also.

"The Court: No; I think this is a matter for the court.

"Mr. Shreve: It is a rather serious matter to undertake to try to let a child like that prove the corpus delicti.

"The Court: It is a very serious matter to have a charge of this kind investigated at all.

"The Witness: Where is Mother, Daddy?

"The Court: If we let you tell your story—look here, little boy. What is your name? A. Junior Seiler.

"Q. If we let you tell your story here, will you tell us what is true? A. M'h'm.

"The Court: I think I will let the witness be sworn.

"Mr. Shreve: We object to the witness being sworn and testifying in the case, on the ground that he has shown himself disqualified, and at this time we will request the court to give us permission to further examine the child with reference to his qualifications.

"The Court: No; that is a matter for the court.

"Mr. Shreve: And we submit to the court that the child is incompetent to testify under the section of the Code of Civil Procedure.

"The Court: Swear him. Can you stand up? (The usual oath was then repeated to the witness by the clerk.)

"Mr. Shreve: Let the record show that the child stands mute, please.

"Q. By the Court: Do you promise that what you will tell here in answer to questions that are asked you shall be the truth? A. (the witness). M'h'm."

[1] If the learned trial judge erred in holding that the child was competent to testify as a witness in the case, it was because he not only refused defendant's counsel the privilege of examining the boy on his voir dire, but so circumscribed his own examination that he failed to bring out any fact tending to show the strength of the child's memory or ability accurately to recall past occurrences. The child's extreme youthfulness was not, per se, sufficient to exclude him from the witness stand. There is no arbitrary age limit under which the testimony of a child is automatically rejected. It was held in Brazier's Case, 1 East, P. C. 443, 1 Leach, C. C. 199, upon consideration by 12 judges, that there is no determinate age at which the testimony of a child might be admitted or rejected. Under that decision a child only 5 years of age was held a competent witness. The requirement of our statute is not one of age, but of understanding. A witness who has reached the age of 10 years is presumed, prima facie, to be competent. If below that age, he still is competent to testify unless it is made to "appear" to the trial judge that the child is "incapable of receiving just impressions of the facts" respecting which he is to be examined, or that he is incapable of relating the facts truly. People v. Dunlop, 27 Cal. App. 464, 465, 150 Pac. 389; People v. Swist, 136 Cal. 522, 523, 69 Pac. 223.

[2] If the child is under 10 years of age, and his competency to testify is, for that reason, challenged, the strength of his mental faculties and his power to understand and appreciate his moral duty to speak the truth is to be determined by an inquiry the purpose of which is to advise the trial judge. The intelligence of the child is to be determined not alone from his answers to the questions propounded to him, but, to a large extent, from his appearance and conduct while in the presence of the court.

[3] Because the trial judge has an opportunity to observe the child and listen to his manner of answering questions, the question as to competency rests peculiarly in his discretion. To so great a degree does it rest in the trial judge's discretion that it has been said that "in most cases, it would hardly be one which could be reviewed." People v. Dunlop, supra. It is only when there has been a clear abuse of discretion or a manifest misapprehension of some legal principle that the trial judge's decision will be reversed.

[4] Appellant's argument against the admissibility of the testimony of any child as young as was this boy is based upon the assumption that it is essential that it should be made to appear, not only that the child understands the nature and force of an oath, but that his sense of the obligatory force of an oath is rooted in sanctions of a religious character. This may have been the rule at common law and under the statutes of some states. Such, however, is not now the rule under the Constitution and statutes of this state. All that our Code requires is that it shall appear to the trial judge that the child's mentality is such that he is capable of receiving just impressions of the facts concerning which he is to testify and of relating them truly.

It was said by Mr. Justice Harrison in the Matter of Johnson, 98 Cal. 549, 33 Pac. 460, 21 L. R. A. 380, by way of obiter, it is true that the rule which formerly obtained in England that, as the child could not be examined except under oath, its evidence was excluded unless it understood the nature of an oath, does not obtain in this state. But even if it be necessary to show that the child understands the nature of the oath that may be administered to him if he shall become a

witness, nevertheless it is not necessary to show that he entertains any particular theological belief, such, for example, as a belief in a Supreme Being who punishes the wrongdoer here or hereafter. No person, child or adult, may be excluded from the witness stand on account of his opinions on matters of religious belief. Const. art. 1, § 4; Code Civ. Proc. § 1879. It is enough that the child possesses a sense of moral responsibility.

In the instant case, so far as the child's sense of moral responsibility is concerned, it was enough that his mother, as the boy told the trial judge, had taught him to tell the truth, and that he thought that little boys who do not tell the truth would be punished by being put in jail. Without doubt, he had no comprehensive conception of the nature of that kind of punishment; but it is sufficient that he understood that some, even if unknown, evil would befall him should he depart from the truth. A child who understands that he will be punished on earth is competent, although he know nothing of punishment after death. Sancedo v. State (Tex. Cr. App.) 69 S. W. 142; Bright v. Commonwealth, 120 Ky. 298, 86 S. W. 527, 117 Am. St. Rep. 590. As said by Mr. Wigmore:

"A child's inclination to tell the truth or the opposite is apt to be more a matter of instinct and of previous training and surroundings than of a conscious reflection upon the prospects of a future state." 3 Wigmore on Ev. pp. 2358, 2359.

For these reasons we think that, to qualify a child under 10 years of age upon the score of his moral responsibility, it is sufficient that he understands that it is his duty to tell the truth, and that he will somehow be punished if he does not. The rule is thus stated in Cyc.:

"It is held sufficient to qualify the child that he understands the difference between truth and falsehood, and his duty to tell the truth, and that he will be punished if he testifies falsely, although he does not understand the legal nature of an oath or appreciate the formality of taking it, as, from a legal standpoint, one who has an adequate sense of the impropriety of falsehood understands the nature of an oath, although not able to define it." 40 Cyc. 2204.

Appellant cites the case of State v. Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605. There the court proceeded upon the theory that the effect of an oath on the conscience of the child should arise from religious sentiments of a permanent nature. This, as we have seen, is contrary to the Constitution and statutes of this state. With us, as we have said, intelligence, and not belief, is the true test. The constitutional guaranty that no person shall be rendered incompetent to be a witness "on account of his opinions on matters of religious belief" would be violated if adults were held to have civil capacity to testify in a court of justice, though entertaining no belief in a Supreme Being or a future state of rewards and punishments, and the privilege denied to a child possessing no opinion conforming to some prescribed theological belief. "Free governments deal with the acts of the citizen, and not with his thoughts."

[5] Where, as here, the child is examined on his voir dire, before being sworn as a witness, and after his capacity to testify has been directly challenged by one of the parties, his capacity is not to be questioned by the jury after the trial judge has ruled against the objection thereto. The jurors, as triers of the credibility and persuasive sufficiency of all evidence, which is admitted for their consideration, may pass upon the weight to be given to the child's evidence, and, if they conclude that it is inherently improbable, may disbelieve it; but, the judge having determined the capacity of the witness by applying the rules of law to the facts found by himself, the witness stands before the jury untrammeled by any question as to his qualification. If, therefore, they reject his testimony, it should be merely because, all things considered, they do not believe him, and not because they find him lacking by force of the law's definition of his competency. With his competency the jury has nothing to do. Wigmore on Ev. vol. 1, §§ 486, 487; Id. vol. 4, § 2550.

We come now to the most difficult aspect of the question here presented—the exceedingly limited nature of the trial judge's examination of the boy and his peremptory refusal to permit appellant's counsel to ask any question while the boy was being examined on his voir dire for the purpose of adducing answers that might shed light upon his competency, i. e., his ability to receive just impressions of the facts respecting which he was expected to testify and to relate them truly. We purposely have given a somewhat extended consideration of the general principles applicable to the determination of a child's capacity to testify, in order to show, not only the wide latitude of discretion with which the trial judge is vested when passing upon the competency of a child witness, but the effect that an abuse of that discretion may have on the rights of the party objecting to the child's competency.

The author of this opinion is not prepared to say that, in all cases, counsel for the objecting party may examine the child on its voir dire as a matter of strict legal right.

"The mode of eliciting and determining by examination the fact of competency is left to the sound discretion of the judge." Williams v. State, 12 Tex. App. 137.

Mr Wharton says:

"The preliminary examination thus requisite is usually undertaken exclusively by the court,

and it is said that it will require a strong case to sustain a reversal of the ruling of the court examining such a witness." Wharton on Ev. § 368.

See the reference to Brazier's Case in People v. Bernal, 10 Cal. 67. In Carter v. State, 63 Ala. 52, 35 Am. Rep. 4, it was said that—

"When * * * a child of tender years is produced as a witness, it is the duty of the presiding judge to examine him or her, without the interference of counsel further than the judge may choose to allow, in regard to the obligations of the witness' oath."

Mr. Wigmore says:

"In this inquiry, on the one hand, the judge is not bound by the ordinary rules of evidence applicable to evidence offered to the jury; and, in particular, he need not permit cross-examination of witnesses called to prove or disprove another's qualifications." Wigmore on Ev. vol. 1, § 487.

But this same eminent law writer, in a later section (vol. 3, § 1820) says:

"The examination of a child, however, is made usually by the judge; though either counsel has of course the *right* to supplement it by questions tending to bring out whatever may be in favor of his contention." (Italics ours.)

And in a footnote on page 2355 appears the following:

"In Hughes v. R. Co., 65 Mich. 10, it was said that the trial court must himself make the examination, and not leave it to counsel; *but this seems unsound.*" (Italics ours.)

[6] Without undertaking to decide whether the objecting party may in all cases, and as a matter of strict legal right, supplement the trial judge's examination with questions of his own, we are satisfied that in the instant case the refusal to permit defendant's counsel to question the boy on his voir dire was clearly an abuse of discretion, so prejudicial to appellant that a reversal must ensue. It may well be that if the examination as conducted by the trial court had taken a wider range, as it should, its decision of the matter would have been final, even though defendant's counsel were denied the right to propound questions to the boy on the voir dire.

The restricted examination conducted by the court was limited to such narrow confines that it barely sufficed to develop the following: In reply to the court's questions, the boy gave his name and age, stated that he had been in court before (referring, we assume, to the preliminary examination before the justice of the peace); that he attended Sunday school; that he lived with his mother, who, he said, had taught him to tell the truth, and that he thought that boys who do not tell the truth would be put in jail. This is practically all that was developed by the court's examination, except the further fact that the child seemingly failed to grasp the purport of some of the judge's questions. While it doubtless was not necessary to interrogate the child respecting the specific facts as to which he was later to be called to testify, we think that a due regard for the rights of the accused demanded either that the court's examination should have covered a wider range or that counsel should have been permitted to put to the boy such questions as might further develop his ability to relate truly the facts respecting which he was called to give evidence. The acts as to which he was expected to testify were of such a character that the author of this opinion inclines to the view that the trial judge, from the boy's apparent age and his general appearance while being examined on his voir dire, was justified in assuming that, if the acts were committed as charged against defendant, the boy was capable, at the time of their commission, of receiving just and accurate mental impressions of the facts. And the author of this opinion is inclined to the view that the facts developed by the trial judge's examination justified the conclusion that, in so far as the boy still retained true mental pictures of what had occurred, unaffected by the suggestions of others, he would endeavor honestly to relate all that he remembered.

But the Code's test of qualification requires something more than a truthful disposition and the ability to receive just mental impressions of objective facts. The requirement that the child shall be able to truly relate the impressions that he may have received implies, not alone a truth-telling disposition, but a memory sufficiently strong and retentive to be able to recollect faithfully the objective facts or the mental impressions originally created thereby. There is nothing in the trial court's examination that tends to disclose the strength or weakness of the child's power of recollection. The trial was had three and a half months after the occurrences that led to the filing of the information against appellant. Meanwhile the boy undoubtedly had heard his parents talk about the case and its distressing facts. The force of suggestion, always strong, is particularly potent with the impressionable and plastic mind of childhood. We have no reason to believe that either parent consciously and willfully intended to influence the child's testimony. But without intending any such result, the repetition of supposed facts in the presence of a child often creates a mental impression or concept that has no objective reality in any actually existing fact. Before being permitted to testify as a witness in the case, the child should have been asked some question or questions having a tendency to disclose the strength or weakness of his recollection—his ability to retain, for three months or more, and uninfluenced by the unconscious effect of suggestion, a clear and distinct mental picture of what happened at the time

when, it is claimed, he and the defendant were together. Such line of questioning was neither pursued by the court nor permitted to counsel.

That such questioning would probably have made manifest the boy's inability accurately to recall and thus relate, at the date of the trial, exactly what did happen three and a half months previously, is, we think, sufficiently disclosed by what occurred after the child was sworn as a witness in the case. Not only did the boy, on cross-examination, testify that he had been told by his mother to say that defendant had done certain things, but his testimony before the committing magistrate, given only 10 days after the alleged crime, and offered in evidence to impeach his testimony in the superior court, leads to the conclusion either that his testimony before the committing magistrate was false or that his power of recollection was so weak that, when examined as a witness in the superior court, he no longer retained any independent recollection of what had happened. The record here shows that the following occurred on the examination of the child before the committing magistrate:

"The Court: * * * Q. Do you know this man sitting over there? (Indicating the defendant.) A. Yes, sir.

"Q. Did that man ever do anything to you? A. What is your name?

"Q. Did this man ever do anything to you? A. That man; no.

"Q. He didn't ever do anything to you? A. No.

"The Court: Now, look at that man over there; do you know him now? A. Yes, sir.

"Q. What did he do to you?

"By the Mother: Tell him the truth.

"The Court: Q. What did this man do to you—anything? A. No.

"Q. Didn't he do anything to you? A. No.

"Q. Do you know that man over there? A. Yes, sir.

"Q. What is his name? A. I don't know what his name is.

"Q. You don't know what his name is? A. No.

"Q. And you say he never did anything to you? A. No.

"Q. Do you want to walk over there and take a look at him? Come on, you and I, and we will walk over there; that is a good boy. (The court and witness approach the defendant.) Now, then, is this the man; do you know him? A. No.

"Q. Did this man ever do anything to you? A. No, sir.

"Q. * * * Do you know this man? A. No.

"Q. (by Mr. Fitts). Did you ever see him before? A. No.

"The Court: Did he ever do anything to you? A. No."

Then, after an interval during which several questions were asked which have no bearing on the case:

"Q. * * * I want you to look at this man again and tell me if he ever did anything to you? A. Yes.

"Q. When did you see him? Do you know when you saw this man before? A. In the garage.

"Q. By Mr. Fitts: What happened in the garage? What took place there? A. He didn't do anything in there.

"Q. Did he do anything at any place? A. No."

The conclusion arrived at by the author of this opinion is that the trial court's examination of the boy on his voir dire was restricted to such a narrow and limited compass that to deny appellant's counsel the privilege of supplementing the court's examination with questions of his own was, under all the circumstances of this case, an abuse of discretion, and therefore error. And since without the boy's testimony the evidence does not warrant a conviction, the error was prejudicial, and a reversal is necessary.

In holding that, under the circumstances of this case, it was error to deny defendant the privilege of examining the boy on his voir dire, I do not wish to be understood as holding that either party to an action, always, in every case, and as a matter of strict legal right, may supplement the court's examination of the child. What I do hold is that the court, by its own examination of a child on his voir dire, should adduce some fact or facts tending to show that the child's memory is strong enough to enable him to recall such facts as those respecting which he is to testify solely by reason of his own independent power of recollection, or else the privilege of showing the possession or lack of such power of recollection should be accorded counsel. Lacking the ability accurately to recollect past occurrences, the child, though he may have received, at the time of their occurrence, just impressions of the facts respecting which he is called to testify, is not capable of "relating them truly."

Judgment and order reversed.

WORKS, J. I concur in the judgment of reversal, and in the reasoning upon which the Presiding Justice concludes that a reversal should result; but, as the question before us is one of great importance, I deem it proper to point out other reasons which, in my opinion, show that the trial judge abused the discretion confided to him under the law regulating the competency of children of tender years to testify.

[7] It is to be observed that, under the terms of subdivision 2, § 1880, Code of Civil Procedure, there are two separate tests for a determination of the question whether children under 10 years of age may be witnesses. They cannot testify if it appears, first, that they are incapable of receiving just impressions of the facts respecting which they are examined; second, that they are

incapable of relating those facts truly. It is worthy of remark, however, that each of these tests must be satisfied through a medium which is akin to one of them; that is, through the ability of the child to narrate, considering also such physical manifestations as may accompany narration, gestures, play of features, and the other indicia which will always aid in determining mental dullness or alertness. It is the existence of these latter phenomena which principally gives rise to the rule that the competency of children to be witnesses is to be left to the discretion of the trial judge; a rule founded, manifestly, upon sense, and one which, it must be conceded, renders it difficult for a court of review to say, in a given case, that the discretion has been abused.

[8] It is to be noted also that, while both tests are to be ascertained through an identical medium, they relate to different periods of time: The first, to the date of the occurrences which are under inquiry, for it is then that "just impressions" are to be received; the second, to the date upon which the child is offered as a witness, for it is then that the capacity for "relating truly" is to be ascertained. Therefore, if a given child shall have made narration of the facts of an occurrence at a time less remote from the time of their happening than is the date of the trial, that narration would be expected better to indicate whether he had received a just impression of the occurrences than would his narration, or his examination on his voir dire, at the trial. On the other hand his examination at the trial would furnish the guide for determination of the ability truly to relate, provided that a comparison of that examination with the earlier narration would furnish a proper aid to the ascertainment of that test. It is to be remembered that such a comparison is to be made by the court, for the purpose of determining whether the child is competent to be a witness, thus presenting a very different question from the one requiring the jury to determine, by comparison, whether statements made in an earlier narration are so variant from his testimony, after he has become a witness, as to make that testimony unworthy of credence.

Taking these principles as a just basis upon which to proceed, if they constitute such a basis, what is the situation in the instant case? The preliminary examination of appellant was held 10 days after the alleged occurrences from which sprang the charge against him, and the testimony of the child on that examination, set forth in the opinion of the presiding justice, was offered for the purpose of impeaching him as a witness. Aside from that purpose, however, it should have been valuable to the court as solving the question whether the boy was competent as a witness, upon the score of his incapacity, 10 days before, to receive a "just impression" of the occurrences of the day, if there were any in which appellant was concerned. Conceding to the trial judge the advantage possessed by him of observing the child, his gestures, his manner, and his expression, it appears to me that his statements made to the magistrate demonstrate that he was disqualified as a witness under the first test provided by the statute. Considering the nature of his answers, it makes no difference what was his demeanor before the trial judge during his examination on his voir dire more than three months later. It is manifest to me that his answers before the magistrate show that his mind was incapable of receiving a just impression of anything that occurred between him and appellant, whatever may have been the nature of the occurrence. He was questioned and requestioned, and questioned yet further, and nothing came of it. He was asked 10 times, in slightly variant forms, whether appellant had ever done anything to him. The first time he answered with a question to the magistrate, "What is your name?" At all other times, up to and including the eighth, he answered, "No." The ninth time he answered "Yes," and the tenth he returned again to, "No." Immediately after he answered "Yes," to the ninth putting of the question, the following transpired:

"By the Court: Q. When did you see him? Do you know when you saw this man before? A. In the garage.

"Q. By Mr. Fitts: What happened in the garage? What took place there? A. He didn't do anything in there."

The tenth putting of the question already mentioned then came in this form: "Did he do anything at any place?" The answer, as already stated, was, "No." The child was asked five times if he knew appellant. The first three times he answered yes. The fourth putting of the question with its answer, are thus shown:

"Q. Do you want to walk over there and take a look at him? Come on, you and I, and we will walk over there; that is a good boy. (The court and witness approach the defendant.) Now, then, is this the man; do you know him? A. No."

To the fifth statement of the question he also answered, "No." Mr. Fitts then put a kindred question: "Did you ever see him before?" The boy answered "No."

Upon this evidence it is to be wondered how the committing magistrate ever bound appellant over, as the other evidence at the trial was very slight, and of no value whatever without the testimony of the child, and that testimony alone must have been taken to establish the corpus delicti. But with the action of the justice of the peace we have nothing to do; and I reiterate the statement that the answers of the boy at the preliminary examination show that he was not qualified as a witness under the first test imposed by the statute.

In developing my views upon the subject of the second test it is necessary to state a few words of the boy's testimony at the trial. He says that appellant unbuttoned one button of his clothes and that "he sucked on my hand." This rather cryptic expression is explained by the testimony of the child's father to the effect that the child had been taught to employ the word "hand" in referring to the male organ of generation. The boy also testified that the crime was committed in a garage; and the circumstance is mentioned, with the reminder that he was questioned at the preliminary examination as to what happened in a garage, for the purpose of indicating that on both occasions he had the same event and the same place in mind. A comparison of the two narratives will indicate an amazing difference between them. The variance cannot be accounted for upon the theory that the child's powers of narration had so surprisingly increased during the three months and a half which elapsed between the two events. To what, then, was the change owing? We have the key in certain of the observations of the presiding justice. He says:

"Meanwhile the boy undoubtedly heard his parents talk about the case and its distressing facts. The force of suggestion, always strong, is particularly potent with the impressionable and plastic mind of childhood. * * * The repetition of supposed facts in the presence of a child often creates a mental impression or concept that has no objective reality in any actually existing fact."

The great change in the child's story and in his manner of telling it must have been occasioned through the process thus so graphically described. At the preliminary examination the boy had no story. A quarter of a year later he has one so fully developed that it serves to establish the corpus delicti and to fasten a conviction upon the appellant.

[9] The second test prescribed by the statute must contemplate that a child's ability truly "to relate" is to depend upon his natural power of narration, exercised through his unprompted relation of facts as to which he has previously acquired a "just impression," and not upon a factitious ability to recite what he may have heard, with frequent repetition, from others, whether their utterances were spoken with design or in complete innocence; and there is no reason to suppose that anything apart from the latter was the case in the present instance.

Conceding that the child was at all times honest, if the idea of dishonesty, in the strict sense, can be thought of in contemplating a child of such tender years in connection with such a matter; conceding that he told the truth on both occasions, as he understood truth (and there appears no reason to assert the contrary); conceding that the testimony before the magistrate did not impeach the witness—conceding all these things, it is impossible to understand how the child could answer as he did before the magistrate, could then answer as he did at the trial, and yet be said to meet the second requirement of the statute. It seems manifest, to me, at least, that he was incapable, at the time of the trial, of truly relating the facts making up an occurrence of three and a half months earlier.

[10] What is said above proceeds upon the theory that it is the duty of a judge, at any time after he has determined that a child is competent as a witness, to change his mind upon due occasion, remove the child from the witness stand, and instruct the jury to disregard his testimony. It requires no argument to convince that this must be the rule. The trial judge should have taken that course upon the presentation of the child's testimony given at the preliminary examination.

I concur: CRAIG, J.

186 Cal. 508

BURR v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 9470.)

(Supreme Court of California. July 26, 1921. Rehearing Denied Aug. 25, 1921.)

1. Municipal corporations ⟸969(3) — Recital as to necessity or emergency in tax ordinance not conclusive so as to warrant increase in rate.

Recital of facts in ordinance to show necessity or emergency is not conclusive of the truth of the recital or existence of such facts so as to warrant increase in tax rate, under San Francisco Charter, art. 3, c. 1, §§ 11, 13.

2. Municipal corporations ⟸957(3) — Statement of increase in expenses in tax ordinance held not to show "great necessity or emergency."

A statement in an ordinance that the expenses of the city had increased to such an extent that they could not be kept up without exceeding the dollar limit did not show "great necessity or emergency" within the meaning of San Francisco City Charter, art. 3, c. 1, §§ 11, 13, authorizing increases in taxes only in case of any great necessity or emergency.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by E. W. Burr, as executor of the last will of C. C. Burr, deceased, against the City and County of San Francisco. Judgment for defendant, and plaintiff appeals. Reversed.

Drown, Leicester & Drown, of San Francisco, for appellant.

George Lull and Maurice T. Dooling, Jr., both of San Francisco, for respondent.

SHAW, J. In the court below judgment was given in favor of the defendant, from which the plaintiff appeals.

The object of the plaintiff's action was to recover of the city and county of San Francisco the sum of $462.60 paid as taxes upon the property of the plaintiff's testator for the year 1914 under protest, which tax, it is alleged, was unlawfully levied by the city, in violation of the provisions of section 11, chapter 1, of article 3 of the city charter, limiting the annual tax rate to $1 on each $100 of the assessed valuation of property.

Section 11 aforesaid provides that, exclusive of certain special taxes, the tax levy for any year "shall not exceed the rate of one dollar on each one hundred dollars valuation of the property assessed." This provision is qualified by a provision of section 13 of the same chapter, which at the time of the said tax levy read as follows:

"The limitation in section eleven of this charter upon the rate of taxation shall not apply in case of any great necessity or emergency. In such case the limitation may be temporarily suspended so as to enable the supervisors to provide for such necessity or emergency. No increase shall be made in the rate of taxation authorized to be levied in any fiscal year, unless such increase be authorized by ordinance passed by the unanimous vote of the supervisors and approved by the mayor. The character of such necessity or emergency shall be recited in the ordinance authorizing such action, and be entered in the journal of the board." Stats. 1899, p. 261.

The levy in question was made under an ordinance adopted by the supervisors of the city on June 29, 1914, for the purpose of meeting the requirements of the aforesaid provision of section 13 regarding taxation in the case of great necessity or emergency. The recital of the facts showing the great necessity and emergency in the ordinance was as follows:

"Section 1. It is hereby recited, determined and declared that a great necessity and emergency exists within the city and county of San Francisco, which requires that the limitation of taxation contained in section 11 of chapter 1, of article 3 of the charter of said city and county, be temporarily suspended, and that the character of such necessity and emergency is as follows, to wit:

"That on the 18th day of April, 1906, and days following, a fire destroyed a vast amount of the taxable property within the city of the approximate value of $150,000,000.00.

"That the assessment roll for the year 1905–06 aggregated $525,000,000.00; that the value of taxable property, shown by the last assessment roll was but slightly in excess of that sum and the estimated value of taxable property for the ensuing fiscal year will not exceed $540,000,000.00; that said fire checked the normal increase of said assessment roll, and its restoration to the former amount has been extremely slow and difficult and at a less ratio than has been the increase of necessary governmental expenses; that in addition to the loss of taxable property aforesaid the adoption of Senate Constitutional Amendment No. 1 by the voters on November 8, 1910, still further reduced the amount of taxable property of said city and county by approximately $97,000,000.00, and at the same time deprived the city of certain license tax revenues amounting to a large sum; furthermore, by amendments made to the charter in 1907, the salaries in the police and fire departments were increased by the amount of more than $1,000,000.00; also that by charter amendment adopted November 15, 1910, additional expenses were added to the expenses of the city in the aggregate of approximately $100,000.00; that at the several sessions of the Legislature since 1905, including the session of 1913, large additional expenses and financial burdens were laid upon the county of San Francisco, including the expenditures on account of the so-called 'Mothers' Pension Act', the so-called 'Employers' Compensation Act' and 'Tenement House Act,' which expenses and burdens could not be anticipated and provided for under the provisions of the charter of said city and county when adopted in 1898; that furthermore, the Legislature by various enactments, has materially reduced the sums heretofore received by the state in support of the public school system, which reductions could not be foreseen and provided for at the time of the adoption of said charter; that industrial, financial and economic conditions existing throughout the country have resulted in a rapid advance in the prices of commodities and of labor and such advance has been proportionately greater than the value of property subject to taxation; that the necessity of meeting such advanced costs is urgent and imperative and is beyond the power of the city and county and its officers to control; that the city and county of San Francisco faces a certain and unexpected shortage of funds, and that it will be impossible to conduct the government of the city and county and meet its essential expenses unless the limitations prescribed in chapter 1 of article 3 of the charter be temporarily suspended.

"That the demand due to the rapid growth of the city, particularly in new districts of the city and county, developed as a result of shifting of population caused by the fire aforesaid, for additional public institutions, services and necessities have been great, which demands and necessities could not be reasonably foreseen; that the revenue of the city and county from licenses has decreased by approximately the sum of $250,000.00 since 1908–09.

"That the estimated and necessary expenditures of the city and county of San Francisco for the fiscal year ending June 30, 1915, will be $14,900,000, of which sum approximately $3,600,000 must be raised in excess of the limitation contained in the charter.

"That a great necessity or emergency exists for the suspension of the limitation in section 11 of chapter 1 of article 3 upon the rate of taxation, because of the inadequacy of a tax of $1.00 on each $100.00 upon the assessed valuation of property in the city and county of San Francisco arising from the conditions, acts, happenings and things above recited, and such limitation is hereby suspended for the purpose of providing for such emergency and necessity."

Section 2 of the ordinance declared that a tax was levied of $66^4/_{10}$ cents upon each $100 of assessed valuation of property within the city, and that said tax should be "an increase of and an addition to the rate of one dollar taxation on each one hundred dollars of assessed valuation" and "an addition to and increase of all taxes of every amount and kind authorized to be levied under and by virtue" of section 11 aforesaid.

The claim of the plaintiff is that the recital of facts set forth in this ordinance to show a great necessity or emergency are insufficient for that purpose, and do not come within the meaning and effect of the aforesaid section 13, and, consequently, that the increase in the tax rate made by said ordinance is wholly void. This presents the only question for consideration in the case.

[1, 2] At the outset it is to be noted that section 13 aforesaid does not authorize a tax exceeding the dollar limit whenever the board of supervisors shall by ordinance declare that a great necessity or emergency exists, but that it authorizes such increased tax only "in case of any great necessity or emergency"; that is, when a great necessity or emergency does, in fact, then exist. The consequence is that the recital of facts in the ordinance to show such necessity or emergency is not conclusive of the truth of the recital or of the existence of such facts. This was expressly decided in San Christina, etc., Co. v. San Francisco, 167 Cal. 772, 141 Pac. 384, 52 L. R. A. (N. S.) 676. It must follow, also, that the conclusion or declaration of the board that the great necessity or emergency did exist because of the facts recited is not conclusive. Both the existence of the recited facts and the conclusion drawn therefrom may be disputed by the taxpayer and, on review by the courts, held to be nonexistent, or unwarrantable, respectively.

In the above-cited case, the San Francisco tax levy of 1910 in excess of the dollar limit was attacked. The ordinance levying that tax declared that a great necessity and emergency existed in 1910, because of the destruction of and damage to public property, building, streets, and sewers by the great fire and earthquake in April, 1906, which the city had found it impossible to reconstruct, replace, or repair in the meantime out of its revenues appropriated to that purpose, and because of danger that the bubonic plague prevalent in 1907 might recur and the necessity of provision to prevent such recurrence. This was held to be insufficient to constitute a "great necessity or emergency" existing in 1910. The court there said:

"It was not in contemplation that the supervisors could foster and nurse such emergency so as to spread their taxing power over an indeterminate number of years. As little was it designed that under the head of emergency or necessity should be imposed taxes not bearing forcefully and directly on the relief, cure or prevention of the emergency or necessity."

Also that—

Where such a tax ordinance is attacked, the "court will scrutinize the items presented: First, to determine whether or not the great emergency or necessity, within the meaning of the charter, existed at the time of the levy; and, second, whether, if it be found that such emergency or necessity did in fact exist, any of the items in the levy do not fairly come within the purport and scope of such emergency levy."

It necessarily follows that a great necessity or emergency requiring the raising of money to rebuild a city hall, for example, would not uphold an additional tax to raise money to repair streets and sewers or to rebuild a county hospital. Webster's definition of the word "emergency" as:

"An unforeseen combination of circumstances which calls for an immediate action or remedy; pressing necessity, exigency"

—is approved and followed in that opinion, and the phrase "great necessity or emergency" is treated on the theory that the adjective "great" applies to both words. See, also, People v. Lee Wah, 71 Cal. 80, 11 Pac. 851.

Counsel for the city virtually concede that no one of the particular facts recited in the ordinance is of itself sufficient to show either a great necessity or a great emergency. They rest their case on the proposition that the facts recited, taken together, showed that the performance of the ordinary functions of the city government for the fiscal year 1914–1915 required the expenditure of a larger amount of money than could have been raised by a tax rate of $1 on the $100, and that this constitutes a sufficient "great necessity" to come within the meaning of the charter provision in question. They say:

"If it will be admitted by counsel for appellant that in every municipality there is a minimum of expenditures which must necessarily be made if the municipality is to serve its normal and essential functions, then it seems impossible to escape the conclusion that if for some reason the value of the taxable property decrease, or the necessary expenditures increase, or both, that there exists a great necessity—indeed, an overpowering one—for increasing the rate of taxation."

With respect to the particular case they proceed to say:

"It will serve no useful purpose to go in detail into the various facts recited in the ordinance which show (1) a decrease in income and (2) an increase in necessary expenditures. If we are correct in our contention that when the city and county cannot perform all of its necessary functions within the dollar limit a great necessity exists for its suspension, it follows that the facts recited which have brought about this state of affairs are not themselves great necessities or emergencies. They are only the various contributing factors which, taken

all together and viewed as a whole, have made it impossible for the city properly to perform all its duties within the dollar limit. The great necessity lies in the fact that the city can no longer properly function within the dollar limit. The contributing facts recited in the ordinance simply characterize this great necessity."

Their claim, in effect, is that the final recital of the ordinance to the effect that the estimated expenditures of the city for the year ending June 30, 1915, will be $14,900,000, "of which sum approximately $3,600,000 must be raised in excess of the limitation contained in the charter," is alone sufficient to show the great necessity for the increased tax, and that the preceding recitals are mere evidentiary facts which establish the ultimate fact.

If this is the meaning of section 13, then it practically destroys the dollar limit. If the growth of the city, or changes in the charter, or in the state law, or the entering upon new activities by the city government, or other changes which are always to be expected in a growing community, require the creation of new offices, bureaus, or commissions and the hiring of more employees, and result in large additions to the regular yearly running expenses of the city, and there is no corresponding increase in the tax valuation, and these things are sufficient to create the "great necessity" in mind when the charter was adopted in 1899, then of course, they will continue to operate every year and the dollar limit ceases to exist. It reduces the meaning of the charter provisions on the subject to a mere statement that such tax shall not exceed the dollar rate, except in cases where that rate will not raise the expenses of the city, in which event the rate will be unlimited. The charter may as well have provided that such taxes should not exceed the dollar limit, unless a higher rate was necessary to raise the money required to pay the regular annual expenses of the city. The temporary suspension authorized to "enable the supervisors to provide for such necessity or emergency" would immediately become regular and permanent. The restriction to the dollar limit, which was intended to compel reasonable economy, would have no effect of that kind whatever. All that the supervisors need do to circumvent the provision would be to create a necessity by their own extravagance or by engaging in new municipal activities and enterprises, benevolent or otherwise, and the power to levy the increased rate would automatically follow.

We think the charter makers did not intend that the dollar limit should be so ineffectual and useless. We can perceive no essential difference between the conditions shown by the ordinance aforesaid and those shown by the ordinance under consideration in San Christina v. San Francisco, supra, which also declared that the facts recited constituted a "great necessity and emergency," as does the present one, and which the court held insufficient to show either. The ordinance, in this view of the case, amounts simply to a statement that the expenses of the city have increased to such an extent that they cannot be kept up without exceeding the dollar limit. This, in our opinion, does not come within the letter or spirit of the term "great necessity or emergency."

It may be observed that the city authorities themselves seem to have been somewhat doubtful on the subject, for early in the year 1915 the supervisors proposed an amendment of section 13 aforesaid to the voters, and called an election at which it was adopted, whereby nearly all the matters stated in the ordinance were excepted from the operation of the dollar limit of section 11, and it is no longer of much practical effect.

It follows from what we have said that the court below erred in holding that a great necessity or emergency was shown by the tax ordinance.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHURTLEFF, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.

185 Cal. 656

JOSE et al. v. UTLEY, Dist. Atty.
(L. A. 6355.)

(Supreme Court of California. May 13, 1921.)

1. Mines and minerals ⊂=36—Location of oil lands in absence of discovery merely authorize possession and development.

In the absence of discovery of oil, the location of mineral lands under the laws of the United States merely authorizes the locators to maintain possession while diligently and in good faith prosecuting the work of endeavoring to discover minerals thereon.

2. Corporations ⊂=144—Purchasers for less than par liable to company for difference between value of property conveyed to corporation for stock and amount of stock issued therefor.

Purchasers of corporate stock, par value $1, for only 10 cents, as fully paid up, if aware of the initial transaction whereby certain unproved oil lands were conveyed to the company for the stock, would be liable to the corporation for the difference between the value of the property conveyed to it for the stock and the amount of stock issued therefor pro rata.

3. Licenses ⊂=18½, New, vol. 12A Key-No. Series—Issuance of capital stock held fraudulent to creditors and stockholders on account of excessive valuation placed on property acquired by company.

In suit to enjoin the district attorney of a county from prosecuting plaintiffs' underwriter

or broker for violating the Corporate Securities Law, popularly known as the Blue Sky Law, complaint *held* to show that the issuance of the capital stock of the corporation involved was fraudulent as against creditors and stockholders because of the excessive valuation placed on the property, claimed but unproved oil lands located under the laws of the United States, acquired by the corporation.

4. Equity ⟸65(2)—Equity will not aid fraudulent corporate transactions by enjoining district attorney from prosecuting for violation of Blue Sky Law.

In view of the fraudulent nature of the corporate transactions involved, equity will not aid plaintiffs seeking injunction against the district attorney for a county from prosecuting plaintiffs' underwriter or broker for violation of the Corporate Securities Law, popularly known as the Blue Sky Law, even if the law attacked is unconstitutional and the threatened action of the district attorney erroneous.

In Bank.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Suit by John A. Jose, Jr., and others against H. S. Utley, District Attorney for San Diego county, Cal. From Judgment denying injunction, plaintiffs appeal. Affirmed.

R. M. Widney, of Pacoima, for appellants.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and H. S. Utley, Dist. Atty., and E. S. Lovett, Asst. Dist. Atty., both of San Diego, and H. L. Carnahan, of Los Angeles, for respondent.

WILBUR, J. This action was brought by the plaintiffs to enjoin the defendant from prosecuting Margaret Truax for violating the Corporate Securities Law (Stats. 1917, p. 673; 1919 p. 231), popularly known as the "Blue Sky Law." Margaret Truax is engaged in selling 1,000,000 shares of corporate stock in the Imperial Pacific Oil, Gas & Refining Company, a corporation. Plaintiffs claim that the Corporate Securities Act is unconstitutional for various reasons, and that the threatened action of the district attorney should be restrained. A demurrer was interposed to the complaint, was sustained, and judgment thereupon rendered in favor of the defendant, from which the plaintiffs appeal.

In order to understand appellants' contention, it will be necessary to state some of the facts alleged in the complaint. Plaintiffs located placer oil mining claims upon 56 quarter sections of surveyed government land in the Imperial Valley, by posting and recording notices of location describing the property by quarter sections in each location notice. In addition to these locations it is alleged that some 250 associates of the plaintiffs have located additional land, amounting, together with the 56 sections, to a total of 32,520 acres. Plaintiffs organized the Imperial Pacific Oil, Gas & Refining Company under the laws of the state of Arizona for the purpose of conveying to such corporation the locations upon the 56 quarter sections (8,960 acres) of land out of the 35,520 acres in consideration of 2,496,000 shares of the capital stock, fully paid up and nonassessable, of the capital of $2,500,000, divided into 2,500,000 shares of stock of the par value of $1 per share. In pursuance of plaintiffs' plan, articles of incorporation were prepared and filed in the office of the Arizona corporate commission, February 12, 1919, wherein I. J. Lipsohn, F. S. Hess, and H. A. Waltz were named as directors, and also as president, vice president, and secretary and treasurer, respectively. The meeting of this board of directors, as appears by the minutes thereof, which are attached to the complaint as an exhibit, was held March 6, 1919, wherein it was announced that the secretary had received $4 for four shares—$1 from I. J. Lipsohn, $1 from F. S. Hess, and $2 from M. A. Waltz—in pursuance whereof four shares of stock were issued; one to I. J. Lipsohn, one to F. S. Hess, and two to M. A. Waltz. Thereupon the directors considered a proposal dated Los Angeles, Cal., February 10, 1919 (two days before the filing of the articles of incorporation), addressed to the board of directors of the corporation offering to sell to the corporation "for and in consideration of $2,496,000, consisting of 2,496,000 shares of the par value of $1 per share, the same to be issued fully paid up and nonassessable, and to be issued to such person or persons in such number of shares, at such time or times as we shall or may from time to time in writing demand, all our rights, claims, and interests in the following described property."

This proposal contains a description of oil claims upon only 16 quarter sections of land, amounting to 2,560 acres instead of 8,960 acres, as planned. Thereupon the board of directors accepted the proposition in a resolution reciting that "the property mentioned therein being worth, in the judgment of the directors, the sum of $2,496,000 in the capital stock of this corporation." The officers of the corporation were directed to complete the purchase from plaintiff of the four sections by the payment to plaintiffs or on their order of the sum of $2,496,000 in the capital stock of the corporation, which "said shares upon being issued and delivered shall thereby become and be fully paid and nonassessable, as provided by the articles of incorporation."

Immediately after the passage of this resolution accepting plaintiffs' offer, F. S. Hess resigned as director and vice president, and two of the plaintiffs, Walter C. Wibeck and Harry L. Hollingworth, were elected; one to fill the vacancy caused by the resignation of Hess, and the other to fill the vacancy due to the fact that the by-laws pro-

vided for four directors, three only being named in the articles of incorporation. On March 8th two of the plaintiffs, Walter C. Wibeck and Harry L. Hollingworth, met as directors of the corporation, accepted the resignation of I. J. Lipsohn and M. A. Waltz as directors, and elected two other of the plaintiffs, John A. Jose and James Howze, as directors of the corporation. The plaintiffs were thus in full control of the corporation, the dummy directors having resigned. The agreement to accept the location upon four sections of land in exchange for 2,496,000 shares of fully paid stock had not been consummated by the conveyance of the land or the issuance of the stock. On April 1, 1919, the directors, being four of the plaintiffs, consented in writing to the holding of a meeting of the board of directors of the corporation, and passed a resolution to make application to the Arizona corporation commission for permission to issue to the plaintiffs, or such persons as they might direct, 1,996,000 shares, fully paid up and nonassessable. An additional proposal was submitted by the plaintiffs for one transfer to the corporation of their interests in eight sections of land (5,120 acres) for the sum of $8. The resolution accepting this proposal recited that the interests of plaintiff therein was worth in excess of $8.

In the complaint the parties in interest, the plaintiffs and their associates, are referred to as of "limited financial ability." It is alleged that the formation of this corporation under the laws of Arizona was brought about "as being more liberal and less expensive and better suited to the limited financial ability of the parties in interest." and further:

"That these plaintiffs, and said service men, being unable, from their limited private resources, to provide the proper funds for development and expenses, and for the purpose of raising such funds with the least expense and delay from technical legal entanglements and obstructions, decided to pool 1,000,000 shares of their private stock, and to legally sell the same, or so much thereof as was necessary, and on safe and reasonable terms, to purchasers, so as to give the purchasers a fair chance in the benefits of a successful future development and rise in stock value; that from the proceeds of said sales there would be paid the necessary current expenses thereof, and that the balance would be spent in the development for oil on said 8,960 acres, for the benefit of all parties in interest."

It is alleged that said 1,000,000 shares of stock were to be transferred to a competent business trustee, experienced in methods of selling and having offices and appliances therefor, "and thereby avoid the necessity of incurring all these expenses for office rent, furniture, books, stationery, typewriters, clerks, and employees." In pursuance of this purpose, on July 10, 1919, plaintiffs entered into a written agreement with Margaret Truax, whereby they transferred to her 1,000,000 shares of stock in the corporation to create a fund for drilling purposes. This stock she was to sell at a price not less than 10 cents per share, receiving and holding the proceeds derived from such sale or sales up to 10 cents as a trust fund to be used for drilling and development purposes on the land of the Imperial Pacific Oil, Gas & Refining Company. She was to have as compensation for acting as trustee all such sum or sums of money as she might secure from the sale of said stock over and above 10 cents, to be full compensation for her services. The funds so derived for the corporation (which could not exceed $100,000), were to be paid out by her for the said drilling operations, which were to be conducted under the direction and supervision of the corporation, through its duly authorized officers.

It is further agreed that the trustee should not be responsible for the failure or mistakes in drilling of wells or developing the property.

Thereafter Margaret Truax sought to secure a broker's permit in accordance with the Corporate Securities Act, and before the issuance of said permit proceeded to advertise said stock for sale. Purchasers were required to sign the following:

"Imperial Pacific Oil, Gas & Refining Company.
"Application for Development Fund Stock.
"Notice.—Right is reserved to withdraw all offerings at any time without notice, or to reject any application, or to allot a less number of shares than applied for.
"To M. Truax, Trustee of 'Development Fund,' Imperial Pacific Oil, Gas & Refining Company:
"I herewith subscribe for and agree to take ——— shares of the stock being sold by you in trust for the benefit of the development fund of the Imperial Pacifc Oil, Gas & Refining Company, and agree to pay therefor the sum of ——— dollars.
"In making this application, I understand that the business of prospecting for oil is hazardous and that no guaranty is made me that oil will be discovered. With this understanding, I consequently relieve you from all claims for liability in the event oil is not discovered, and the money herein subscribed for development purposes lost. Said money is hereby contributed to said development fund as per your trust terms.
"Name, ———,
"Address, ———."

It is further alleged that the corporation commissioner refused to permit sales of said stock or advertisements therefor until the corporation should receive a permit for the original issue and sale of the stock by the corporation, claiming that said original issue was void under the Corporate Securities Act of California.

Plaintiffs allege that notwithstanding the alleged unconstitutionality of the Corporate

Securities Act they endeavored to comply with the demands of the commissioner and made application to such commissioner, which application is set up in the complaint. Plaintiffs, owing to the expense of complying with the orders of the commissioner of corporations, as they allege, finally decided to ignore the orders of the commissioner, and on July 28, 1919, thereupon it is alleged, the commissioner directed the defendant, district attorney of San Diego county, to proceed to prosecute Margaret Truax and the San Diego newspapers for "publishing the advertisements relating to said oil lands, or territory thereabout, or relating to historical or geological reports on other successful oil fields and profitable investments therein, all of which were truly and fairly stated in said advertisements; said order or decision stating substantially that the newspapers were to be treated leniently, and that said M. Truax was the party they were after."

Plaintiffs allege that by reason of the invalidity of the Corporate Securities Act no criminal cause of action exists against plaintiffs or M. Truax or the San Diego newspapers. It is further alleged that prosecutions under this act would cause a multiplicity of prosecutions and litigation.

It is nowhere alleged in the complaint that there has been any discovery of oil upon any of the property located by the plaintiffs or their associates. On this subject it is alleged the lands located as oil claims and described in the complaint "were surveyed lands of the United States, known as mineral lands, and having the usual and very favorable geological and surface indications and evidence of containing valuable and extensive deposits of petroleum and mineral oils in commercial quantities; that said lands were open to location and development under the laws of the United States by these plaintiffs, and other persons qualified under such laws."

It is further alleged that experienced oil experts were employed by the plaintiffs to examine, test, and report upon the lands; that from such examinations and testings a report was made in which it was stated:

"That the geological indications and evidence were unusually favorable for large and profitable deposits of mineral oil, and that apparently it would be developed into one of the best producing oil fields in the United States."

These allegations fall short of alleging a discovery of oil within the meaning of the United States Statutes authorizing the location of government mineral lands. U. S. Revised Statutes, 2324–2329 (U. S. Comp. St. § 4620 et seq.); Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673–675.

[1] In the absence of discovery, the location of these lands merely authorized the locator to maintain possession while diligently and in good faith prosecuting the work of endeavoring to discover minerals thereon. The rule is thus stated in Union Oil Co. v. Smith, 249 U. S. 337, 39 Sup. Ct. 308, 63 L. Ed. 635:

"In the California courts the right of a locator before discovery while in possession of his claim and prosecuting exploration work is recognized as a substantial interest, extending not only as far as the pedis possessio but to the limits of the claim as located; so that if a duly qualified person peaceably and in good faith enters upon vacant lands of the United States prior to discovery but for the purpose of discovering oil or other valuable mineral deposits, there being no valid mineral location upon it, such person has the right to maintain possession as against violent, fraudulent, and surreptitious intrusions so long as he continues to occupy the land to the exclusion of others and diligently and in good faith prosecutes the work of endeavoring to discover mineral thereon. Miller v. Chrisman, 140 Cal. 440, 447, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444 (case affirmed in 197 U. S. 313, 49 L. Ed. 770, 25 Sup. Ct. 468); Weed v. Snook, ubi supra; Merced Oil Min. Co. v. Patterson, 153 Cal. 624, 625, 96 Pac. 90; 162 Cal. 358, 361, 122 Pac. 950; McLemore v. Express Oil Co., 158 Cal. 559, 562, 139 Am. St. Rep. 147, 112 Pac. 59."

The expense of drilling one oil well is from $100,000, to $150,000. Under the system of financing adopted by the promoters of the corporation, it would receive money enough to only sink one well to such a depth as $100,000 might justify. In order to hold the balance of the land located, it would be essential to put down an oil well on each 160 acres of land (Union Oil Co. v. Smith, supra), which would cost $5,600,000, at the estimated cost of $100,000 per well. It is thus apparent that under the scheme adopted for financing this corporation only one well could be sunk, which, if successful, would give the corporation title to 160 acres of land. It is also apparent from the foregoing that none of the parties interested in this organization believed that the property transferred to the corporation was worth $2,496,000, and that the offering of the corporate stock at 10 cents per share, with a commission of all over that amount, was an indication of their belief that the stock was not worth more than 10 cents per share.

[2] It is proposed to issue stock to purchasers who pay therefor only 10 cents, as fully paid up. Under our decisions, if the purchaser is aware of the initial transaction he would be liable to the corporation for the difference between the value of the property conveyed to the corporation for their stock and the amount of stock issued therefor, pro rata; if he was not, plaintiffs would be liable therefor. Sherman v. S. K. D. Oil Co., 197 Pac. 799.

It is apparent from the complaint that plaintiffs would be utterly unable to respond to this great liability.

[3] The respondent contends that the method of sale adopted, if stock is offered at 15 cents per share, was a representation to the public that the property of the corporation was worth at least $375,000, that is, 2,500,000 times 15 cents, and that it was in fact valueless. It is sufficient for us to say that it is manifest from the complaint that the issuance of the capital stock of the corporation was fraudulent as against creditors and stockholders, because of the excessive valuation placed upon the property acquired by the corporation, which brings the transaction under the rule announced first in Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143, and adhered to through a long line of cases, the last of which is Sherman v. S. K. D. Oil Co., supra, holding such a transfer of corporate stock to be fraudulent as to future creditors, and that the representation upon the face of the stock was a false statement of the fact, calculated to deceive both future creditors and stockholders.

[4] In view of the fraudulent nature of the transaction sought to be carried out, equity will not aid the plaintiffs by an injunction, even if it be conceded the law attacked is unconstitutional, and the threatened action of the district attorney is therefore erroneous. It is sufficient on this point to cite a decision of the United States District Court, in National Mercantile Co. v. Keating (D. C.) 218 Fed. 477, wherein the constitutionality of the Blue Sky Law of Montana (Laws 1913, c. 85) was attacked by a plaintiff who sought to enjoin the enforcement of the law; but as the plaintiff came into court with unclean hands that court refused relief.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; OLNEY, J.; SHAW, J.; SLOANE, J.; LAWLOR, J.

186 Cal. 535

IRILARRY v. CITY OF SAN DIEGO.
(L. A. 6540.)

(Supreme Court of California. July 26, 1921. Rehearing Denied August 25, 1921.)

Garnishment ⟸17 — Garnishment cannot be levied on municipal corporation engaged in private enterprise.

A debt due by a municipal corporation in the conduct of a private and proprietary enterprise, such as a municipal water system, may not be garnished in an action against the creditor, under Code Civ. Proc. § 710, and section 710a, as added by St. 1919, c. 276.

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by John T. Irilarry against the City of San Diego. Judgment for defendant, and plaintiff appeals. Affirmed.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellant.

S. J. Higgins, City Atty., of San Diego, and A. F. H. Wright, Deputy City Atty., of San Diego, for respondent.

WILBUR, J. The city of San Diego entered into a contract with James Kennedy for the construction of a dam for a reservoir to be used in connection with its municipal waterworks. On May 1, 1918, there was due and unpaid from the city to the contractor the sum of $6,238.16. On May 6, 1918, a writ of attachment issued out of the superior court in and for the city and county of San Francisco in an action brought by Prosper Wolf against James Kennedy, together with a notice of garnishment, were served upon the mayor, auditor, treasurer, and manager of operations of San Diego for the purpose of garnishing all moneys, debts, credits, and effects due or owing to Kennedy. Thereafter, on May 6, 1918, Kennedy filed his claim with the auditing committee of the city, and the same had been allowed and paid. On December 20, 1918, after securing judgment against Kennedy in the attachment suit for the sum of $26,017.89, the judgment creditor assigned his rights to the plaintiff, who brought this action against the city to enforce his claim against the fund garnisheed. The court having rendered judgment in favor of the defendant city, the plaintiff appealed.

Appellant thus states his main contention:

"This appeal presents for determination, for the first time in this state, the important question whether a debt due by a municipal corporation in the conduct of a private and proprietary enterprise—here a municipal water system—may be garnished in an action against the creditor. The appeal is from the judgment entered for defendant, upon sustaining its general demurrer to the complaint."

The appellant apparently concedes that such a garnishment could not be levied upon a municipal corporation acting in its governmental capacity. He does, however, contend that in many states the rule is otherwise. In Skelly v. School District, 103 Cal. 652, 37 Pac. 643, it was held that a school district was not subject to garnishment and that the general language of the Code (subdivision 5 of section 542, Code Civ. Proc.) did not apply to a school district. This case was based in part upon the reasoning of the Supreme Court of the state of Illinois in the case of Merwin v. City of Chicago, 45 Ill. 133, 92 Am. Dec. 204, holding that a municipal corporation could

not be garnished. In the case of Ruperich v. Baehr, 142 Cal. 190, 75 Pac. 782, this court considered the question of whether or not the salary of a municipal employee working in the electrical department of the public service was subject to the payment of a judgment as provided in section 710, Code of Civil Procedure. In determining that question against the employee it was assumed throughout the opinion that, before the enactment of the statute, debts due by a municipal corporation were not subject to garnishment. In that opinion it is stated:

"It is true that it is generally held to be against public policy to apply general statutory provisions for garnishee process to public corporations, so as to make them subject to such process, to reach claims for money due from them to a judgment debtor. And, for the same reason, general provisions making property subject to execution or liens are construed to apply only to the property of private persons and corporations, and not to that of public corporations of bodies politic. Skelly v. School District, 103 Cal. 652; Witter v. School District, 121 Cal. 350; Mayrhofer v. Board, 89 Cal. 110; Whitaker v. Tuolumne Co., 96 Cal. 100; Reclamation District v. Sacramento, 134 Cal. 480; Savings, etc., Soc. v. San Francisco, 131 Cal. 363."

The decision of the court in Ruperich v. Baehr, supra, that section 710, Code of Civil Procedure, was constitutional as applicable to a recognized class, is based in part upon the following reasoning:

"The fact that there has been heretofore no means by which moneys due from the state, or from its public corporations, could be reached and applied upon the debts of the persons to whom they were due, and that considerations of public policy required that public corporations and public officers and employees should not be held subject to the ordinary provisions and processes of law for the garnishment of debts and claims due or owing, sufficiently distinguishes the classes of persons and assets to which this section relates to justify the Legislature in making special regulations concerning the persons concerned and the mode of reaching the assets. It does not destroy its character as a general law, nor its uniformity of operation, that its provisions in these particulars differ somewhat from the ordinary processes of attachment and execution."

It is conceded by text-book writers that in a majority of the states the courts have held that municipal corporations are not subject to garnishment. Dillon on Municipal Corporations (5th Ed., 1911) § 249; Wade on Attachment, § 345; Shinn on Attachment and Garnishment, § 500.

It is unnecessary to discuss the reasons advanced in cases which hold to the contrary, as this court has adopted the rule most generally accepted, and the Legislature, by enacting section 710 and section 710a (as added by St. 1919, c. 276), Code of Civil Procedure, have provided a special method for the subjection of debts due from a municipality to the lien of a judgment.

It remains for us to consider whether or not the fact that the city was indebted to the creditor by reason of his contract for the building of a portion of the waterworks owned by the city takes the case out of the well-recognized rule. A municipal corporation is just as truly such when engaged in its proprietary capacity as when engaged in its governmental capacity. City of Pasadena v. Railroad Commission, 192 Pac. 25, 10 A. L. R. 1425, and the opinion of this court in Marin Water & Power Co. v. Town of Sausalito (App.) 193 Pac. 296, on denying a rehearing. Where it is engaged in building waterworks by contract the same reasons which would exempt the corporation from garnishment of its obligations incurred in its governmental capacity would apply with equal force to the obligations incurred in exercising this public function.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

186 Cal. 544

ROSSI v. CAIRE et al. (S. F. 9402.)

(Supreme Court of California. July 28, 1921. Rehearing Denied Aug. 25, 1921.)

1. Corporations ⊂=619 — Six months' statute held not to bar existing right of action against trustees of dissolved corporation if action is brought within reasonable time after the statute took effect.

Code Civ. Proc. § 341, subd. 3, as added by St. 1917, p. 381, barring an action to set aside or invalidate any action of a majority of the trustees of a corporation dissolved by operation of law, including its revivor, unless brought within six months, does not absolutely destroy an existing right of action of a successor in interest of a former stockholder to obtain an accounting and distribution of the property owned by the corporation at the time of the forfeiture of its charter, and the proceeds thereof in the hands of the trustees, but requires merely that the action be instituted within a reasonable time from the taking effect of the amendment, so that an action instituted one month thereafter, though four years after an attempted revivor of the corporation, is not barred.

2. Corporations ⊂=619—Stockholders of corporation whose charter was forfeited held vested with right to have affairs settled by directors as trustees and property distributed among them.

In view of Const. art. 12, § 1, permitting the alteration or repeal of all corporation laws, the absolute power of the state over charter

and the clear intent of the license tax act (St. 1905, p. 493) providing for the forfeiture of charters for nonpayment of the license tax was such that a corporation whose charter was forfeited for failing to pay its license tax ceased to exist and was no longer capable of holding title to or possession of its property, so that, in the absence of a provision of law for its rehabilitation at the time, its stockholders were vested with the right to have its affairs settled by the directors, as trustees, and property distributed among them pursuant to St. Ex. Sess. 1906, p. 25, § 10a, and it is immaterial that under Const. art. 12, § 7, a forfeiture of the charter of any except a quasi public corporation may be remitted, and that the Legislature, at each session previous to an attempted revivor of such corporation for several years, provided (St. 1906, supra; St. 1907, p. 745, 1909, p. 454; St. 1911, p. 1094) for remission of forfeitures previously had.

3. Constitutional law ⊂=93(1)—Rehabilitation of defunct corporation by act of trustees cannot impair vested right of nonconsenting former stockholder.

Though St. Ex. Sess. 1906, p. 22, St. 1907, p. 745, St. 1909, p. 454, and St. 1911, p. 1094, amending the corporation license tax act (St. 1905, p. 493), and St. 1913, p. 513, repealing it, while providing for the rehabilitation of such corporations as had previously failed to pay the tax, did not indicate how the assent of the former stockholders to such revivor was to be expressed, it was the intention that the statutory trustees, the former directors, who were simply trustees in liquidation, under St. Ex. Sess. 1906, § 10a, supra, should represent the former corporation in the matter of revivor, that their consent alone should be sufficient, and that the rehabilitated corporation should proceed as if no forfeiture had occurred, with all its former powers and property remaining in the trustees' hands subject to obligations lawfully incurred by them during its lapse of life, the proviso in the amendments of 1909, 1911, and 1913 that such rehabilitation should be without prejudice to any action, defense, or right which accrued by reason of the forfeiture not being intended to save the right of a stockholder to prevent the corporation's rehabilitation, but only to save such rights as had accrued in the trustees' management of the affairs of the former corporation, but the enforcement of such rehabilitation provision against a nonconsenting former stockholder, who diligently asserted his rights, would be an empairment of a vested right in property prohibited by both state and federal Constitutions, the rights of former stockholders under the statutory trust to have the property distributed among them being secure against impairment by any subsequent act of the Legislature, though Const. art. 12, §§ 1 and 7, does not prohibit such action, such vesting being complete prior to the attempted exercise of such power.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Edmund A. Rossi against Arthur J. Caire and others, individually and as trustees of the Santa Cruz Island Company, and its stockholders, and others. Judgment for all defendants except Aglae S. Capuccio, and the latter and plaintiff appeal. Reversed and remanded.

See, also, 39 Cal. App. 776, 180 Pac. 58.

D. Freidenrich and Ambrose Gherini, both of San Francisco, and Orrin K. McMurray, of Berkeley, for appellants.

Frank P. Deering, J. F. Bluxome, and Myrick & Deering, all of San Francisco, for respondents.

ANGELLOTTI, C. J. This is an action brought by the successor in interest of a stockholder of the Santa Cruz Island Company, a domestic corporation for profit, whose charter was forfeited to the state on November 30, 1911, for nonpayment to the state of its license tax, against the five persons who were the directors in office at the time of the forfeiture and the only other stockholder, to obtain an accounting and distribution, according to their respective interests, to the stockholders, of the property owned by the corporation at the time of forfeiture and its proceeds in the hands of said former directors as trustees for such corporation and its stockholders. Aglae S. Capuccio, one of said directors and trustees, by answer joined with the plaintiff in seeking this relief. Judgment went in favor of the other defendants. The appeals here are by the plaintiff and defendant Aglae S. Capuccio from the judgment and from an order denying their motion to set aside the judgment and enter a judgment in their favor.

There is no dispute as to the material facts. The company was incorporated February 19, 1869, for a period of 50 years. It was a going concern until November 30, 1911, when its charter was forfeited for nonpayment of its license tax of that year. At that time it owned personal property valued at $250,000 and Santa Cruz Island, comprising about 58,800 acres of land. Its capital stock was $50,000, divided into 100 shares of the par value of $500 each. The four directors and trustees who are respondents here owned in the aggregate 79 of these shares, and respondent Helene A. Caire 7 shares, while director and trustee Aglae S. Capuccio, one of the appellants, owned 7 shares, and Amelia A. Rossi, plaintiff's predecessor in interest, owned the remaining 7 shares. At the time of the forfeiture of the corporation there was no provision of law looking to or providing for the rehabilitation of any corporation whose charter had been so forfeited. Section 6 of the license tax act of 1905 (approved March 20, 1905 [Stats. 1905, p. 493]), as amended in 1909 (act approved March 19, 1909 [Stats. 1909, p. 454]),

provided for such rehabilitation only as to such corporations as had previously failed to pay the license tax and penalty imposed by the license tax act. The Constitution provided as it has ever since 1850, that "all laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed" (section 1, art. 12), and also, as amended in 1908, that "the Legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter of any quasi public corporation now existing or which shall hereafter exist under the laws of this state" (section 7, art. 12). The amendment of 1908 was the insertion of the words "quasi public," obviously for the purpose of limiting the prior absolute prohibition as to all corporations to quasi public corporations, and thus to allow the Legislature to provide, under its general powers with relation to all laws relative to corporations, for the remission of forfeiture of the franchise or charter of any corporation except a quasi public corporation, if it saw fit so to do. The original license tax act (Stats. 1905, p. 493) contained no provision for a revivor of the corporation whose charter was forfeited for failure to pay the tax, but at each succeeding session of the Legislature the act was so amended as to provide for such revivor as to corporations that had failed to pay. Stats. 1906, Extra Session, p. 22; Stats. 1907, p. 745; Stats. 1909, p. 454; Stats. 1911, p. 1094; and Stats. 1913, p. 513, when the act was repealed. By the amendment of 1906 it was provided that "any corporation which failed to pay the license tax and penalty required by the act" might pay the same within a certain time, and that any corporation so doing "shall be relieved from the forfeiture prescribed." The subsequent amendments of section 6 were substantially the same up to those of 1909, 1911, and 1913, each of which included a provision that "the rehabilitation of a corporation under the provisions of this act shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture." By the act of 1906 and all the subsequent acts relative to rehabilitation it was substantially provided that, in the event that the original name of the corporation or a name so closely resembling the same as would tend to deceive had been adopted by some other corporation since the date of forfeiture, then such corporation shall be relieved from forfeiture only on adopting a new name. In the act of 1906, and ever since, section 10a provided that "in all cases of forfeiture under the provisions of this act, the directors or managers in office * * * are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited, and have full power to settle the affairs of the corporation," and "to take such legal proceedings as may be necessary to fully settle the affairs of said corporation." The directors in office on November 30, 1911, apparently took no step in liquidation, and upon the enactment of the amendment of 1913 authorizing a revivor of such corporation as had failed to pay took the necessary steps to revive the corporation. No point is made as to the validity of the meeting of the trustees held August 25, 1913, at which the resolution looking to a revivor of the corporation was adopted. Four of the five trustees (all except Aglae S. Capuccio), owning 79 of the 100 shares, were present, and the action was unanimous, and another stockholder owning 7 shares requested such action. In accord with the resolution, application was made as provided in the act, the license tax for 1911, 1912, and 1913 and penalties and fee were paid, and on August 28, 1913, the secretary of state issued his certificate. Immediately thereafter the trustees delivered all the assets in their hands, including the real property, to the corporation, which has ever since been in the use and possession thereof. To confirm the title of the corporation to the real property a conveyance was attempted to be authorized at a meeting of the trustees held January 30, 1917, at which all were present except Aglae S. Capuccio, who had been notified, and sent a protest. In accord with this authorization a conveyance was executed by the four trustees present and delivered to the corporation. The corporation has ever since its revivor been acting as a corporation, holding its annual meetings and dealing with the property here involved as its property. The revivor of the corporation and all subsequent dealings with the property were without the consent of Aglae S. Capuccio, Amelia A. Rossi, and plaintiff, and it is not claimed that there was anything by way of act or omission in the conduct of either Amelia A. Rossi or plaintiff to estop either from making the claims here presented.

[1] This action was instituted August 28, 1917, just four years after the attempted revivor. Defendants interposed a plea of the statute of limitations, alleging the action to be barred by subdivision 3 of section 341, Code of Civil Procedure, a subdivision added by the Legislature July 27, 1917 (St. 1917, p. 381). This section as so amended bars an action "to set aside or invalidate any action taken or performed by a majority of the trustees of any corporation heretofore or hereafter dissolved by operation of law, including the revivor of any such corporation," unless brought within six months. We regard this matter and the finding of the court thereon as unimportant in the determination of this cause. The amendment cannot be accepted as absolutely destroying any right of action existing at the time of its adoption, which would be the effect if applied here in

any other way than as requiring an action to be instituted within a reasonable time from the taking effect of the amendment. Section 17, Ruling Case Law, p. 676, et seq.

[2] The theory of respondents is that by virtue of the proceedings had looking to a rehabilitation the corporation was restored to life on August 28, 1913, with full ownership of the property in the hands of the trustees, and has ever since been functioning as a corporation, and that the interests of the former stockholders or successors in such property is only such interest as a stockholder has in the property of the corporation.

The status of a corporation whose charter is forfeited under the license tax act referred to is well settled by decisions of this court. The penalty imposed by the act for nonpayment of the license tax prescribed was exceedingly severe, and the consequence doubtless often disastrous. But in view of our constitutional provisions the absolute power of the state over corporation charters was such, and the intention of the act to accomplish this end was so clearly and unambiguously shown thereby, that there could not be any well-founded difference of opinion as to the result. The Governor's proclamation having been duly made, and the corporation having failed to pay within the specified time thereafter, the corporation simply ceased to exist, just exactly as in the case of a forfeiture for cause by judicial decree, without any existing provision of law for rehabilitation as a corporation. It was not a case simply of suspended animation, as under the present license tax law, but one of absolute death, and, as was held in Rossi v. Caire, 174 Cal. 74, 81, 161 Pac. 1161, a previous action involving questions arising out of this very forfeiture, the corporation having ceased to exist, it was no longer capable of holding the title to the property formerly belonging to it, or the possession thereof. Much is said in the briefs herein as to the correctness of the statement in Rossi v. Caire, supra, that upon the forfeiture under such circumstances the property of the corporation vests in the stockholders (subject, of course, to the claims of creditors and the expenses of liquidation), and the right of possession in the former directors as trustees for the settlement of the corporate affairs, it being claimed by respondents that the title to the property vested in such trustees. It is unnecessary, it seems to us, to discuss that question, for we cannot see that it has any substantial bearing here. Assuming purely for the purposes of this decision that the position of respondents is well grounded in this regard, it would nevertheless remain that the former directors would hold the title simply as trustees for the purpose of their statutory trust, with the former stockholders as the sole beneficiaries, subject, of course, to the claims of creditors. Section 10a of the license tax act made them simply trustees to settle the affairs of the defunct corporation—trustees in liquidation to conserve its property, discharge its obligations, and deliver or account for any residue to the beneficiaries, the former stockholders. While section 10a says that such former directors are deemed to be the trustees "of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited," this does not mean that they are anything more than "trustees in liquidation," and "they cannot be allowed or required to perform further functions in their capacity as a corporation or as directors thereof." See Lewis v. Miller & Lux, 156 Cal. 101, 103 Pac. 496. It is plain, in view of our decisions, that upon the death of this corporation without any existing provision of law for its rehabilitation, the corporation could no longer have any interest in the property, and those who were its stockholders at the time of its death were immediately vested with the right to have its affairs settled by the trustees designated by the statute for that purpose, and the property remaining after such settlement distributed among them according to their respective interests. Such former stockholders immediately became the beneficiaries of a statutory trust created solely for that purpose. The former stockholders either had the equitable title to the property of the former corporation, subject to a charge in favor of the creditors to be enforced by the former directors as trustees for that purpose, or they had a legal title in such property subject to a power in the trustees to dispose of so much thereof as was necessary to pay the creditors. This certainly was the condition at all times prior to the enactment of the legislation of the year 1913 authorizing a revivor of such corporations as had theretofore failed to comply with the requirements of the license tax law, and whose charters had been forfeited for this reason. The mere fact that our Constitution did not prohibit the Legislature from providing for the remission of such a forfeiture was altogether immaterial to any question here involved, if in fact it had not so provided. And, of course, the fact that the Legislature had consistently at each previous session for several years made provision for remission of forfeitures previously had is likewise immaterial.

[3] This being the situation, we are brought to a consideration of the meaning and effect of this legislation of the year 1913, and the effect of the proceedings had thereunder with relation to nonconsenting former stockholders. Of course, in view of our constitutional provision relative to the remission of forfeitures, there can be no doubt that the Legislature had the power to authorize the remission of the forfeiture and the reinstatement of the corporation as a corporation.

But it does not follow either that the Legislature intended by the legislation of 1913 to allow the rehabilitation of the corporation against the expressed will of former stockholders, who had become vested with the rights to which we have referred, or that so intending it had the constitutional power to impair such rights. Appellants claim that no such intent is apparent in the legislation adopted, and also that the rights of the former stockholders with regard to a complete liquidation of the affairs of the corporation and the distribution of the property were such that, in the absence of acquiescence in an attempted revival of the corporation, they could not be affected.

None of the amendments to the old license tax act of 1905, which was repealed in 1913, relative to the relief of corporations whose charters had been forfeited, contained anything indicating how the assent of those formerly comprising the corporation, stockholders, or members to a revival of the corporation was to be expressed. It was simply provided that "any corporation which failed to pay * * * may pay," and thereupon "be relieved," etc. We think, however, after much consideration of the very loosely drawn legislation relative to forfeiture of corporation charters for nonpayment of license tax and relief from such forfeiture, that it was the idea of the framers of these relief amendments that the statutory trustees "of the corporation and stockholders or members," who, under the law existing at the time of the death of the corporation, were simply trustees in liquidation, and nothing else, should represent the former corporation in this matter of revival, and that the assent of this body alone and the payment by it of the tax and penalties would be sufficient to effect a rehabilitation of the corporation. We think also that it is clear that it was contemplated that the rehabilitated corporation should proceed exactly as if no forfeiture had occurred, with all its former powers and owning all the property remaining in the hands of the trustees, subject, of course, to all obligations lawfully incurred by the trustees during the corporation's lapse of life. Doubtless under these amendments, crudely drawn as they are, this would be held to be the situation in any case wherein a former stockholder did not diligently assert his objection to any revival of the former corporation which would have the effect of destroying his rights under the statutory trust. His consent under such circumstances would be implied, or he would be held estopped to urge that he had not consented. But, as we have seen, there is no question in this case of any lack of diligence on the part of the complaining former stockholders or the assignee of one of them. We are of opinion that the proviso inserted in the amendments of 1909, 1911, and 1913 that such rehabilitation "shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture," strongly relied on by appellants as showing an intent to save the right of a stockholder to prevent the rehabilitation of the corporation, does not refer to such a right at all. The provision contemplates a rehabilitated corporation, saying "the rehabilitation of a corporation," etc., "shall be without prejudice to," etc., and the whole intended scope thereof undoubtedly was to save such actions, defenses, and rights as had accrued in the management of the affairs of the former corporation by the trustees for the benefit of the former stockholders.

We are forced to the conclusion, however, that, so construing the rehabilitation provision here involved, its enforcement against a nonconsenting former stockholder who diligently asserted his rights would be an impairment of a vested right in property prohibited by both state and federal Constitutions. In this regard the very able argument of learned counsel for respondents to our minds fails to give sufficient force to certain facts which, in view of our decisions, must be conceded, and which appear to us to make the question a very simple one. We are not dealing here with an unenforced penalty. The judgment of death pronounced by the law on this corporation had been carried into effect. The corporation was dead, and had died without any existing provision of law for its revivification. Taking, for the purposes of this decision, the view most favorable to respondent, the legal title to the property of the former corporation had wholly vested in the trustees designated by the statute for the purposes of the trust declared by the statute, which were solely the liquidation of the affairs of the corporation and the distribution of the property remaining among the former stockholders. Subject to the expenses of the trustees and the payment of creditors, the former stockholders were the sole beneficiaries and the absolute owners in equity of the property. Under all the definitions this was certainly a vested property right. It cannot matter why such penalty of forfeiture of charter was imposed and enforced, or what the obligation to each other of the former stockholders would have been had such penalty not been enforced. The status with relation to the property had been created, and the terms of the trust upon which it was held defined. We do not see how it can be held that the rights of former stockholders under the trust defined by the statute, the right subject to the payment of the former corporation debts and expense of liquidation, to have the property distributed among them, was not a vested property right secure against impairment by subsequent act of the Legislature. Much reliance is placed upon the fact that the Constitution ever since the amendment of 1908,

has impliedly authorized the Legislature to provide for the remission of the forfeiture of charters of private corporations. This it does solely by failure to prohibit such action. But the mere fact that the Legislature has this power does not authorize it to interfere with vested property rights over the protest of those having such rights, nor does it prevent such rights from absolutely and unconditionally vesting immediately upon the forfeiture without any existing provision of law for rehabilitation. Such vesting was complete prior to the attempted exercise of any such power. The provision does not purport to authorize the accomplishment of any such result as is here claimed for it against the consent of any of those who have become, by reason of the forfeiture, the owners in equity of the property. We would have an entirely different case had there been a statute authorizing remission of forfeiture and rehabilitation of the corporation at the time of the forfeiture of its charter. In that event the vesting of the property rights might well have been held to be upon condition. But there was no such statute, with the result that the former stockholder at once succeeded to vested property rights which cannot be impaired by subsequent legislation. The terms of the trust upon which the property was held by the trustees could not, therefore, be changed to the detriment of the beneficiaries without their consent.

Our conclusion upon this question necessitates a reversal.

The judgment and order appealed from are reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SLOANE, J.; LENNON, J.; LAWLOR, J.; SHAW, J.

186 Cal. 476

W. F. BOARDMAN CO. v. PETCH.
(S. F. 9055.)

(Supreme Court of California. July 22, 1921.)

1. Corporations ⊜182—Hold property in trust for stockholders.

A corporation is the creature of its stockholders, and holds its property in trust for them; the stockholders, as between themselves and the corporation, being the beneficial owners.

2. Sales ⊜1(1)—Word "sale" given narrow or broad meaning, according to context or surrounding circumstances.

Under Civ. Code, § 1721, defining a sale, the word "sale," when used in a contract, does not necessarily mean a transfer for money only, and is not a word of fixed and invariable meaning, but may be given a narrow or broad meaning, according to the context or the surrounding circumstances and the conduct of the parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

3. Contracts ⊜170(1)—Practical construction by parties evidence of meaning.

The contemporaneous and practical construction of a contract by the parties is strong evidence of its meaning, if its terms are equivocal.

4. Corporations ⊜308(3)—A transfer of assets of corporation to other corporation held a "sale," within contract entitling manager of former to per cent. of profits.

The transfer of the assets of a corporation to a newly organized corporation in return for the issuance to owner of first corporation of stocks and bonds of the second corporation *held* a "sale," within a contract between such owner of first corporation and the manager of its plant, entitling manager to a certain per cent. of the net profits on the sale of the company within a certain period.

5. Corporations ⊜308(11)—Testimony as to value of services of manager of corporation selling assets to another corporation held admissible in suit for per cent. of profits under contract of employment.

Where assets of one corporation were transferred to another corporation under an agreement requiring manager of first corporation to manage operations of the second corporation, testimony as to the value of such services was admissible in action to recover from owner of first corporation a certain per cent. of the net profits of the sale of assets to second corporation, under a contract, since the value of such services was an additional contribution of the owner of first corporation to the second corporation, and should have been deducted from the price paid to owner in order to determine the profits made by it in the transaction.

6. Corporations ⊜308(11)—Evidence showing improper management held admissible to show discharge of manager for cause.

In an action involving the question whether the manager of a gas company was discharged without cause, testimony as to facts showing impropriety and lack of necessity of laying a pipe line to supply water to the plant *held* admissible.

7. Evidence ⊜471(17)—Mismanagement of gas plants should be shown by facts instead of opinion.

In action involving question of whether manager of gas company was discharged without cause prior to expiration of his contract, where it was claimed that the manager had laid a pipe line 3,000 feet long and had installed a gasoline engine and pump at the end of such pipe to supply water to the gas works, when an equally good supply could have been obtained much nearer to the works, the facts showing the impropriety and lack of necessity of such pipe and pump should have been shown

instead of showing it by the opinion of witnesses.

8. Evidence ⊂540—Witness experienced in operating and financing gas plants qualified to testify as to number of consumers necessary to make given length of gas main profitable.

In action involving question of whether manager of gas company was wrongfully discharged prior to expiration of contract, in which it was claimed that the manager had been guilty of mismanagement, witness, who had long experience in operating and financing gas plants in several places, should have been permitted to give his opinion as to the number of consumers necessary to make a given length of gas main profitable, regardless of whether he had had a technical education as an engineer or experience as a plumber.

9. Trial ⊂199—Instruction held erroneous in submitting jury question whether instructions violated by employee were material, proper, and reasonable.

In an action involving the question whether an employee was wrongfully discharged, instruction that he could not justify a violation of material and proper and reasonable instructions from employer in regard to the performance of his duties on the ground that he believed that he was acting for the best interests of the plaintiff *held* erroneous in leaving to the jury the question of whether the instructions violated were material, proper, and reasonable, since the court should have determined such question for itself, or should have stated the facts hypothetically so that the jury might know what was considered reasonable in point of law.

10. Master and servant ⊂44—Instruction on discharged employee's duty to procure employment held misleading.

In an action involving the question whether an employee was wrongfully discharged, an instruction that, while a wrongfully discharged employee is bound to use reasonable diligence to procure employment, he is not bound to accept any sort of employment that may be offered him, *held* indefinite and misleading.

11. Corporations ⊂308(11)—Instruction on failure to comply with ordinances as ground for discharge of manager held properly refused.

In an action involving the question whether manager of a gas plant was wrongfully discharged, the refusal of an instruction that any failure on his part to use reasonable care to comply with the ordinances of the town would be a reasonable ground for his discharge *held* proper, since a failure to use such reasonable care might be excusable under special circumstances.

12. Corporations ⊂294—Negligent or willful failure to comply with ordinances ground for discharge of manager.

Negligent or willful failure of a gas plant manager to use reasonable care to comply with ordinances of the town is a sufficient ground for his discharge.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the W. F. Boardman Company against Thomas D. Petch, in which the defendant filed a cross-complaint. From judgment for defendant on the cross-complaint, plaintiff appeals. Reversed.

Chickering & Gregory, of San Francisco, for appellant.

McGowan & Westlake, of San Francisco, for respondent.

SHAW, J. This is an appeal by the plaintiff from a judgment rendered upon a second trial of the case, following a reversal of the judgment entered on the first trial upon appeal to this court. Boardman v. Petch, 174 Cal. 259, 162 Pac. 1028.

A statement of the facts is necessary to a clear understanding of the points to be considered. On January 28, 1911, plaintiff and defendant entered into a contract which forms the basis of the controversy. The plaintiff was then the owner of practically all the stock in a corporation known as the Rogue River Valley Gas Company, having a plant situated at Medford, Or., for the supplying of gas and electricity for public use. By the terms of the contract Petch was employed "to devote his time, attention, and ability to the management of the property mentioned, by using every effort in his power to make it successful." He was to be employed for five years at $3,000 per year, in monthly payments. The agreement provided that in addition to said salary Petch was to be paid by the plaintiff 6 per cent. of the net profits received by the plaintiff on the sale of the Rogue River Valley Gas Company, should the sale be made on or before five years from the date of the contract. If the property was not sold within the five years it was to be appraised by a committee of three persons. They were to take the actual cost up to the time of appraisement, with interest at 6 per cent. from the time money was furnished to that date, deduct this from the appraised value, and the balance was to be deemed actual profits, upon which Petch was to receive 6 per cent., to be paid by the plaintiff. In this behalf the contract stated:

"The first parties (plaintiff) then agree to deliver to the said second party (Petch), or his heirs at time of said sale, this 6 per cent. in cash, or, if the property has not been sold, in stock or bonds."

By a transaction between plaintiff, Rogue River Valley Gas Company, and Oregon Gas & Electric Company, which was closed on June 3, 1911, all the property belonging to the Rogue River Valley Gas Company pass-

ed into the possession of the Oregon Gas & Electric Company. Whether this transfer constituted a sale, within the meaning of the contract aforesaid, is one of the principal questions in the case. Petch continued thereafter to manage the property included in the transfer as before until March 23, 1912, when he was discharged from further service. This action was begun on March 12, 1912, by the plaintiff by a complaint asking for the reformation of the aforesaid agreement in certain particulars not important here. On August 15, 1912, the defendant filed a cross-complaint thereto. Upon the first trial of the case the court entered a judgment of nonsuit against the plaintiff upon its complaint and thereafter proceeded to trial upon the cross-complaint. From this judgment no appeal was taken, and the complaint ceased to be a part of the pleadings in the action for any practical purpose thereafter. From the judgment entered upon the cross-complaint the plaintiff appealed, and upon that appeal that judgment was reversed and the cause remanded for a new trial.

Upon the appeal in that case it was conceded that there had been a sale of the property of the gas company which became effective on June 3, 1911, and the question whether or not the transaction above referred to constituted a sale was not discussed or determined. It was determined upon that appeal: (1) That under the contract Petch was to be employed for five full years at $3,000 a year, whether there was a sale of the property of the Rogue River Valley Gas Company during that period or not; (2) that under the evidence there presented, where it appeared that the plaintiff had continued in control of the plant after the transaction of June 3, 1911, Petch was bound to continue his services as manager for the remainder of the five years after such transaction, if the plaintiff desired him to do so; (3) that in addition to this salary for five years he was to receive 6 per cent. of the net profits of a sale, if made, within the five years.

After the reversal upon the former appeal defendant filed an amended cross-complaint, wherein he alleged: (1) A cause of action to recover the sum of $11,750 and interest, on account of unpaid salary on the five-year contract of employment aforesaid, based on the allegation that he was discharged from said employment without cause on March 23, 1912, being the salary due monthly from March 1, 1912, to February 15, 1916; (2) a cause of action for $23,700, claimed as 6 per cent. of the net profits of a sale of the Rogue River Valley Gas Company's property alleged to have been made by the plaintiff in 1911 as aforesaid; (3) a cause of action for special damages in the sum of $425, arising from the alleged wrongful discharge. In its answer thereto the plaintiff put in issue all of the essential allegations of the cross-complaint. This cross-complaint and answer presented the only issues to be determined upon the second trial.

These issues were tried by a jury, and a verdict was rendered in favor of the defendant on the cross-complaint for $8,175. From the judgment rendered on this verdict the plaintiff appeals.

It is conceded in the argument that no evidence was introduced to support the allegation regarding the special damage of $425. The points of controversy arise solely with reference to the first and second cause of action as above mentioned.

The plaintiff claims that the verdict for the sum of $8,175 is not supported by the evidence under either the first or second cause of action above mentioned. We will first consider the second cause of action, that for the recovery of 6 per cent. on the net profits of the alleged sale of the property.

The evidence on this subject is without substantial contradiction. The Boardman Company was the owner of the entire issue of stock of the Rogue River Valley Gas Company, even including that held by directors to qualify them to act. It controlled all its actions and it had furnished all the money used in the construction of the plant of that company, amounting to $112,605.74. (In making the deal under consideration the amount furnished was estimated at $125,000. It was afterwards discovered that an item of over $12,000 had been entered twice upon the books as a charge against the company. The true amount was found to be as above stated, and the matter was adjusted by returning stock and bonds to the Oregon Gas & Electric Company, the successor in interest of the Rogue River Valley Gas Company, to make up the amount of the mistake.) While carrying on the gas company's operations the Boardman Company concluded to enlarge the enterprise and construct other plants at other places to carry on the same kind of business. In order to do this it was necessary to obtain more capital. For that purpose it organized the Oregon Gas & Electric Company, with a capital stock of $1,000,000. To this company it immediately transferred all of its stock in the aforesaid gas company. Thereafter, until the transaction of June 3, 1911, was closed, the Boardman Company controlled the acts of both companies in carrying out that transaction. Two persons were found who agreed to invest $150,000 in the electric company by the purchase of bonds and stock thereof at a valuation of 90 cents on the dollar of the face value of the bonds. The Boardman Company then caused the gas company to transfer its entire property to the newly formed electric company, in consideration of the issuance by the electric company to the Boardman Company of bonds of the electric com-

pany for $195,000, taken at a value of 90 cents on the face value, that is, at the value of $175,000, and stock of said company to the amount of $293,250, or thereabouts, par value, as a bonus. When this was done, it will be seen, the Boardman Company had merely caused the gas company to transfer its property to the electric company, and in consideration had received all the issued stock of the electric company, together with the bonds aforesaid. It therefore controlled the action of the electric company as completely as it had previously controlled that of the gas company. The value at which the bonds were taken, if the equivalent of cash, constituted an increase of $50,000 over the estimated value of the investment in the gas company. When the subsequent adjustment was made the amount of bonds taken was reduced correspondingly, so that the excess of the value, measured in bonds, remained $50,000, as contemplated by the parties. The two new investors then paid in their $150,000 in cash and received $166,000 in bonds and $250,000 in stock of the electric company, both at par value. Thereafter the Boardman Company was the owner of the majority of the stock of the electric company and controlled its actions, as before it had controlled those of the gas company.

[1] A corporation is the creature of its stockholders and it holds its property in trust for them. As between themselves and the corporation, the stockholders are the beneficial owners of the property held by the corporation. Havemeyer v. Superior Court, 84 Cal. 362, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Ashton v. Dashaway Ass'n, 84 Cal. 65, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809; Hobbs v. Tom Reed, etc., Co., 164 Cal. 499, 501, 129 Pac. 781, 43 L. R. A. (N. S.) 1112; Rossi v. Caire, 174 Cal. 81, 161 Pac. 1161. Prior to the issuance of the stock of the electric company to the new investors, the only substantial change that had occurred, aside from the additional $50,000 to the Boardman Company, was a change of trustee of the property, the electric company having succeeded the gas company in that capacity. The change in the form of the indebtedness from an open account to bonds would not of itself have had the effect to characterize the deal as a sale of the property, and the transaction might have been considered a change of form only. But the debt was increased in the deal by the issuance to the Boardman Company of additional bonds of the electric company to the value of $50,000 at the discount price at which the bond issue was taken by all the parties. This was not added, so far as the evidence shows, on the ground that the services of Boardman Company in carrying on the business of the gas company were of that value. Nothing was said about such services, and the increase was not made as for services chargeable to the gas company, but, on the contrary, they were added as the profit going to the Boardman Company by reason of the transfer, and were designated as such. During the remainder of the year 1911 there were negotiations between the Boardman Company and Petch looking to a settlement of Petch's claim to the 6 per cent. of the profits, and in the course thereof statements were made by the company to Petch wherein the transaction was set down as a sale and the profits thereon as claimed by the Boardman Company were stated.

[2, 3] The Code defines a sale as "a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property." Civ. Code, § 1721. It is also defined as "a transmutation of property from one man to another in consideration of some price or recompense in value." Anderson's Law Dic. 914; Mechem on Sales, § 1. The agreement whereby one person transfers a right of way for a ditch over his land in consideration that the other party should excavate the ditch and keep it in repair for the common use of both was held to be a sale of the right of way. Flickinger v. Shaw, 87 Cal. 130, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234. It is clear, therefore, that the word "sale," when used in a contract, does not necessarily mean a transfer for money only. It is not a word of fixed and invariable meaning. Eaton v. Richeri, 83 Cal. 186, 23 Pac. 286. It may be given a narrow or broad meaning, as may be indicated by the context or the surrounding circumstances and the conduct of the parties. "The contemporaneous and practical construction of a contract by the parties is strong evidence of its meaning, if its terms are equivocal." Keith v. Electrical, etc., Co., 136 Cal. 181, 68 Pac. 598; Kennedy v. Lee, 147 Cal. 596, 82 Pac. 257; Vulcan I. W. v. Cook, 15 Cal. App. 412, 114 Pac. 995.

The effect of the agreement between the parties was that Petch was to receive 6 per cent. of the profits of the Boardman Company's investment in the Rogue River Valley Gas Company in any event. If a sale was made within the five years, the profit was to be ascertained from the price obtained on the sale. If there was no sale, then it was to be ascertained by an appraisement in accordance with the agreement whereby the cost was to be deducted from the appraised value and the balance taken as the profits.

[4] In view of all this evidence and from these authorities we are of the opinion that the evidence was sufficient to justify a conclusion by the jury that there was a sale of the property within the meaning of that term as used in the agreement, and that they might have believed from the evidence that there was a profit of at least $50,000 received by the Boardman Company upon that sale. It is true that no money was obtained, but the bonds taken upon the transaction were valued therein at 90 cents on the dollar, and

the jury would have been justified in concluding that at that time the bonds had that value in cash. On that issue, therefore, the jury might have decided that Petch was entitled to $3,000 as his percentage of the profits on the sale, with interest from June 3, 1911.

Under the rule established by the former decision, Petch was entitled to employment for five years at $3,000 a year, payable monthly, regardless of the fact that a sale took place in June, 1911. He could not be deprived of this right except by conduct which justified his discharge for cause. The appellant does not claim that there is not sufficient evidence to uphold the finding of the jury that the discharge was without cause. It appears that for the remainder of the five years after his discharge $11,875 would become due upon the salary, not including interest, and that during that time he earned by other employments $4,550, leaving a balance of $7,325 unpaid upon the amount which the Boardman Company agreed to pay him. The measure of damages in such cases is the amount of the salary agreed upon for the entire period of service, less the amount which the servant has earned or with reasonable effort might have earned from other employment. 3 Elliott on Const. §§ 2154, 2155; Seymour v. Oelrichs, 156 Cal. 801, 106 Pac. 88, 134 Am. St. Rep. 154. In Seymour v. Oelrichs the suit was begun and the judgment rendered long before the termination of the employment, and while it was said that the measure of damages was the amount due on the contract, less the amount earned, there was no occasion for considering the proposition of interest. Prior to the termination of the employment, of course, it could not be ascertained how much the employee would have earned during the unexpired portion of the time, and the damages would be unliquidated in the sense in which that term is used in the cases holding that interest is not allowable as damages for a discharge without cause. It does not follow, however, that this is the rule where the time had expired and the inquiry is made when the facts can all be ascertained.

"The law is well settled that where a contract for service is made for a fixed period, if the employer discharge the servant before its termination, without good cause, he is still liable, and the servant may recover the stipulated wages." Webster v. Wade, 19 Cal. 292, 79 Am. Dec. 218.

Where one was employed for a year to perform certain duties and was at all times ready and willing to perform them, but was prevented from doing so by the employer, and could not obtain other employment, his damage is the amount he would have received under the contract if he had performed the duties thereof. Hancock v. Board, 140 Cal. 562, 74 Pac. 44. We think the provisions of section 3287 of the Civil Code authorize the allowance of interest in cases like the present one where the damages are not estimated until after the term of employment has expired. That section provides:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and a right to recover which is vested in him upon a particular day, is also entitled to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

Under the terms of the contract Petch was entitled to $250 at the end of each month. This obligation became absolute at that time, and the failure to pay each monthly installment was a breach of the contract. The amount was absolutely certain, except as reduced by the earnings of Petch in other employment. If the month had not yet expired when the discharge took place, the amount of such earnings would be uncertain; but after the expiration of the period—and in this case after the expiration of the entire period of the contract—the amount of his earnings from other sources was capable of ascertainment by calculation from the evidence on the subject of his earnings, and it comes within the terms of section 3287, upon which interest would be allowed on the respective amounts. The question of the right to recover interest was not raised upon the former appeal, and there is nothing in the opinion then rendered that is decisive of that question. The evidence shows without dispute that for the first three months after his discharge he had no employment. Three monthly payments would become due during that period and each would draw interest. Also from February 1, 1913, to March 1, 1914, he was without employment, and $3,250 became owing for the monthly payments. In short, a mere calculation will show that the amount of the unpaid balance of his five-year contract, with interest from the time the payments became due, would more than equal the amount of the verdict. There is no claim that he was lacking in diligence in endeavoring to get other employment. It follows that we cannot say that the evidence is insufficient to support a verdict for the amount given.

The evidence sustaining the verdict is, however, rather unsatisfactory, and errors of law were made at the trial which we feel must have been prejudicial to the plaintiff, and we proceed to consider them.

There was evidence to the effect that a part of the arrangement for the transfer from the gas company to the electric company was that the Boardman Company should take charge of, oversee, and superintend the operations of the electric company for a period of five years thereafter, and superintend

the construction of the new plants to be erected at Grants Pass and Roseburg, all without any charge therefor to the electric company, and that it had performed that part of the agreement up to the time of trial.

[5] The plaintiff then offered evidence to prove the value of such services, and the court refused to admit the evidence. This ruling was erroneous. The fact that the Boardman Company held the majority of the stock of the electric company did not put upon it any obligation to perform these services. That service would have been the duty of the managing officers of the company, and for performing it they would have been entitled to compensation from the company, which would have come out of all stockholders alike. If this agreement was, as the testimony indicated, a part of the consideration for the transfer, then the value of the services was an additional contribution of the Boardman Company, and should have been deducted from the price paid to it in order to determine the profits made by it in the transaction. The evidence should have been admitted.

[6, 7] Upon the question whether or not Petch was discharged without cause there was a sharp conflict in the evidence. The plaintiff should have been allowed to prove his conduct in managing the property during the time he served in that capacity, in so far as it indicated his want of capacity or neglect of duty. It should, therefore, have been allowed to prove, if it could, that it was not necessary or proper for Petch to lay a pipe line 3,000 feet long across the property of another, and to buy and install a gasoline engine and pump in a well at the end of such pipe, to supply water to the gas works, when an equally good supply could have been obtained much nearer to the works. The form of the question put to the witness to elicit this information was faulty, and if the objection had been to the form alone it should have been sustained. The facts showing the impropriety or lack of necessity should have been shown instead of showing it by the opinion of the witness. But the objection was that the evidence was irrelevant and immaterial, not that the question was defective in form, and the ruling had the effect of excluding the evidence entirely.

[8] The witness Boardman should have been allowed to give his opinion as to the number of consumers that were necessary to make a given length of gas main profitable. He had had long experience in operating and financing gas plants in several places and was qualified to testify on the subject. It was not necessary that he should have had a technical education as an engineer or experience as a plumber. The evidence had a direct bearing on the question whether or not the Boardman Company had good reason to discharge the defendant from its service, and its exclusion was necessarily prejudicial to the plaintiff.

[9] The court instructed the jury that, "if the defendant violated material and proper and reasonable instructions" from the plaintiff in regard to the performance of his duties, the defendant could not justify a violation of such instructions on the ground that he believed he was acting for the best interests of the plaintiff. The instruction was erroneous in leaving the question to the jury whether the instructions violated were material, proper and reasonable. Either the court should itself have determined that they were reasonable, or should have stated the facts hypothetically so that the jury might know what was considered reasonable in point of law.

[10] The instructions that, "while a wrongfully discharged employee is bound to use reasonable diligence to procure employment, he is not bound to accept any sort of employment that may be offered him," is ambiguous and likely to be misleading. It should not have been given in the form above stated, but should have been made more certain and definite.

[11, 12] The plaintiff asked an instruction that Petch, as manager, was required to use reasonable care to comply with the ordinances of the towns in which the gas plants were being constructed, and that any failure on the part of the defendant to use reasonable care would be sufficient ground for discharging him. The court gave the first part of the instruction, but modified it by striking out the last part to the effect that failure to use such care would be reasonable ground for discharge. The instruction as asked is not entirely accurate. It is not true in all cases that a failure to use reasonable care would be sufficient ground for discharge. The failure might be excusable. If the failure were negligent or willful, then it would be sufficient ground for a discharge.

On account of the rulings above mentioned we find it necessary to reverse the judgment.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

186 Cal. 554

In re ARMS' ESTATE.

ARMS v. HEATH et al. (L. A. 6740.)

(Supreme Court of California. July 28, 1921. Rehearing Denied Aug. 25, 1921.)

1. Stipulations ⊜3 — Parties could properly stipulate in probate proceedings to try title.

Superior court in probate proceeding properly permitted parties to stipulate that case should proceed in dual character of proceeding in the estate for partial distribution and a civil action by one of the parties against the others to declare and enforce his right and title to land.

2. Husband and wife ⊜49¾(5)—Facts held to create presumption of gift of money by wife to husband.

In a probate proceeding involving moneys accumulated by deceased husband in another state, facts and circumstances *held* to raise a presumption or inference that money given by wife to husband was a gift.

3. Husband and wife ⊜264—Evidence held to warrant finding that property was not community property.

In a probate proceeding involving the distribution of property accumulated in another state, evidence *held* to warrant a finding that the property in question was not community property.

4. Trusts ⊜352—Trustor not owner of property untraceable.

Where property, with the consent of the trustor, has been commingled with the property of the trustee, so that no part of it can be definitely traced and segregated from that held by the trustee, or identified as a part of any specific fund or property, none of it can be considered as the property of the trustor, and the trustor has no special lien upon the general estate of the trustee, which is superior to that of any other creditor, and his only remedy is a personal action for damages or for money had and received; but the case is different where the money or property can be traced into a particular fund or deposit, where it still remains, though mingled with other money, or where it is used to establish a particular business which was continued in existence and is carried on by the trustee, or some one taking from him with knowledge of the trust.

5. Husband and wife ⊜246—Separate property of husband brought into state remains separate property.

Where a husband brings into the state money or property acquired by him during coverture in another state, by whose laws it was his separate property, it remains his separate property after it reaches the state, and any property acquired therewith in the state, either by purchase or exchange, is also the separate property of the husband.

6. Wills ⊜733(1)—Rights of distributees vest immediately upon death.

Rights of legatees in property devised vest immediately upon the death of the testator, and hence Civ. Code, § 164, as amended by St. 1917, p. 827, purporting to change rule as to separate property acquired in another state and afterwards brought into the state and invested in land, could not affect rights of devisees under will, where testator died prior to its going into force.

7. Wills ⊜802(2) — Remaindermen, where widow takes under law, not entitled to immediate enjoyment.

Where testator died a resident of Illinois, leaving real estate in California and personal property elsewhere to the widow for life, with remainder in the real estate in California to respondents, but widow elected not to take under the will, and hence became entitled to one-half of all the real estate and personalty of the testator, the respondents did not become entitled to immediate enjoyment of the land involved, which was testator's separate estate, and the widow was entitled to a one-half interest in the life estate, and other heirs of the testator were entitled to the other one-half interest in the life estate, and respondents must wait until the expiration of the life estate before enjoyment of the land in question, under Civ. Code, § 1386, subd. 2, and section 780.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the Estate of Harrison Arms, deceased. From a judgment decreeing partial distribution in favor of Gertrude Heath and another, Lucy R. Arms appeals. Reversed and remanded, with directions.

Lucius K. Chase, of Los Angeles, and Lincoln G. Backus, of Monrovia, for appellant.

Milton K. Young and Lyndol L. Young, both of Los Angeles, for respondents.

SHAW, J. Lucy R. Arms, widow of the decedent, appeals from a decree of partial distribution, embracing certain land held by decedent at his death.

The respondents are residuary legatees under the last will of the decedent, Harrison Arms. Arms died possessed of a large estate amounting to several hundred thousand dollars worth of property, situated in Illinois, where he then resided, and of certain lots on which was a dwelling house, in Los Angeles county, Cal. The real property in California was of the value of about $20,000. The respondents filed a petition for the distribution to them of the property in California, including certain household goods, offering to execute such bond as should be required by the court for the payment of their proportion of the debts due from the estate, as provided by the Code. Section 1658, Code Civ. Proc. The appellant filed objections to the petition, claiming that the property was the community property of herself and her deceased husband; that she had elected to take under the provisions of the law instead of under the provisions of the will; and that the re-

spondents were therefore not entitled to the whole of the property. She also filed a cross-complaint, so called, wherein she alleged that she intermarried with Arms, the decedent, more than 50 years before his death, and had lived with him as his wife until his death; that at the time of the marriage Arms had no property; that subsequent thereto she received property by inheritance of the value of $35,000, which she intrusted to him for her use to invest and reinvest the same; and that all the property which said Harrison Arms had at the time of his death consisted of the said $35,000 of property originally intrusted to him, together with the rents, issues, and profits arising and accruing therefrom, and that therefore it was her separate property which was held by him in trust, and praying that it be so adjudged. The court found that the property was not community property, nor the separate property of the widow, nor property held by her husband in trust for her, as alleged, but that it was all the separate property of the decedent, and that the distribution should be made of the real property only, as prayed for in the petition. A decree was entered accordingly.

[1] Upon the trial the respondents objected to the jurisdiction of the court to try the claim set up in the cross-complaint on the ground that it alleged a claim of title to the property in the widow adverse to that of the decedent, and that such claim was not cognizable by the court in the probate proceeding. Thereupon the parties, in open court, agreed that the pleadings relating to her said adverse claim might be amended so as to constitute a complaint in equity to enforce her right and title, and that the case should then proceed in the dual character of a proceeding in the estate for partial distribution and a civil action by her against the residuary devisees and legatees to declare and enforce her right and title to the land. The proper amendments were made, and with the consent of the court the case proceeded accordingly. We perceive no objection to this method of procedure where the court and all the parties concerned consent thereto. The superior court has jurisdiction to hear and determine cases in probate and in equity, and its final adjudication under such circumstances would be conclusive on all the issues.

The claim of the appellant is that the findings of the court are contrary to the evidence.

Arms died a resident of Illinois, and his will was duly admitted to probate in that state. The probate proceedings in California were ancillary to the administration in Illinois. The evidence shows that the estate of the decedent in Illinois was of the value of about $425,000, all but $75,000 of it being in personal property, and that the personal property readily convertible into money was amply sufficient to pay all the specific legacies, debts of the estate, and costs of administration. The claims filed against the estate in California had all been paid, except the inheritance tax. Shortly after the probate proceedings were begun the widow elected to take under the law instead of under the will, and filed, both in the probate court in Illinois and in that of California, her renunciation of the benefits conferred upon her by the will and her election to take under the law. Under the law of Illinois, a widow whose husband died testate may elect to renounce the provisions of the will, and in that event she is entitled to take one-half of all the property of the estate of the husband. There were no children or descendants of the testator living at the time of his death. In such cases, under the California law, the separate property of the husband descends, one half to the surviving wife and the other half to the relatives of the decedent—in this case his brothers and sisters and the descendants of such as are dead (Civ. Code, § 1386); and of the community property the surviving wife takes by descent one half and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition the wife takes the same share of such other half as she does of his separate property (Civ. Code, § 1402).

After providing for the legacies the will declares as follows:

"I give, devise and bequeath unto my beloved wife, Lucy R. Arms, for her sole use and benefit, during her natural life only, the use, income and rents of and from all of the remainder and residue of my estate and property.

"Upon the death of my said wife, Lucy R. Arms, and out of the remainder and residue of my property and estate unused and unexpended for my said wife, as hereinbefore provided and directed, I hereby make gifts, devises and bequests as follows: [Then follow bequests amounting to $20,000, and it then proceeds as follows]: Upon the death of my wife, Lucy R. Arms, and after the payment of all of the gifts, devises and bequests hereinbefore mentioned and provided for are paid and distributed, I give, devise and bequeath all the rest, remainder and residue of my property and estate * * * to my sister, Gertrude Heath, * * * and my nephew, George L. Arms, * * * share and share alike."

We will first consider the claim under the cross-complaint, to the effect that the estate of Harrison Arms consisted entirely of the proceeds, income, and profits of the money intrusted to him by his wife in the early years of their married life.

In Dimmick v. Dimmick, 95 Cal. 328, 30 Pac. 547, under conditions similar to those here appearing, it was claimed that the property in question there was the separate property of the estate of Julia A. Dimmick, the deceased former wife of Elmer D. Dimmick, and not the community property of that marriage. On this point the court said:

"While the wife [Julia A.] had some separate property very many years ago, at that

time it passed into the hands and commingled with the funds of her husband, an active business man engaged in numerous speculations in land, so numerous and so varied that at the date of this recent transfer it is impossible to say that one dollar of the money which she received from her father's estate, or its proceeds, passed into this tract of land."

The testimony here shows that the widow was married to Arms in 1861; that her husband was then without means, as she termed it "a poor boy"; that within the next eight years she received by inheritance funds amounting to $35,000; that she gave it to her husband "to invest in our business"; that she "let him borrow it" of her to go into business; that she "let him have the money for use in our business there, for the use of both of us"; that she "let him use it for my use"; that she first gave him $1,200 to buy oil stock and then $5,000; that he bought out part of a livery business in the year 1864, in Toledo, Ohio, with the $5,000; that afterwards he sold that livery business and with the proceeds started a better one and bought more horses; that he then added an omnibus business, and then sold both the livery and omnibus business and started what she called the "Arms Palace Car Business" in Toledo, Ohio. Just when this occurred does not appear, but this car business was carried on in Toledo until 1887, when he moved the business to Chicago, and there, until his death, it was carried on under the name of the Arms Palace Car Company, a corporation, of which he owned half the stock. How much of his estate consists of this stock does not appear. Some of the money she paid to him—how much she did not say—was paid for a silver mine which he bought. It does not appear what was done with this mine, nor what became of the oil stock above mentioned. She paid him the money from time to time and many years ago. She never asked him for any account, nor took a note or other obligation to repay the money. He never paid her any interest or any return for the use of the money, nor rendered to her any account thereof. In his will he states that he had at divers times presented his wife with money and property of the aggregate value of more than $200,000. She would not admit this value, but she did not deny the receipt of money, and she admitted that he had deeded her some land in Toledo, Ohio, which he had bought with the money received from her, and which she had subsequently sold for $100,000; also that he bought land in Michigan with the money.

[2, 3] It is obvious from her testimony that her husband was a very active, enterprising, and successful business man, and that the fortune of which he died possessed was largely the result of his own ability, energy, and industry. It is also apparent that it would be impossible at the present time, from the meager account which she was able to give, to trace the money which she delivered to him so many years ago through the numerous transmutations it underwent in the course of his business life so as to ascertain now what proportion of his estate is the increase from investments of her money, conceding that he held it in trust, and what proportion is the result of his own earnings and the increase thereof. Under such circumstances, and in view of the long-continued course of conduct of both parties indicating that the property was regarded and treated as that of the husband, a strong presumption or inference arises that she let him have the money as a gift and that she never intended to reclaim it in specie, or even to treat it as a debt. In view of the vagueness of her testimony as to the transactions between herself and her husband, it cannot be said that the court was bound to take her general statements and conclusions as a fact in opposition to this presumption. If his fortune had been accumulated in that manner in California, the presumption would be that it was property acquired during marriage, and was therefore community property. Under the laws of Illinois, as proven to the court below, the property acquired during the marriage is the separate property of the husband, unless it is transferred, conveyed, or given to the wife, in which event it becomes her separate property.

[4] Where property, with the consent of the trustor, has been in that manner commingled with the property of the trustee, so that no part of it can be definitely traced and segregated from that held by the trustee, or identified as a part of any specific fund or property, none of it can be considered as the property of the trustor. "The right of pursuing it fails when the means of ascertainment fails. This is always the case where the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description." Where the identity cannot be traced the trustor "is forced to rely upon the personal liability of the trustee. * * * He has no special lien upon the general estate of the trustee which is superior to that of any other creditor," and his only remedy is a personal action for damages or for money had and received Lathrop v. Bampton, 31 Cal. 23, 89 Am. Dec 141. There are many other cases to the same effect. Byrne v. Byrne, 113 Cal. 299, 45 Pac. 536; Reid v. Reid, 112 Cal. 278, 44 Pac. 564; Estate of Boody, 113 Cal. 687, 45 Pac. 858; Orcutt v. Gould, 117 Cal. 316, 49 Pac. 188; McGrath v. Carroll, 110 Cal. 83, 42 Pac. 466; Miller v. Ash, 156 Cal. 565, 105 Pac. 600; Rowland v. Madden, 72 Cal. 18, 12 Pac. 226, 870; Faulkner v. Hendy, 103 Cal. 15, 36 Pac. 1021; Estate of Dutard, 147 Cal. 257, 81 Pac. 519; Title, etc., Co. v. Ingersoll, 158 Cal. 484, 111 Pac. 360; People v. California, etc., Co., 175 Cal. 759, 167 Pac. 388. The case is different, of course, where the money or prop

erty of the trustor can be traced into a particular fund or deposit, where it still remains, though mingled with other money, or where it is used to establish a particular business which was continued in existence and is carried on by the trustee or some one taking from him with knowledge of the trust. Elizalde v. Elizalde, 137 Cal. 641, 66 Pac. 369, 70 Pac. 861, Moore v. Jones, 63 Cal. 15, and Byrne v. McGrath, 130 Cal. 316, 62 Pac. 559, 80 Am. St. Rep. 127, are of this character. The evidence in this case is not of such character that we can say, as matter of law, that the court below should have found that the fund can be traced and identified, within the rules laid down in the cases last cited.

Our conclusion is that the findings that the property was not the separate property of Lucy R. Arms nor subject to any trust in her favor is not contrary to the evidence.

[5] What has been said establishes the fact that the property which Harrison Arms accumulated and earned in Illinois, during coverture, was not community property of the marriage, but was his separate property. It has long been the established law of this state that where a husband brings into this state money or property acquired by him during coverture in another state, by whose laws it was his separate property, it remains his separate property after it reaches this state, and that any property acquired therewith in this state, either by purchase or exchange, is also the separate property of the husband. Kraemer v. Kraemer, 52 Cal. 302; Shumway v. Leakey, 67 Cal. 460, 8 Pac. 12; Estate of Niccolls, 164 Cal. 372, 129 Pac. 278; Estate of Warner, 167 Cal. 686, 140 Pac. 583. It appears without dispute that the land ordered distributed to the residuary legatees was purchased by the decedent with money brought by him from Illinois which was a part of the property there accumulated by him as aforesaid, and which was therefore his separate property. It follows that said land was also his separate property and subject to his testamentary disposition. This being the case, it was disposed of in his will by the residuary clause above recited; the separate property being subject to his testamentary disposition according to the law of this state.

[6] The amendment of 1917 to section 164, Civil Code (Stats. 1917, p. 827), purports to change the above-stated rule as to property acquired in another state and afterwards brought into this state. It appears to declare that all property of a husband or wife acquired after marriage (other than that acquired by gift, bequest, devise or descent) is community property, regardless alike of the place of its acquisition and of the place where it is situated, except that property conveyed to the wife by an instrument in writing is presumed to be her separate property. But this amendment was not in force until July 27, 1917. Arms died on July 5, 1917, and the rights here involved became vested immediately upon his death. Hence the amendment of 1917, even if it is valid, does not affect the case in any manner. We mention it only for the purpose of noting that fact.

On behalf of the appellant her counsel argue that the property acquired by the decedent in Illinois should be treated as community property here, for the reason that "the incidents of the husband's estate in Illinois are more nearly identical with the incidents of ownership of community property in California than with the incidents of the ownership of our separate property," and that "separate property, as we understand the term, is unknown in Illinois." Doubtless the incidents of ownership of separate property in Illinois are not precisely identical with the incidents of such ownership here, for the laws of the respective states relating to the use, enjoyment, disposition, and descent of property are not identical in all respects. But there is no substantial difference between the idea of separate property, as we understand it, and the conception of it prevailing in Illinois. The law of Illinois governing the acquisition, use, enjoyment, and conveyance. The same is true as to the husband is not similar to our law respecting these incidents of community property. Community property is unknown here. There, a conveyance to the wife, otherwise than in trust, vests in her the absolute title, irrespective of the source of the consideration for the conveyance. The same is true as to the husband's title upon a conveyance to him. Transfers of personal property which pass any title or interest therein also pass to the transferee, whether husband or wife, the title to the property as his or her separate property. Separate property there is the separate property known to the common law, as it is also here, except as in either state it may have been changed by statute. The rights of the respective spouses upon a dissolution of the marriage by divorce in Illinois are not similar to the rights in community property in this state upon divorce. The rights of the widow in the realty on the death of the husband in Illinois are the same in character as those rights under the common law, except that a fee in one-third has been substituted for the common-law estate of dower. No distinction is made there between property earned by the husband before and after marriage, as it is here, either with regard to marital rights, rights of inheritance, or upon divorce. The husband's power of disposition of his separate estate in Illinois during his life is not restricted, as is his right here to dispose of community property. In short, the incidents of ownership, so far as they are similar at all, are not of such character as to make that which is the separate property of the husband in Illinois community property of the marriage when it is brought into this

state. We cannot doubt that this proposition received consideration in the cases on the subject above cited, although it was not specially mentioned. The aforesaid decisions have become a rule of property and cannot be changed by the courts upon considerations such as are here presented.

[7] The appellant claims further that the court below erred in distributing the entire interest in the real property to the two residuary devisees. The theory advanced in support of this contention is that upon her election to renounce the will and take under the law the life estate given to her became ineffective; that that interest in the real property thereupon went back into the general estate, and, not having been effectually disposed of by the will, the testator died intestate as to that life estate. This being the case, and it being his separate property, as we have seen, they say that under the Code one half of it descended to her and the other half to his brothers and sisters and the descendants of such as are dead (Civ. Code, § 1386, subd. 2), and that it should have been distributed accordingly.

We see no escape from the conclusion that the widow is entitled to distribution of a one-half interest in this real estate for the period of her own life. The terms of the will are such that the estate given to the two residuary devisees did not begin in possession and enjoyment until after her death. It provides that "Upon the death of my wife, * * * and out of the remainder and residue of my property and estate unused and unexpended for my said wife" the legacies amounting to $20,000 were to be paid, presumably by the executors, since no provision is made for the payment by any trustees or other person. The residue is then given by the following words:

"Upon the death of my wife, * * * and after the payment of all of the gifts, devises and bequests hereinbefore mentioned and provided are paid and distributed, I give, devise and bequeath all of the rest, remainder and residue of my property," to Gertrude Heath and George L. Arms.

The phrase "upon the death" usually refers to the time of enjoyment and not to the time of vesting, and doubtless it was so used here. But the decisive point here is the time of enjoyment, and it is clear that this did not begin until after the happening of both of the events mentioned, namely, the death of the widow and the payment of the legacies which did not become due until her death. Hence the estate in the property in the meantime was not included in the residue described and did not go to said residuary legatees, but was disposed of only by the provision for the wife, and when she renounced it that portion of the estate remained without effective testamentary disposition. As to that, the effect was the same as if he had died intestate.

Where a legacy or devise is rejected by the beneficiary, and there is a residuary clause which would include it by its terms, the property so refused goes into the residue, and the residuary legatee or devisee takes it by virtue thereof. Macknet's Ex'rs v. Macknet, 24 N. J. Eq. 289; 18 Am. & Eng. Ency. of Law (2d Ed.) 762; 40 Cyc. 1950. But if the residuary clause is not general or is not couched in language that would include the property so refused, such property goes to the heirs at law as property of which the testator died intestate. Bugbee v. Sargent, 23 Me. 271; Temple v. Nelson, 45 Mass. (4 Metc.) 584; James v. James, 4 Paige Ch. (N. Y.) 115; 18 Am. & Eng. Ency. of Law (2d Ed.) 761; 40 Cyc. 1941.

In California a widow is not put to her election by a gift to her of the separate property of the husband, unless the will is so drawn as to make an election necessary. As to that property she stands upon the same footing as any other beneficiary. But any person may refuse to accept a provision for him or her in a will, and of course a widow may do so. When the widow elected to take under the law and renounced the provisions of the will for her benefit, the devise to her of the use, rents, and income of the real property in question during her natural life became inoperative, and that portion of the estate of the testator therefore fell into the undisposed of residue and descended to his heirs at law. The widow was one of the heirs of the husband, with respect to his separate estate, and under the circumstances of this case she was entitled to one-half of all the property not disposed of by the will. It follows that she was entitled to one half of this life estate, and the other half thereof descended in equal shares to the brothers and sisters of the testator and to the children or grandchildren of any deceased brother or sister by right of representation. Civ. Code, § 1386, subd. 2. The decree should have made distribution accordingly.

There are cases which hold that upon a refusal of the widow to take a life estate given in lieu of her positive rights under the law, such as dower or other interest in land not subject to the husband's testamentary disposition, where there is a remainder over to residuary devisees, the vesting of the remainder is accelerated, so that the residuary devisees may take before the widow's death. But the weight of authority and the better reason is the other way. Hauk v. McComas, 98 Ind. 464. In effect, such a doctrine would operate as a judicial devise of the decedent's estate—a supplementary will not made by the testator. We think the court is without power to do that, even if it would be more convenient in the particular case. Moreover, it appears to be contrary to section 780 of the Civil Code.

The judgment is reversed and the cause remanded, with directions to the court below to distribute the life estate in the realty in accordance with this opinion and the remainder therein to the respondents.

We concur: ANGELLOTTI, C. J.; SHURTLEFF, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

53 Cal. App. 186

PEOPLE v. HINRICH. (Cr. 550.)

(District Court of Appeal, Third District, California. June 14, 1921.)

1. Infants ⊂⊃20—Evidence sufficient to sustain conviction of lewd conduct on body of child.

In a prosecution for lewd and lascivious conduct on the body of a girl of the age of 8½ years, evidence *held* sufficient to sustain conviction.

2. Witnesses ⊂⊃243 — Leading questions to youthful prosecuting witness permissible.

In a prosecution for lewd and lascivious conduct on the body of a girl of the age of 8½ years, leading questions to the prosecuting witness were permissible in the sound discretion of the court in view of the age of the girl and her embarrassment.

3. Criminal law ⊂⊃338(3) — Testimony of prosecuting witness permissible as foundation for introduction of measurements.

In a prosecution for lewd and lascivious conduct on the body of a girl of 8½ years, the trial court, to lay the foundation for the introduction of measurements made by a second witness of the distance from the place where a fire was built to the scene of the crime, properly permitted the prosecuting witness to testify that a few days before the trial she pointed out to another witness the place where the crime was committed.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Henry Hinrich was convicted of lewd and lascivious conduct on the body of a girl of the age of 8½ years, and he appeals. Affirmed.

E. S. Bell, of Napa, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. Appellant was convicted of the crime of lewd and lascivious conduct upon the body of a girl of the age of about 8½ years. He bases his appeal upon two grounds:

"(1) That the evidence is insufficient to support the verdict.

"(2) That the court erred in overruling the objections of the defendant to the admission of certain evidence."

[1] The evidence shows that the defendant and the prosecuting witness, together with another girl of about the same age, and a little boy of four years, went from Oakdale on a Sunday afternoon to a place called "the slides," near which there is an irrigating ditch, then dry. For a time the children amused themselves sliding down the embankment, and then a fire was started, all gathering fuel. The defendant and the prosecuting witness, leaving the other children at the fire, walked for some distance along the ditch, bringing fuel for the fire on their return, and it was during this absence that the alleged crime was committed. The prosecuting witness testified in detail to the effect that the defendant placed his coat in the bottom of the ditch, had her lie down upon it and unbutton her drawers, then unbuttoned his pants, lay down upon her, and proceeded to the point of sexual emission, and that he then gave her 50 cents and cautioned her not to tell her parents. The other little girl testified that when the prosecuting witness returned to the fire the latter told her what the defendant had done, and showed her the 50 cents he had given her. The defendant denied any wrongful conduct, and also denied giving the girl any money. The evidence produced by the prosecution, if believed by the jury, was amply sufficient to convict. The credibility of witnesses is for the jury in the first instance and for the court on motion for a new trial.

[2] General objection is made that the district attorney was permitted to ask leading questions of the prosecuting witness, but no particular ruling is pointed out as error, and an examination of the record fails to disclose any error in this regard. In view of the age of the girl and her embarrassment in relating the sordid story in court, it was necessary for the district attorney to resort to leading questions in parts of his examination. If the course pursued is not permissible in the prosecution of such crimes, then offenders against little children will usually go unpunished. Leading questions may be permitted in the sound discretion of the court. People v. Clary, 72 Cal. 60, 13 Pac. 77; People v. Harlan, 133 Cal. 16, 65 Pac. 9; People v. Brown, 130 Cal. 591, 62 Pac. 1072; People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323. Safeguards against unjust convictions must be found in the conscientious discharge of their duties by trial judges and prosecuting officers, duties in which such officers seem not to have been remiss in this case.

[3] Objection is made that the court permitted the prosecuting witness to testify that a few days before the trial she pointed out to another witness the place where the crime was committed, and that the second witness was allowed to testify as to the place she so

designated. The evident purpose was to lay the foundation for the introduction of measurements made by this second witness of the distance from the place where the fire was built to the scene of the crime. For that purpose the evidence was clearly admissible.

No error appearing in the record, the judgment appealed from is affirmed.

We concur: BURNETT, J.; HART, J.

53 Cal. App. 194

GREEN v. SOUTHERN PAC. CO. et al. (Civ. 3429.)

(District Court of Appeal, Second District, Division 1, California. June 14, 1921. Hearing Denied by Supreme Court Aug. 13, 1921.)

1. Negligence ⊂=135—Contributory negligence established by preponderance of evidence.

Contributory negligence is an affirmative defense which must be established by a preponderance of the evidence.

2. Railroads ⊂=327(3)—Pedestrian must look and listen.

A railroad track being a place of probable danger, a pedestrian approaching it must both look and listen to ascertain whether there are approaching cars.

3. Negligence ⊂=122(5)—Care on part of deceased presumed.

In the absence of direct proof of the conduct of a person alleged to have been killed by negligence, the jury may infer ordinary care and diligence on his part from all the circumstances of the case, his character and habits, and the natural instinct of self-preservation.

4. Negligence ⊂=136(9) — Contributory negligence for court on undisputed facts susceptible of but one inference.

To establish contributory negligence as against the jury's verdict the evidence must be such that the court must say that it is not in conflict on the facts, and that from these facts reasonable men can draw but one inference, pointing unerringly to deceased's negligence, contributing to his own injury.

5. Railroads ⊂=350(22)—Pedestrian's contributory negligence held for jury.

In an action against a railroad company for the death of a pedestrian at a crossing, where the evidence was conflicting as to whether deceased's view was unobstructed, and as to how light it was at the time, and the jury visited the scene at a time in the evening when the amount of light was about the same as at the time of the accident, and observed the placing and movment of trains, it was for the jury to determine whether the physical facts demonstrated a situation compelling the conclusion of deceased's contributory negligence through failure to look and listen for the approaching car.

6. Railroads ⊂=307(4)—Duty to provide flagman.

Keeping a flagman at a crossing is within a railroad company's duty to use reasonable care, corresponding to the circumstances constituting the probable danger to avoid injury to travelers.

7. Railroads ⊂=350(5) — Negligence in failing to provide flagman held for jury.

In an action against a railroad company for the death of a pedestrian at a much-traveled crossing, at which there was no flagman or other means of warning, where there was evidence that obstructions frequently interfered with the view of moving trains, it was for the jury to decide whether it was negligence for the company to run its cars across the highway without providing a flagman or warning signals other than those usually given by engines and cars.

8. Master and servant ⊂=333 — Verdict exonerating locomotive engineer held no bar to recovery against railroad.

Where there was evidence from which the jury might determine that a railroad company's failure to have a flagman at a crossing at which a pedestrian was killed was negligence, and a proximate cause of the accident, a verdict in favor of the engineer, joined as a defendant, did not bar recovery against the company.

9. Trial ⊂=295(7)—Instruction as to duty of pedestrian at crossing held not misleading when considered with instructions as whole.

In an action against railroad company for death of pedestrian at a crossing, where the jury were instructed that if deceased did not look and listen for the approaching train before crossing the track, and could have seen or heard it, and remained in his place of safety until it passed, the verdict should be for defendants, and that a failure of a pedestrian to exercise constant viligance to discover the approach of a train at a crossing and to make use of all his senses to avoid the danger is negligence precluding recovery, an instruction that if deceased stopped, looked, and listened, and did not hear or see, or, with the exercise of reasonable care, could not see the approaching train, he was not guilty of contributory negligence, though subject to the criticism that the jury was told in substance that if he looked and did not see, however careless his inspection and unseeing his eyes, they must find for plaintiff, was not such error as would probably mislead the jury, the instructions being considered as a whole.

10. Trial ⊂=295(1)—Instructions laying down substantially correct rule when examined together will be sustained.

Instructions are not to be tested by particular clauses without considering them in connection with the instructions as a whole, and if, when examined together, they lay down a substantially correct rule, they will be sustained.

Appeal from Superior Court, San Luis Obispo County; Benj. K. Knight, Judge.

Action by Zoy Green, as administratrix of Harry Green, deceased, against the Southern

Pacific Company, a corporation, and another. Judgment for plaintiff against the named defendant, and the latter appeals. Affirmed.

W. I. Gilbert, of Los Angeles, and W. H. Spencer and C. P. Kaetzel, both of San Luis Obispo, for appellant.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, and S. V. Wright, of San Luis Obispo, for respondent.

CONREY, P. J. This is an action prosecuted by Zoy Green, as administratrix of the estate of Harry Green, deceased, against the Southern Pacific Company and George A. Brown, to recover damages for negligence which caused the death of the plaintiff's husband, who was struck by a "gondola" car at a grade crossing on Osos street, a public street in San Luis Obispo, the car at the time being pushed by an engine then being operated by defendant George A. Brown. The verdict of the jury was in favor of the defendant Brown, but against the defendant Southern Pacific Company. Judgment was entered against appellant in the sum of $21,500. While a motion for a new trial was pending this amount was, on suggestion of the trial judge, and by consent of the plaintiff, reduced to the sum of $15,000, whereupon the motion for a new trial was denied. From this judgment the defendant Southern Pacific Company appeals.

Appellant contends that the verdict was not supported by the evidence in this, that the evidence without conflict established the truth of appellant's plea that the injury to Harry Green, and his death resulting therefrom, were directly caused by his contributory negligence in failing to look before leaving his place of safety to walk over the track upon which he was killed. Osos street runs southeasterly from the business section of the city of San Luis Obispo, and crosses the railroad tracks at a point north of and near to the railroad station. The railroad tracks at the railroad station lie nearly due north and south. They run northerly on a slight curve, so that within a short distance north of Osos street their direction is southwest and northeast. The trains going northerly, toward San Francisco, are known as west-bound trains, and those going southerly at this point, toward Santa Barbara, are known as east-bound trains. The most westerly track of appellant is known in this record as the main track. Parallel to it, and easterly from it, are switching tracks, parallel, or nearly parallel, to each other, which are successively designated as tracks 1, 2, 3, 4, and 6. Tracks 4 and 6 are connected by a lead track (5) for the transfer of cars from track 4 to track 6. At a point about 150 feet northeasterly from the point where Osos street and track 6 intersect there is an icehouse located a few feet east of track 6. At 279 feet from Osos street track 6 is split into two parts, one of which is designated as "rip track 1," and the other as "rip track 2."

The home of Harry Green was located in a section of town easterly from these tracks. His place of business was somewhere in the city west of these tracks. That he was well acquainted with the railroad premises and the customary running of trains thereon is not denied. At about 20 or 25 minutes after 5 o'clock on the evening of November 20, 1917, Green approached these tracks while on his way toward home. With him were his wife and Mrs. Sarah Peacock. They were all walking, but Green had with him a bicycle. At the time of their arrival at the railroad tracks a freight train was standing on track 3. This train had been broken into two sections, leaving Osos street open between them. Gianopolis, a car inspector of appellant, was there in charge of an air hose which connected the two sections of the train. The inspector, in reply to a remark of Mrs. Peacock, said, "All right, you got plenty of time to cross." Thereupon Green and the two women crossed track 3 and proceeded across track 4 to the "lead track," 5, and thence, moving forward, attempted to cross track 6, and at that point of crossing the accident occurred.

It must be taken as established by the evidence that there was no watchman or warning signal at this place, and that no bell was rung or whistle sounded, or other warning given, of the approach of any engine or car on track 6. At the same time another train was moving in the yard. The freight train on track 3 was closed up immediately after the three pedestrians crossed that track. There were 23 of these cars, and one engine. Gianopolis testified that just when these cars came together he heard behind him some kind of a crash, and the scream of a woman. These facts concerning the freight train are pertinent in connection with the fact that the noises caused by the movement of its engine and cars furnished one of the reasons why the deceased probably did not hear the approaching cars on track 6. There is evidence that some cars were standing on track 5, north of the street, and that they extended to a point within 15 feet of the center of the roadway.

The car which struck Green was being pushed southerly by an engine which faced north, and which was pulling with it two tank cars. The train crew consisted of a foreman or conductor (Wilson), an engineer (the defendant Brown), the fireman Purcell, and Herman and Miller, brakemen. Wilson was on the north end of the north car, Brown in the engine cab, Purcell on the left-hand side of the cab, Miller somewhere north of the engine, and Herman at the rear end of the engine. There was no one at the southerly end of the gondola car, and there does not appear to have been any light there or on the

train. The color of the gondola car was black, and the time was at dusk or twilight of evening.

This switching train had been made up at rip tracks 1 and 2, and on signal given by Wilson had started from that place toward Osos street just before the time of the accident. Appellant contends that the train came to a dead stop at the icehouse at a point about 150 feet from Osos street, whereas respondent contends that the movement of the train was continuous from the start at the rip tracks until the gondola car struck Green. Without quoting testimony we will say here that the evidence is sufficient to support respondent's position concerning these facts.

If the deceased was guilty of negligence, such negligence must consist of failure to use due care at the moment when he passed from track 5 to track 6. As he was killed instantly, the court was deprived of any testimony from him concerning the facts. The only testimony relating to those facts is that of Mrs. Peacock and Mrs. Green. At the time in question Mrs. Peacock was walking at the right of Green (the bicycle between them), and Mrs. Green was on the right of Mrs. Peacock. Referring to the conversation between those persons, the testimony of Mrs. Peacock is as follows:

That after passing track 3, Green said to her, "We must look before we go any further, as there was cars there. Q. He told you to look before he went any further because there were cars there? A. Yes, sir. Q. In what direction was he looking when he talked about these cars? A. West."

Again:

"A. We started on, and the next thing I knew his wheel hit me, and it warned me, and I hit her, and jumped, and I looked around; the wheels were on his chest, of the car. Q. What wheel hit you? A. The bicycle."

Mrs. Green testified as follows:

"Q. Before going upon this track, did you look to see if there were any cars moving? A. Yes, sir. Q. Or any engine? A. Yes, I seen; and I don't see any one move. Q. You say you saw no cars moving at all? A. I did. No cars moving at all."

[1-3] Contributory negligence is an affirmative defense which must be established by a preponderance of the evidence. A railroad track is a place of probable danger. For that reason the rule has been established that a pedestrian approaching such a track must both look and listen to ascertain whether there are approaching cars. This is a necessary part of the duty of a person to use reasonable care for his own safety. But—

"In the absence of any direct proof, * * * the jury are at liberty to infer ordinary care and diligence on the part of the plaintiff from all the circumstances of the case—his character and habits, and the natural instinct of self preservation." Gay v. Winter, 34 Cal. 153, 164; Larrabee v. Western Pac. Ry. Co., 173 Cal. 743, 161 Pac. 750.

In the case last cited, while recognizing the presumption that the deceased exercised ordinary care, it is noted that that presumption is given weight only in the absence of evidence on the subject of the deceased's conduct. The court quoted with approval Thompson on Negligence, § 401, that this is—

"An artificial presumption of so weak a character that it is not to be allowed to have the effect of evidence before the jury, where the uncontradicted evidence of the circumstances attending the accident overthrows it."

[4] The law being thus defined, and there being in the present case no testimony tending directly to prove negligence on the part of the deceased, appellant is obliged to rely upon its contention that the uncontradicted evidence of the circumstances attending the accident necessarily overthrows the presumption of due care on the part of the deceased. To establish this defense of contributory negligence, as against the verdict of the jury, the evidence must be such that the court must say that it is not in conflict on the facts, and that from these facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the deceased contributing to his own injury. Zibbell v. Southern Pac. Co., 160 Cal. 237, 116 Pac. 513.

[5] Appellant contends that in this case the unquestioned physical facts demonstrate a situation from which no other reasonable conclusion can be drawn than that the deceased was guilty of contributory negligence causing his death. We are unable to agree with this contention. It is conceded by counsel for appellant that the cars on the fifth track may have obstructed the view of deceased until he reached the track on which they were located. The distance between the inside rails of the fifth track and the sixth track at the point where the deceased was walking was a little less than 9 feet. Counsel argue that, since both tracks curved away from the icehouse, the deceased, from the time that he reached the last rail of track 5, must have had a clear and unobstructed view of the entire track 6 to the starting point of the train which struck him. It must be remembered, however, that these incidents occurred in the dusk of evening, when the clearness and certainty of daytime light were absent; that the icehouse was in the background of the car as it approached; and therefore that there is some room for doubt as to the degree in which it may be said that the view was clear and unobstructed. This court cannot know to what extent the daylight had faded.

A very careful attempt was made to inform the jury upon that question. In accord-

ance with a stipulation to that effect the court caused the jury to visit the scene of the accident at a time in the evening when the amount of light was about the same as it was at the time of the accident. Cars were placed and trains were moved for the purpose of aiding those observations. It was stipulated by appellant that the jury might take into consideration everything they saw and everything that happened upon that occasion. These observations, therefore, became independent evidence in the case, of such a nature, however, that it could not be transcribed into the record. The jury having been thus instructed by its own observations, as well as by the testimony of witnesses, was able to define the limitations of visibility of moving trains and stationary cars at the time of the accident. In view of these facts we are not in a position to say that the unquestioned physical facts demonstrated a situation compelling the conclusion of contributory negligence through failure to look and listen for the approaching car. Mrs. Green, whose situation was about the same as that of Wilson, testified that she looked to see if there were any cars moving, and saw none.

We have noted the fact that defendant's engineer, Brown, was a codefendant in this action. Upon these facts appellant suggests that because Brown was its agent appellant is exonerated by the verdict in favor of the agent. In Bradley v. Rosenthal, 154 Cal. 420, 425, 97 Pac. 875, 129 Am. St. Rep. 171, it was decided that where recovery is sought, based upon the act or omission of an agent whom a principal did not direct and in which the principal did not participate, and where thus his responsibility is simply the responsibility cast upon him by law by reason of his relationship to his agent, the effect of the judgment in favor of and exonerating the agent is such that the principal is thereby relieved of responsibility. See, also, Fimple v. Southern Pac. Co., 38 Cal. App. 727, 177 Pac. 871. So, in the case at bar, if the claim of negligence as charged against appellant arose solely from the conduct of the engineer in the operation of the engine and cars, without express instructions of appellant governing the particular manner of running the train, and without other acts of negligence on the part of appellant, a verdict and judgment in favor of the engineer would relieve appellant from liability for such alleged negligence.

The complaint, as amended at the trial, contains the allegation that, prior to the time when said freight car came in contact with the deceased, the defendant corporation carelessly and negligently failed and neglected to place or maintain any flagman or signalman, or any other person or persons, or to show or give any signal or signals whatever, at or near said Osos street, or on or near said gondola freight car, to warn or notify pedestrians, or other persons, crossing or about to cross said tracks of defendant corporation on said Osos street, of the approach of said gondola freight car and said locomotive. The evidence amply proved the truth of that allegation. That charge of negligence presented one of the issues which was submitted to the jury.

[6] Appellant replies that there is no evidence that the deceased was misled by the failure of appellant to keep a signalman there; that for years the deceased had crossed the same track under the same circumstances, and therefore could not have depended upon the presence of a flagman for his safety. Further, in this connection, appellant asserts that no duty was by law imposed upon it to keep a signalman there. But the law does impose upon a railroad company the duty to use reasonable care, corresponding to the circumstances constituting the probable danger, to avoid injury to persons lawfully traveling upon the public highway crossed by the company's tracks and trains. It then becomes a question for a jury to decide whether or not it was negligence for the company to run its cars across the highway without providing a flagman or some means of warning to travelers at the place of crossing.

[7] And where the facts in evidence prove that usually or frequently there are obstructions which interfere with the opportunity to see moving trains while travelers on the highway are approaching a much-traveled crossing, it cannot be held that, as a matter of law, it is not negligence to run trains there without warning signals other than those usually given by engines and cars.

"The question really is as to what is due care where the view of the tracks is obstructed, and it is usually left to the jury to say whether, in view of the obstructions, the company has exercised ordinary care in respect to the peculiarly dangerous condition of the crossing; whether ordinarily prudent men would have taken extra precautions; and whether such precautions were taken in the particular case. This rule requiring the adoption of extraordinary means to signal the approach of trains at peculiarly dangerous crossings also has frequent illustration in cases where trains or engines have been backed over crossings. Thus a railroad company has been held grossly negligent in backing a train across a much-frequented crossing, without a brakeman at the rear end as a lookout, and ready, in case of danger, to apply the brakes, and thus prevent collision or accident." 22 R. C. L. p. 990.

[8] In view of these principles, and the negligence pleaded and proved in this action, we conclude that the verdict in favor of defendant Brown does not bar the right of recovery against appellant. In their report to the company, the trainmen themselves said that the accident could have been avoided "if there had been a flagman stationed at the crossing." The jury, under the evidence, was authorized to determine that failure to have

a flagman there was negligence and was a proximate cause of the accident.

[9] The final error claimed by appellant is in the giving of instruction numbered XXV, a part of which stated that if deceased "stopped, looked, and listened * * * and * * * *did not hear nor see* said locomotive or gondola freight car being run or operated upon said track, and was not aware of the approach of said locomotive and gondola freight car, *or* with the exercise of reasonable care and caution could not see," etc., the deceased was not guilty of contributory negligence. The words italicized by us direct attention to the point made. Appellant argues that the jury was thus told in substance that, if Green looked and did not see, however careless his inspection, however unseeing his eyes, they must find for the plaintiff. Standing alone, and interpreted according to strict rules of grammatical construction, this instruction does not state the law correctly, and is subject to that criticism. But there were other instructions bearing upon the same subject. The jury were told that if they believed from the evidence that the deceased—

"did not look or listen for the approaching train when he was on the track next to what is called the rip track, or when he was between said track and the rip track, and further believe that he could have seen or heard the approaching train which struck and killed him, and thereupon remained in his place of safety until the train passed, then the court instructs you that your verdict must be for the defendants."

In another instruction the court said:

"A railroad track upon which trains frequently run is itself a warning of danger to any person who has reached the years of discretion and who is possessed of ordinary intelligence that it is not safe to walk across it without the exercise of constant vigilance in order to be made aware of the approach of a railroad locomotive and cars, and thus be enabled to avoid injury. A failure of such person, so situated with reference to the railroad track, to exercise such watchfulness and care and to make use of all his senses to avoid the danger incident to such a situation, is negligence which precludes a recovery."

[10] Considering the instructions as a whole, the language criticized does not result in error of such a character that the jury probably would be misled thereby. Instructions to the jury are not to be tested by particular clauses, without considering them in connection with the instructions as a whole. If, when examined together, the instructions lay down substantially a correct rule, they will be sustained. Peters v. Southern Pac. Co., 160 Cal. 48, 69, 116 Pac. 400.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

53 Cal. App. 243

BENUSSI v. HANNAH. (Civ. 3788.)

(District Court of Appeal, First District, Division 1, California. June 17, 1921. Hearing Denied by Supreme Court August 15, 1921.)

1. Carriers ⊜306(1)—Finding that defendant and not receiver was owner of building sustained.

In an action for negligent death of tenant of apartment in elevator, facts *held* to warrant a finding that the actual possession and actual control of the apartment building had been taken over by the defendant before the accident, and that a receiver in mortgage foreclosure proceedings was not in possession and control thereof, although the receiver's account was not settled and he was not discharged until after the accident occurred; the defendant being the purchaser at the sale under the mortgage.

2. Carriers ⊜306(1)—Ownership of building immaterial.

In an action for negligent death of a tenant of an apartment building in an elevator accident, it was not necessary for the jury to determine who was the legal owner or had the right to the possession of the apartment building, but it was only necessary for them to determine that defendant was actually in possession and control.

3. Evidence ⊜219(1)—Insurance policy and making of repairs admissible to show who was in control of building at time of accident.

In action for damages for negligent death of tenant in elevator in apartment building, where the issue was as to whether a receiver or defendant owner was in possession and control of the building at the time of the accident, court properly permitted in evidence, as an admission against interest, an insurance policy issued to the defendant upon the elevator in such building, and such was true of evidence that defendant immediately after the accident caused repairs to be made.

4. Appeal and error ⊜1067—Failure to limit scope of evidence not reversible error.

Where it is safe to say that jury had only in mind the single question as to which the evidence might properly be applied, it cannot be said that failure of the court to limit the evidence to such issue was prejudicial error.

5. Trial ⊜295(1)—Instruction construed as a whole.

Criticisms as to specific parts of the charge will not be considered on appeal, where, upon the whole, it was a fair and full statement of the law of the case.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Minerva A. Benussi, as executrix of the last will and testament of Louis Benussi, deceased, against Jesse D. Hannah. Judgment for plaintiff, and defendant appeals. Affirmed.

Aitken, Glensor, Clewe & Van Dine and E. F. Conlin, all of San Francisco, for appellant.

Sullivan & Sullivan and Theo J. Roche, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff, as executrix of the last will and testament of Louis Benussi, deceased, who was killed in an elevator accident in an apartment house in the city and county of San Francisco. The action was brought by her against the defendant, Hannah, who was alleged to be the owner and in the possession and control of said apartment house at the time of the accident which resulted in her husband's death.

The elevator in question was an automatic electric elevator for the use and convenience of the tenants of the apartment house, installed at the time of the erection of the building some years before, and in operation at the time of the casualty in which the decedent lost his life. Mr. and Mrs. Benussi were tenants of the building, having their apartment on the third floor. On the evening of May 25, 1915, they left their apartment and proceeded toward the elevator; Mrs. Benussi reaching it first and touching the button which would start and bring to a stop the elevator at that floor. It arrived and stopped, when Mrs. Benussi opened the door and entered the elevator. Her husband followed, and was in the act of entering the open door when the elevator started downward, and Mr. Benussi was caught and crushed to death between the top of the door and the third floor, being partly in and partly out of the descending elevator.

The plaintiff, in the complaint, alleges that the accident occurred through the carelessness and negligence of the defendant in failing to have said elevator properly maintained and inspected. The answer of the defendant consists in denials, based upon the alleged fact that the defendant was not the owner or in possession or control of said building at the time of said accident. The case came on for trial before a jury, which, upon its submission, rendered a verdict in favor of the plaintiff for the sum of $10,800, for which sum judgment was accordingly entered, from which judgment, after the denial of a motion for a new trial, this appeal has been taken.

The first contention on the part of the appellant is that the overwhelming weight of the evidence in the case shows that the defendant was not in the possession or control of the building in question or of the elevator therein at the time of the occurrence of the accident which caused the death of the deceased, but that a certain Miss A. S. Morrison, as receiver appointed by the superior court of the city and county of San Francisco in a certain foreclosure suit then pending, was the person solely in possession and control of said building and of said elevator at the time of the accident. Much evidence was introduced at the trial upon this issue, of which the following is, we think, a fair summary:

The defendant herein, prior to January, 1914, held a mortgage on the real estate on which the apartment house known as the "De La Sierra Apartments" had been erected, and in the said month of January, 1914, commenced an action in the superior court of the city and county of San Francisco for the foreclosure of said mortgage, and in said action and under a power given in said mortgage moved the said court that a receiver be appointed to take possession and control of the property pendente lite. The court granted said motion and appointed Miss A. S. Morrison as such receiver. Prior to her said appointment Miss Morrison had been an employee in the office of the defendant, and she continued to be such employee of the said defendant after her appointment as receiver of said property. As such receiver, however, she took possession of the same, and opened an account with the Crocker National Bank in the name of "A. S. Morrison, Receiver," in which were deposited the receipts of said receivership. The foreclosure sale of the premises occurred on December 10, 1914, and the defendant became the purchaser of the property at such sale for the full amount of his judgment obtained in said foreclosure suit. A short while prior to said sale said receiver filed with said court her report and account as such receiver up to December 1, 1914, asking for her discharge as such receiver, and also filed a supplemental account up to December 10, 1914, the date of said sale. No other or further account of said receiver was ever filed, although her said account was not settled and she was not discharged until some time after the accident in question occurred. A few days, however, after said sale the defendant herein went with Miss Morrison to the Crocker National Bank, where a new account was opened in the name of "De La Sierra Apartments, J. D. Hannah"; the defendant at that time and place signing the usual signature card stating that he was the sole owner of the De La Sierra Apartments. He also at said time signed and left with said bank another card authorizing Miss Morrison, as his agent, to draw checks upon said account. In this account were deposited thereafter all of the receipts of the De La Sierra Apartments from and after the date of December 10, 1914, and no portion of said receipts were thereafter deposited in the said former account of said receiver, nor were any of the costs and expenses of the operation of said apartments charged thereafter to said former account, but the same were charged to and paid out of the account

of "De La Sierra Apartments, J. D. Hannah." From that time forward the defendant assumed to exercise certain acts of apparent ownership and control over said apartment house. He discharged Mrs. Pels, who had been the resident manageress of the apartments during the time of Mrs. Morrison's receivership, and in so doing stated to her, according to her testimony, "You understand I have taken over the apartment house." He also and in the month of April, 1915, took out a policy of insurance indemnifying him against the claims of persons injured or killed in the operation of said elevator, in which policy he was described as the owner of the De La Sierra Apartments. On the day following the accident the defendant visited Mrs. Benussi, introducing himself as the "landlord" and offering the use of his automobile in making the funeral arrangements. Within a few days after the accident the defendant procured from the Elevator Repairs Company bids for the repair of said elevator, which bids he personally passed upon, and the cost of the repairs when made were charged to and paid out of the account of "De La Sierra Apartments, J. D. Hannah." It is true that the defendant, when he was called as a witness, denied that he had ever been, prior to said accident, in the possession and control of said premises; and it is also true that Miss Morrison also so testified, and that she resided at said apartments and managed the same during the period after her appointment as receiver and up to December 10, 1914, and that after that date she continued to reside there and attend to the details of the management thereof; but it is also true that during all of said time she was in the employ of the defendant and that she continued in his employ and continued to reside in said apartments and continued to attend to the details of the management thereof after she had been discharged as such receiver.

[1] From the foregoing facts we think the jury were entitled to draw the inference that the actual possession and actual control of said apartments had been taken over by the defendant on or about the date when he became the purchaser thereof at said foreclosure sale, and that he was actually thereafter and up to and including the date of said casualty in the full possession and control of said apartment house.

[2] The appellant urges against the force of this inference the fact that said receiver was legally entitled, during all of said time, to the possession and control of the premises; and this may be conceded without in any way diminishing the force or application of said inference to the liability of the defendant herein, since the question in this case is not who was legally entitled to the possession and control of the premises in question, but who was actually in possession and control of the same, so as to be held responsible for negligence in the maintenance, operation, and inspection of the elevator therein through the defective manipulation of which the fatality to the decedent occurred. Upon this subject the trial court properly gave the jury the following instruction:

"It is not necessary for the jury to determine who was the legal owner or had the right to the possession of the De La Sierra Apartments on or prior to the 25th day of May, 1915, but it is necessary for you to determine who was actually in possession and control of said building at and prior to said time."

We deem the foregoing instruction to embody a correct statement of the law applicable to the facts of this case.

The cases cited by the appellant do not controvert this doctrine, but at the most go only to the extent of holding that a receiver who is legally entitled to and is actually in possession and control of premises, as such receiver, would be the party to sue on account of injuries occurring during such receiver's legal and actual possession and control of the premises wherein such injuries occurred.

[3] The appellant, however, contends that the trial court committed certain errors in its rulings upon the admission or rejection of evidence during the course of the trial. The first of these alleged errors consisted in the admission in evidence of the insurance policy issued to the defendant upon the elevator in said apartment house. While it is doubtless true that such evidence is ordinarily inadmissible under the authorities and in the cases referred to by the appellant, this rule has no application to cases where the question in issue is that of the defendant's possession and control of the appliance which caused the casualty on which the action is predicated. In such cases the act of the defendant in insuring himself against liability and his statements made in the course of procuring such insurance constitute acts and statements against interest to the admission of which there can be no valid objection.

[4] The same principle has application to the acts of the defendant immediately after the accident in causing repairs to be made to the elevator, to evidence of which the defendant also objected; the purpose of the introduction of such evidence being that of showing the defendant's possession and control of the premises in which the appliance which caused the casualty was installed. The appellant complains that the effect of this evidence as to the insurance policy and as to the subsequent repairs upon the elevator was not limited to the sole issue of the defendant's possession of the premises at the time the accident occurred, upon his request made at the time of the introduction

of such evidence. While the trial court might properly have yielded to the defendant's suggestion as to the limitation of these species of evidence to the single issue of the defendant's possession of the premises at the time the accident occurred, we do not think that its failure so to do was sufficiently prejudicial to justify a reversal of this case. Practically the whole case turned upon the question of the defendant's possession of the premises at the time of the decedent's injuries. The defendant offered no suggestion as to any subject upon which said evidence would be inadmissible; and it is safe to say that the jury had only in mind the single question as to which this evidence might be properly applied, in the absence of any specific request for a final instruction by the trial court in its charge to the jury. We do not think that this constitutes reversible error in this case.

[5] The appellant also contends that the court committed certain errors in its charge to the jury. We have examined the entire body of the court's instructions, and having done so we do not deem it necessary to discuss in detail the numerous criticisms offered by the appellant to specific parts of the charge, since upon the whole we deem it a fair and full statement of the law of the case.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

52 Cal. App. 747

PEOPLE ex rel. WILLIAMSON et al. v. RINNER et al. (Civ. 2256.)

(District Court of Appeal, Third District, California. May 24, 1921.)

1. Statutes ⇐149—Repealing act valid, unless inhibited by express constitutional provision or against public policy.

In view of Const. art. 4, § 1, vesting the legislative powers of the state in the Legislature, an act of repeal must be rendered effective, unless inhibited by some express provision of the Constitution or manifestly against public policy; the Constitution being a restriction on the powers of the Legislature rather than a grant of power, and there being no implication of the absence of legislative authority or power.

2. Statutes ⇐90(3) — Act repealing special act creating school district not inhibited by constitutional prohibition of creation of "corporations for municipal purposes" by special laws.

Act May 2, 1919 (St. 1919, p. 239), repealing Sp. Act March 30, 1878 (St. 1877–78, p. 752), creating the Courthouse school district of Sonoma county, was not inhibited by Const. art. 11, § 6, prohibiting the creation by special laws of corporations for municipal purposes, and providing for the incorporation, organization, and classification, in proportion to population, of cities and towns, by general laws; the term "corporations for municipal purposes" being limited to cities and towns, and the school district being neither a city or town, nor a municipal corporation, in the general sense, though Const. art. 4, § 30, provides that "neither the Legislature nor any county, city, township, school district, or other municipal corporation shall make," etc.; a school district being classified with the county, which is not a municipal corporation within Const. art. 11, § 6, and the school district being a political division of the county under the supervision of the local authorities for the promotion of the general educational purposes of the state; the system being a matter of general concern and not a municipal affair.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corporation for Municipal Purposes.]

3. Statutes ⇐76(1)—Repeal of act creating school district held not in conflict with constitutional prohibition of special legislation, where general law can be made applicable.

Act May 2, 1919 (St. 1919, p. 239), repealing Sp. Act March 30, 1878 (St. 1877–78, p. 752), creating a school district, is not in conflict with Const. art. 4, § 25, subd. 33, prohibiting the passing of special laws in cases where a general law can be made applicable; such provision against special legislation containing no restrictions in terms against repeal, and not prohibiting the repeal, where the effect is merely to withdraw from the operation of the special law and make subject to the general law.

4. Schools and school districts ⇐22—Act repealing special act creating school district held not in conflict with constitutional requirement of a system of common schools.

Act May 2, 1919 (St. 1919, p. 239), repealing Sp. Act March 30, 1878 (St. 1877–78, p. 752), creating a school district, is not in conflict with Const. art. 9, § 5, requiring the creation of a system of common schools by which a free school shall be kept up and supported in each district at least six months a year; the effect being merely to withdraw from the operation of the special law and make subject to the general law, and not interfering with, but promoting, the constitutional scheme for a general educational system.

5. Schools and school districts ⇐22—Repeal of act creating district embracing city and adjacent territory held not to violate public policy.

The repeal by Act May 2, 1919 (St. 1919, p. 239) of Sp. Act March 30, 1878 (St. 1877–78, p. 752), creating a school district embracing the area of a subsequently incorporated city and some adjacent territory, was not in violation of public policy, in that it leaves the outlying territory without an organization as a district; Pol. Code, § 1576, immediately becoming operative, creating a district with boundaries coextensive with the city's limits and leaving the outlying territory subject to the authority of the board of supervisors as provided in subdivision 2 of section 4041; the

court assuming that proper action was taken and a new district formed of the outlying territory, any delay and inconvenience caused by the necessity for readjustment being considerations for the cognizance of the Legislature alone.

6. Schools and school districts ⊜22—Validity of repeal of special act creating district held not affected by curative acts.

The validity of Act May 2, 1919 (St. 1919, p. 239), repealing Sp. Act March 30, 1878 (St. 1877–78, p. 752), creating a district, is not affected by Pol. Code, § 1724, or Act March 18, 1905 (St. 1905, p. 243), curing irregularities in formation of such districts theretofore organized, but not creating any district or affecting the repeal of any special statutes.

7. Appeal and error ⊜907(2)—In view of presumption failure to find on special defenses not available, where evidence not in record.

In an action to oust the trustees of a school district claimed to have been abolished by the repeal of the special act creating it, where the court's findings were sufficient to support the judgment for plaintiffs, its failure to find on certain special defenses set up in defendant's answer is of no avail, where the evidence was not brought up; the presumption being that such evidence was opposed to said allegations.

8. Constitutional law ⊜48—Statutes declared unconstitutional only where plainly and palpably so.

A court must move with great caution in declaring an act of the Legislature unconstitutional, resolve all doubts in favor of its validity, and hold it unconstitutional only where it is plainly and palpably violative of the Constitution.

Appeal from Superior Court, Sonoma County; George H. Thompson, Judge.

Quo warranto by the People of the State of California, on the relation of J. C. Williamson and others, against John Rinner and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

G. W. Hoyle, of Santa Rosa, for appellants.

Carl Barnard, of Santa Rosa, U. S. Webb, Atty. Gen., and Russell P. Tyler, of San Francisco, for respondents.

BURNETT, J. The appeal is from a judgment in favor of the plaintiffs. The action was in quo warranto to have it adjudged that defendants were usurping and improperly exrcising the office of trustees of Courthouse school district in the county of Sonoma. This district was created by a special act of the Legislature in 1878 (St. 1877–78, p. 752), and embraced what now constitutes the city of Santa Rosa and some adjacent territory outside the corporate limits thereof. In 1919 (St. 1919, p. 239), the Legislature repealed the said act of 1878 creating said district. At the time of said repeal and for some time prior thereto the defendants were the duly acting and qualified trustees of the said Courthouse school district, and they claim that their right to said office has not been affected, for the reason that said attempted repeal of said act of 1878 was and is invalid. As to this vital consideration the court's finding is:

"That it is true that the act of the Legislature of 1919 of the state of California, approved May 5, 1919, which repealed the said act of the Legislature of the state of California of 1878, approved March 30, 1878, is now and at the time of the filing of the complaint in this action was in full force and effect, and it is true that the said Courthouse school district, county of Sonoma, ceased to exist after the taking effect of the said act of the Legislature of 1919, repealing the said act of the Legislature of 1878."

[1] In the determination of the validity of said repeal act the plenary power of the Legislature, where not circumscribed by the Constitution, must, of course, be regarded. The principle is not disputed that there is no implication of the absence or nonexistence of legislative authority or power, and that whoever would claim that the power in any instance does not exist must point out the provision of the Constitution which has taken it away or forbidden its exercise. In re Madera Irrigation District, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350.

This follows, from the provision of the Constitution itself (article 4, § 1) that "the legislative power of this state shall be vested in a Senate and Assembly which shall be designated 'the Legislature of the state of California,'" and from the application of the admitted principle that "the Constitution is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature." Of course, we are not concerned herein with the reservation by the people of the authority embraced in the initiative and referendum, but, concededly, said act of repeal must be rendered effective unless inhibited by some express provision of the Constitution, or unless manifestly against sound public policy.

[2] The only provision which is invoked as so operative is section 6, art. 11, providing:

"Corporations for municipal purposes shall not be created by special laws; but the Legislature shall, by general laws, provide for the incorporation, organization, and classification in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. * * * Cities and towns heretofore organized or incorporated may become organized under the general laws passed for that purpose, whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith. Cities and

towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

No extended consideration of this provision is required since the language is simple and perspicuous and its interpretation has been the subject of discussion in many decisions of the appellate courts of the state. It may be remarked, however, that it would seem to be an unnatural and strained construction to hold that it has any application whatever to a school district.

If it might be said that a school district is a "corporation for municipal purposes," and therefore subject to the first clause of said provision, it is doubtful whether it would be of any avail to appellants. The primary and direct object of the act of repeal was, not to create a district, but to dissolve and terminate it. The district having been created by the act of 1878, when special laws were not prohibited by the Constitution, the act in controversy releases said district from the operation and effect of a special law and makes it subject to the general law. It must be admitted, though, that, in consequence of subjecting said territory to the operation of the general law, said repeal results indirectly in the creation of the two districts where one existed before and there is force in the contention of appellants that said repeal does, in effect, create a new district

However, this point is not necessary to the decision, as it is apparent that in said provision the people have clearly limited the term "corporations for municipal purposes" to those relating to and included in "cities and towns," and it would not be claimed, of course, that Courthouse school district is a city or town, although it does include the city of Santa Rosa. The school district is admittedly a totally distinct entity from the municipal corporation of Santa Rosa. Manifestly, the residue of said provision can afford appellant no comfort, since it is clearly confined to "cities and towns heretofore organized," etc., and "cities and towns heretofore and hereafter organized."

The authorities cited by appellants have reference to an entirely different situation, as will readily be appreciated. In Desmond v. Dunn, 55 Cal. 242, the question was whether the so-called McClure Charter for the city and county of San Francisco was constitutional and operative. Donahue v. Graham, 61 Cal. 276, involved the validity of the act of April 1, 1872, relating to street improvements in San Francisco. Ex parte Helm, 143 Cal. 553, 77 Pac. 453, had to do with a license tax imposed by the town of Santa Clara. These cases and some others that are cited in the brief of appellants involved directly the construction of said constitutional provision, but, for the reason before stated, they are hardly in point here. As stated by the learned trial judge in his opinion filed in the case:

"Obviously, the Courthouse school district was not a 'city' or a 'town'; consequently it did not come within the specific provisions of said section for reorganization of towns and cities under the general law."

Moreover, if we disregard the apparently strict limitation of said provision to "cities and towns," and by judicial construction stretch the language so as to include all municipal corporations, or corporations for municipal purposes, we shall fall short of meeting appellants' necessities. This follows for the reason that a school district is not, strictly speaking, a municipal corporation. It is true that for certain purposes in some decisions a school district has been considered as constituting a municipal corporation, as in Horton v. Mobile School Commissioners, 43 Ala. 598, and Curry v. District Township of Sioux City, 62 Iowa, 102, 17 N. W. 191. It is claimed also by appellants that a school district is so recognized in section 30, art. 4, of our Constitution, providing that "neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation shall ever make," etc. This contention hinges manifestly upon the use of the word "other." As to this, though, it may be stated that a school district is classified with a county, and it has been expressly held in this state that a county is not a municipal corporation within the meaning of section 6 of article 11 of the Constitution. People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; Kahn v. Sutro, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620; County of San Mateo v. Coburn, 130 Cal. 632, 63 Pac. 78, 621.

The weight of authority is, indeed, to the effect that a school district is not a municipal corporation. In section 22 of Dillon on Municipal Corporations it is said:

"Corporations intended to assist in the conduct of local civil government are sometimes styled political, sometimes public, sometimes civil, sometimes municipal, and certain kinds of them with very restricted powers quasi corporation—all these by way of distinction from private corporations. All corporations intended as agencies in the administration of civil government are public, as distinguished from private corporations. Thus an incorporated school district, or county, as well as city, is a public corporation; but the school district or county,

properly speaking, is not, while the city is, a municipal corporation."

The school district is a necessary political division of the county under the direction and supervision of the local authorities for the promotion of the general educational purposes of the state; the system being a matter of general concern and "not a municipal affair." Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 44; Malaley v. City of Marysville, 37 Cal. App. 638, 174 Pac. 367. However, as before stated, this question is not of decisive moment herein.

[3, 4] We can see no merit in the claim of appellants that said repeal is in conflict with subdivision 33, § 25, art. 4, or section 5, art. 9, of the Constitution. The first of these provides:

"The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Thirty-third—In all other cases where a general law can be made applicable."

The latter is:

"The Legislature shall provide for a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

The contention of appellants based upon these constitutional provisions is completely answered by the suggestion of the trial judge "that we are dealing with a repeal, not with any creative act, or with any amended act; and that the said provisions of the Constitution contain no restriction in terms against repeal." In his opinion attention is called to State v. Prather, 84 Kan. 169, 112 Pac. 829, 36 L. R. A. (N. S.) 1084, wherein it is said:

"The adoption of a constitutional provision against special legislation does not prevent the repeal by special act of a special law previously enacted, or its partial repeal, where the effect is merely to withdraw a county from the operation of the special law and make it subject to the general law."

People ex rel. Rogerson v. Crawley, 274 Ill. 139, 113 N. E. 119, involved the validity of the repeal of the charter of the city of Jacksonville, and the court held that it was not violative of the Constitution, art. 4, § 22, providing that—

"The General Assembly shall not pass local or special laws for incorporating cities, towns, or villages, or changing or amending the charters of any city, town, or village, and providing for the management of common schools, since it is the substance and not the form that determines the constitutionality of an enactment, and the special purpose of the provision was to discourage dissimilarity and to promote and encourage legislation uniform on all subjects referred to, and the act tends to promote uniformity in the organization of incorporated cities and in the management of their schools."

In that case the court issued a writ of mandate requiring the defendants to organize under the general law the school district that had been released from the provisions of the special statute.

A Michigan case in line with the foregoing is Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639, 92 N. W. 289. Therein the Legislature consolidated into one school district lands which had been previously divided among several, the said new district not including all the lands comprised in the several districts from which it was organized; and the act further provided (among other things) that the school inspectors of the township should attach to other school districts the portions of the several districts not included in the new. It was held by the Supreme Court that the act did not violate the constitutional provision requiring the Legislature "to provide for and establish a system of primary schools, whereby a school shall be kept without charge for tuition at least three months in each year in every school district in the state."

In discussing the validity of certain legislative acts repealing the charter of the city of Memphis, the Supreme Court of Tennessee, in Luehrman v. Taxing Dist., 2 Lea (Tenn.) 425, said:

"The prohibition of the Constitution is against the creation or the increase or diminution of the powers of a corporation by special law, and the direction is to provide by general laws 'for the organization of all corporations hereafter created.'"

But it was declared that this did not prohibit the Legislature—

"from repealing, at any time, the corporate privileges of a particular community, whether organized previous or subsequent to the adoption of the Constitution. This is a power so essential to sovereignty and the preservation by the state of its control over its instrumentalities of local rule that it cannot well be considered as cut off except by a positive provision to that effect. The restriction is against the powers * * * being 'diminished' by special laws, not against their entire abolishment."

To the same effect are other cases cited by respondents, among them being State ex rel. Worthley v. Steen, 43 N. J. Law, 542; Central, etc., Co. v. City, 23 Tex. Civ. App. 390, 57 S. W. 982; City v. State (Tex. Civ. App.) 77 S. W. 24; Mayor, etc., of South Morgantown v. City, 49 W. Va. 729, 40 S. E. 15.

It is indeed quite apparent that the repeal of a special act creating a school district and thus making it subject to the general law on that subject not only does not interfere with but it tends to promote the constitutional scheme for a general educational system. It is likewise apparent that it would be impracticable, if not impossible, by means of a general law to accomplish the purpose that the Legislature had in view in enacting said

repeal. If it had been desired to repeal all special laws creating school districts, a general law might have been "applicable," but the repeal of one act creating one district necessarily excludes the consideration of a general law.

The cases cited by appellants, as we understand them, are not opposed to the foregoing views. People v. Common Council, 85 Cal. 369, 24 Pac. 727, involved the construction of an act relating to the city of San Diego. Moreover, it was not a repeal but an amendment to a statute, and it operated to take away from said city the territory embraced in Coronado Beach. By said amendment the Legislature plainly violated the letter and spirit of said constitutional provision.

In Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558, the question was whether the city treasurer of the city of San Diego was entitled to the custody of certain moneys that had been apportioned by the county superintendent of schools to the school district of said city. In holding that the county treasurer was entitled to the custody of said funds the Supreme Court held that "the city is a corporation distinct from that of the school district, even though both are designated by the same name, and embrace the same territory," and that the general school law passed by the Legislature for the establishment and maintenance of one system of public schools governed the situation instead of the provisions in the freeholders' charter adopted by said city. The decision is strictly in accordance with the contention of respondents herein.

In Platt v. City and County, 158 Cal. 74, 110 Pac. 304, the question was as to the validity of the issuance of bonds by the city and county of San Francisco for the construction and completion of certain proposed municipally owned street railways. The opinion embraces a learned and comprehensive discussion of certain provisions of the Constitution relating to the powers and forms of government of the municipalities of the state, but it has no particular bearing upon the controversy herein.

The vital point decided in Las Animas, etc., Land Co. v. Preciado, 167 Cal. 580, 140 Pac. 239, was that, when a county was divided so that part of an existing school district fell in the new county, the board of supervisors of the new county was without authority to order the annexation of that portion of the district to one of its own districts; the Supreme Court holding that the situation was covered and controlled by a general law passed by the Legislature.

[5] Equally without merit is, in our opinion, the claim that said repealing act is in violation of the public policy of the state, in that it leaves the outlying territory without any legal status as a school district. It is no doubt true, as stated in Smith v. S. F. & N. P. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119, that—

"'Public policy' is a term of vague and uncertain meaning, which it pertains to the lawmaking power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law."

Herein, there has been no such violation. It is true that by the repeal of said act the outlying territory was left without an organization as a school district and it became, according to appellants' designation, "no man's land." The general law, however, immediately became operative, creating Santa Rosa school district with boundaries coextensive with the city limits (section 1576, Pol. Code) and leaving the outlying territory subject to the authority of the board of supervisors as provided in subdivision 2 of section 4041 of the Political Code. We must assume that proper action has been taken and a new district formed of the outlying territory, affording necessary school facilities for the children residing therein. It may be that some delay and inconvenience have been caused by the necessity for a readjustment, but such considerations are matters for the cognizance of the Legislature alone. It was for that tribunal to determine whether it was in the interest of the public welfare to make this territory subject to the general law. The reasons which prompted the desire to make the territory of the city of Santa Rosa to constitute the boundaries of one district to the exclusion of the outside land were no doubt considered adequate, but, at any rate, we cannot say that the Legislature violated any law or exceeded its authority in effecting the repeal.

Some questions as to the division of property and payment of bonded indebtedness are suggested by appellants. But we do not think they are involved in this litigation, and, if any controversy concerning them should arise, they will probably be solved without the difficulty now apprehended by appellants.

[6] The problem, in our judgment, is not complicated by section 1724 of the Political Code or by the act of the Legislature entitled "An act confirming the organization of school districts," approved March 18, 1905 (Stats. of 1905, p. 243). These are curative acts; the former applying to high schools and the latter to common schools. They cure only irregularities in the formation of the districts which were organized prior to said enactments, and in no manner do they create any school district or affect the repeal of any special statutes. The scope and significance of such legislation are determined in Board of Education v. Hyatt, 152 Cal. 519, 93 Pac. 117;

Wood v. County of Calaveras, 164 Cal. 405, 129 Pac. 283; People v. Van Nuys, 173 Cal. 797, 162 Pac. 97, Ann. Cas. 1918D, 255.

[7] Appellants complain that the court failed to find upon certain special defenses set up in the answer. But since the findings are sufficient to support the judgment, the contention can be of no avail, as the evidence is not brought up. The presumption would be that the evidence was all opposed to said allegations, and the corresponding findings upon said defenses would necessarily have been against appellants. In this view they have suffered no prejudice. However, the truth is that said special defenses contain only immaterial facts, conclusions of law, and facts covered by the actual findings of the court. It seems unnecessary to exhibit them fully, but we content ourselves with a recital of paragraph 8 of the answer, as follows:

"As a further and separate defense to plaintiff's complaint and petition defendants and each and all of them aver and allege that if the repealing act of 1919 referred to in plaintiff's complaint and petition is to be construed as contended for by plaintiffs, then the said repealing act is unconstitutional in this, that section 6 of article 11 of the Constitution of the state of California prohibits the creation by special act of a municipal corporation, which Courthouse school district is in the sense that it operates governmentally and exercises certain state sovereignty which has been delegated to it by the state itself, and if it is unconstitutional to create a municipal corporation by a special act it is likewise unconstitutional to abolish a municipal corporation by a special act."

It is apparent that the foregoing presents an important question of law and an interesting legal argument, but it tenders no issuable fact.

[8] In view of the well-settled principle announced by the authorities, that "a court must move with great caution in declaring an act of the Legislature unconstitutional, resolve all doubt in favor of its validity, and hold it unconstitutional only in cases where the act is plainly and palpably violative of the Constitution," we do not feel warranted in disturbing the conclusion of the trial court.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

52 Cal. App. 352

McAULIFFE v. McAULIFFE. (Civ. 3867.)

(District Court of Appeal, First District, Division 1, California. June 29, 1921.)

1. Husband and wife ⟸298½—Finding as to property unnecessary, after finding against right to separate maintenance.

After the court found that plaintiff's allegations as to defendant's cruelty were untrue, so that she was not entitled to separate support and maintenance, the issue as to the community property of the parties became immaterial, and no finding was required thereon.

2. Husband and wife ⟸298½—Finding allegations of cruelty were not true is sufficient in form.

In an action for separate maintenance, a finding by the trial court that the allegations of the complaint with reference to the alleged acts of cruelty by defendant were not true, and have not been sustained by sufficient evidence, leaves no doubt that the trial court found defendant not guilty of cruelty, and is sufficient in form.

3. Trial ⟸395(1), 404(1) — Negative pregnant in finding not fatal, as findings must be construed to uphold judgment.

The findings of the trial court are not, like the pleadings of the parties, to be deemed insufficient because they contain a negative pregnant, since the findings are to be construed so as to uphold the judgment, if they are reasonably susceptible of such construction.

4. Husband and wife ⟸300—Award of children not disturbed on appeal, when not shown to be abuse of discretion.

In an action for separate maintenance, where the husband filed cross-complaint for divorce, a decree, denying the relief asked by both parties because their respective allegations of cruelty by the other were not sustained, but awarding to the plaintiff custody of the youngest child only, and to the defendant the custody of the other two children, is not shown to be an abuse of discretion, where the trial court, in course of the introduction of considerable testimony on the issue of custody, had opportunity to observe the character and qualities of the respective parties bearing upon their fitness to have such custody.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Margaret McAuliffe against George J. McAuliffe, for permanent support and maintenance, in which defendant presented a cross-complaint for divorce. From a judgment denying the prayers of both complaint and cross-complaint and awarding the custody of the youngest child to plaintiff and of the two older children to defendant, plaintiff appeals. Affirmed.

Joseph B. Gordon, of San Mateo, and Stanislaus A. Riley, of San Francisco, for appellant.

Joseph J. Bullock, of Redwood City, and Joseph L. Taaffe, of San Francisco, for respondent.

RICHARDS, J. The plaintiff commenced this action against the defendant, her husband, for permanent support and maintenance, alleging extreme cruelty on his part as the basis of the action, and praying for alimony, the custody of the children, and for an

award to herself of the community property as described in her complaint. The defendant answered said complaint, denying its averments as to his cruelty, and also making certain admissions and denials as to the community property. Later the defendant presented a cross-complaint for divorce, averring cruelty on the part of the plaintiff, and also setting forth certain grounds for an award of the custody of the children of the marriage to himself. To this cross-complaint the plaintiff filed her answer, and upon the issues as thus made up the cause proceeded to trial.

The trial court found against the plaintiff upon her averments as to the defendant's cruelty, and also found against the defendant upon his averments of the plaintiff's cruelty as set forth in his cross-complaint; and it accordingly denied both the plaintiff's prayer for separate maintenance for herself and the defendant's prayer for a divorce.

The trial court made no finding or award upon the subject of the community property of the parties, but as to the three children of the marriage it awarded the care and custody of the youngest child, a daughter, aged three years, to the plaintiff, and awarded the care and custody of the other two children, a daughter aged seven and a son aged five years, to the defendant. The court also directed the defendant to pay the plaintiff the sum of $25 a month for the support of the child awarded to her. From the interlocutory decree entered in accord with these findings the plaintiff prosecutes this appeal.

The appellant's first contention is that said judgment must be reversed upon appeal for the reason that the trial court failed to make any finding upon the issue as to the community property.

[1] This contention has no merit for the reason that when the trial court found that the plaintiff's allegations as to the defendant's cruelty were untrue, and that she was not entitled to separate support and maintenance, such finding rendered the issue as to the community property of the parties an immaterial issue in the case, and hence one upon which no finding was required. The case of O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225, cited by the appellant as supporting her contention, has no application, since in that case the court points out that the question of alimony remained a material issue in the case, upon which of course the trial court was bound to make a finding. On the other hand, the cases of Baker v. Baker, 168 Cal. 346, 143 Pac. 607, Ann. Cas. 1916A, 854, and Zihn v. Zihn, 153 Cal. 405, 95 Pac. 868, are authority for the proposition that the trial court is not required to make findings upon matters which have become immaterial issues in the case.

[2] The appellant's next contention is that the findings of the trial court are insufficient in form to support its judgment. The particular finding attacked is in the following words:

"The court finds that all the allegations of plaintiff's complaint having reference to the alleged acts of cruelty alleged therein to have been inflicted upon plaintiff by defendant, as a cause for the separation of plaintiff from defendant, were not true, and have not been sustained by sufficient evidence."

The appellant's criticism of the foregoing finding is based upon the cases of Krug v. F. A. Lux Brewing Co., 129 Cal. 322, 61 Pac. 1125; Harlan v. Ely, 55 Cal. 340, Bank of Woodland v. Treadwell, 55 Cal. 379, and Ladd v. Tully, 51 Cal. 277, but a cursory examination of each one of these cases will disclose a most material difference between the finding criticized in each of them and the finding assailed in the case at bar, since in each of these cases the defect in the finding was that it left in doubt what facts the court found to be true or untrue; while in the finding assailed in the instant case there is no such doubt or confusion, since the trial court has expressly found that all of the plaintiff's allegations upon the subject of the defendant's cruelty are untrue. This finding we think sufficient under the authority of Continental B. & L. Ass'n v. Wilson, 144 Cal. 776, 78 Pac. 254; Williams v. Hall, 79 Cal. 606, 21 Pac. 965.

[3] The further criticism of said finding by the appellant upon the ground that it presents a negative pregnant is also without merit, since the logical defect of a negative pregnant as applied to legal matters has reference to pleading, not to findings, which are to be construed so as to uphold the judgment if they are reasonably susceptible of such a construction. Baker v. Eilers Music Co., 26 Cal. App. 371, 146 Pac. 1056.

The appellant's next contention seems to be that the trial court in finding against the plaintiff upon the issue of the defendant's cruelty as the foundation of her action for separate maintenance, did so upon the mistaken idea that her testimony in that regard required corroboration as in an action for divorce. This, however, is a man of straw, since the findings nowhere disclose that the court was possessed of this notion. On the contrary, the court's finding is susceptible of the construction that the plaintiff failed to make out a case of cruelty as against the defendant's proofs in that regard.

[4] The appellant's final contention is that the distribution of the children of the marriage between the parties is indefensible, in view of the court's findings and of the evidence in the case. We cannot agree with this contention, for while it is true that the court did find that the defendant's averments as to the plaintiff's neglect of the children were

not sustained by the evidence, it is also true that there was considerable testimony presented pro and con upon these issues, in the course of which the trial court had abundant opportunity to observe the character and qualities of the respective parties bearing directly upon the fitness of each to have the custody of their offspring. These facts, when taken in connection with the very wide discretion with which trial courts are invested in dealing with the custody of the minor children of discordant parents, lead us to the conclusion that the trial court has not been shown to have committed any error or abuse of discretion in its award of the children in the instant case. Jones v. Jones, 192 Pac. 867.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

52 Cal. App. 662

MILLER v. LERDO LAND CO. (Civ. 3474.)

(District Court of Appeal, Second District, Division 1, California. May 19, 1921. Rehearing Denied June 17, 1921. Hearing Denied by Supreme Court July 18, 1921.)

1. Brokers ⟸11—Agreement held to contemplate that water be furnished land before sale.

In an action by a broker to recover damages for breach of sale contract, *held*, that contract contemplated that landowner should bore wells and construct ditches for purposes of irrigation as rapidly as reasonably possible and before the land was sold.

2. Brokers ⟸71—Broker held entitled under contract to interest on deferred payments.

Under a brokerage contract under which broker was to receive a certain per cent. of installments in certain cases, *held*, that the broker was to share in interest received on deferred payments.

3. Appeal and error ⟸1011(1)—Findings based on conflicting evidence sustained.

Findings of trial court will be sustained on appeal if there is in the record evidence substantially tending to support the same, even though there may be strong conflicting evidence.

4. Brokers ⟸11—Landowner held required to furnish water for land sold.

In an action by broker for breach of contract concerning sale of irrigated lands, contract *held* to require landowner to construct ditches capable of carrying to the several tracts of land the amount of water necessary for irrigation, and distribution of the water was to continue until transferred to a mutual water company.

12. Brokers 11—Evidence held to sustain finding that landowner failed to furnish water as agreed.

In an action by a broker for breach of contract concerning sale of lands in parcels to be irrigated, evidence *held* to support a finding that landowner failed to furnish water in accordance with the contract.

6. Brokers ⟸64(1)—Agent not to be deprived of compensation because deferred payments are not made by purchaser procured or other terms not carried out.

Unless there is a provision in the contract to the contrary, a real estate agent employed to negotiate a sale of land earns his commission, and it is payable when he produces within the time allowed a purchaser who is ready, willing, and able to take the property on the terms prescribed or with whom the owner enters into a contract on these or other terms satisfactory to him, and the agent cannot be deprived of the agreed compensation because deferred payments are not made by the purchaser or because other terms of the contract are not carried out.

7. Brokers ⟸40—Contract may make payment of commission dependent on any lawful condition.

The parties to an agency contract may make the payment of commission dependent on any lawful condition as on completed sale or out of installments as paid.

8. Brokers ⟸11—Where principal does not comply with contract with broker and purchaser fails to complete payments broker held entitled to commissions on deferred payments.

When landowner does not comply with the terms of his contract with broker, and as a result thereof the purchaser fails to complete his payments, broker is nevertheless entitled to commissions which were to be paid out of the deferred purchase money of the land so bought.

9. Brokers ⟸11—Items of damage held not supported by evidence.

In an action by a broker employed to sell irrigated lands in parcels to recover damages consisting of percentage of deferred payments by purchasers who had forfeited their contracts by reason of defendant's failure to comply with its brokerage contract in respect to furnishing of water, *held*, that many items of awards of damages were not sustained by the evidence.

10. Brokers ⟸11—Finding of damages held not sustained by evidence.

In an action by a broker to recover damages resulting from defendant's failure to develop and distribute water necessary for the irrigation of the land in question, evidence concerning four sales of land which fell through by reason of defendant's breach *held* insufficient to show that defendant's breach was the sole cause of the sales not being consummated.

11. Brokers ⟸11—Evidence held to sustain finding that plaintiff furnished buyers ready, able, and willing.

In an action by a broker for damages for breach of contract, evidence *held* to sustain a finding that plaintiff furnished certain persons who were ready, able, and willing to buy parcels of the land in question on terms in conformity with agreement between plaintiff and defendant.

12. Brokers ⇐11—Evidence held to sustain finding that all land would have been sold.

In an action by a broker employed to sell a tract of land in parcels to recover damages for breach of contract to furnish and distribute irrigated water, evidence *held* sufficient to sustain a finding that plaintiff would have sold all of the land except for defendant's breach.

13. Brokers ⇐11—Broker held entitled to recover for loss of prospective profits.

A broker who agreed to conduct a campaign for and the business of selling defendant's tract of land in parcels to the end that the same should be sold in the shortest possible time and agreed not to engage in the sale of other land subdivisions during the life of the agreement on breach of defendant's agreement to furnish water for irrigation was entitled to recover prospective profits.

14. Evidence ⇐142(1)—Sales of other lands held inadmissible to show plaintiff would have sold lands in question.

In an action by a broker to recover damages for breach of a contract respecting sale of tract of irrigated lands in parcels, evidence of sales made of land in other places in the valley at the period of time in question should have been rejected where offered to show that plaintiff would have sold the whole of the tract in question if defendant had not breached its contract as to furnishing and distributing water; the conditions being different.

15. Evidence ⇐486—Opinion evidence held improper as to value of exclusive agency in property.

Opinion evidence as to value of the exclusive agency contract and the profits which might have been made, or on the amount of business it might have done under the agency if it had not been wrongfully terminated, is not admissible, since such opinion would be purely speculative and conjectural.

Appeal from Superior Court, Los Angeles County; G. W. Nicol, Judge.

Action by C. E. Miller against the Lerdo Land Company. Judgment for plaintiff, and defendant appeals. Reversed in the District Court of Appeals, and hearing denied in Supreme Court.

Thomas C. Job and Merserve & Meserve, all of Los Angeles (Earl T. Miller, of Los Angeles, of counsel), for appellant.

Valentine & Newby and Nathan Newby, all of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover damages for the breach of a contract in writing dated October 2, 1912, wherein appellant, as party of the first part, gave and granted to respondent, as party of the second part, the exclusive right, subject to the conditions and limitations therein stated, to sell and dispose of, as agent for the first party, the lands known as the "Lerdo tract," situated in the county of Kern, state of California, and said to contain 6,481.03 acres of land. Judgment having been entered in favor of the plaintiff, the defendant appeals therefrom.

The lands of the Lerdo tract were so situated and of such character that without irrigation they were valueless for agricultural purposes. The parties to the contract believed, and they framed their contract upon that theory, that a supply of water could be developed on the land sufficient to furnish and supply 50 miner's inches for each 160 acres thereof, and that this would be sufficient for the purposes intended. Generally speaking, respondent agreed to sell the land for appellant, and appellant agreed to make the subdivision and provide the water supply. The controversy between the parties herein, as to the actual facts rests chiefly upon respondent's claim that appellant agreed both to develop and to distribute a stipulated amount of water to each 20-acre tract, and that appellant failed to comply with this agreement and also repudiated the contract, and caused it to be understood in the vicinity where the land was located that no further development would be made, and that the selling campaign of respondent under his contract had been terminated, and that no further sales would be made, and thereby made is impossible for respondent to complete the sale of the land described in his contract; that otherwise respondent could and would have sold all of the land within the stipulated time.

There are two counts in the complaint. The first count contains demands for special damages and a demand for general damages. By the second count respondent sought to recover the proportion which he claims became due to him out of moneys received by appellant on deferred payments made to appellant by purchasers and for which appellant has not accounted to respondent. The judgment entered in favor of respondent awarded general damages in the sum of $107,928.93, and special damages in the aggregate sum of $53,479.10, under the first cause of action, and $1,890.87 under the second cause of action, making a total of $163,298.90, besides costs.

Appellant contends that the court erred in overruling its demurrer to the complaint. The grounds of demurrer were that the complaint did not, nor did either count thereof, state a cause of action against the defendant; that in the first count several causes of action were joined, but not separately stated; that upon the second count several causes of action were joined, but not separately stated; that each count was uncertain in stated particulars; and that each count, for like reasons, was ambiguous and was unintelligible.

[1] In the argument upon the general demurrer to the first cause of action counsel for appellant depended principally upon cer-

tain interpretations which they say should be given to the contract. These points are: (a) That under the terms of the contract appellant's obligations to respondent were to bore wells with reasonable diligence, at reasonable cost, and, when a well was bored, that well was to be tested, accepted in writing by respondent, and the lands to be irrigated therefrom declared, and that then, and not until then, was appellant under any obligation to respondent to sign any contracts of sale; (b) that the contract did not obligate appellant to construct any ditches or to deliver any water from the wells to any tract of land, or to do anything in the way of development of water other than "as needed in order to supply the lands sold with water for irrigation"; (c) that, under the proposed contracts to purchasers, respondent was to be under no obligation for delivery of water to the purchaser until the time when a conveyance was to be made; (d) that the contract did not comtemplate that appellant should be called upon to execute contracts of sale to purchasers until the water for those lands had been provided in the manner stated in the contract. With these suggested views of the meaning of the contract we do not agree. Throughout the contract it appears that the land could not and it was not expected that it would be sold without actually supplying water to each tract. Manifestly this was to be done by appellant. Necessarily this included ditches or other conduits adequate to bring the required amount of water to each purchaser's land. It was provided in the contract that this work was to be done "as rapidly as reasonably possible and as needed in order to supply the land sold with water for irrigation." The supply was to be "sufficient to furnish and supply 50 miner's inches for each 160 acres of said lands." This furnished a basis for computation of the quantity of water to which each tract sold would be entitled. Time, amounting to several years, was to be allowed to the purchasers to complete their payments. Nevertheless it was provided that the purchaser must agree that during the first and each succeeding year of his contract until at least one-half of the purchase price was paid he would cultivate and irrigate not less than one-half of the land agreed to be purchased by him. Clearly he could not comply with such proposed agreement unless the water was brought to his land promptly after the making of such contract. It was further provided in the contract between respondent and appellant that purchasers of land should be "entitled to the use of water thereon from the time of purchasing or agreeing to purchase the same," and should pay assessments for the use of the water. It was further agreed that respondent would "immediately enter upon a campaign for and the business of selling the land and property hereinabove described, to the end that the same shall be sold and disposed of in the shortest possible time and at the best obtainable price under and in accordance with this agreement."

Replying to the contention that in the first cause of action several causes of action were joined, but not separately stated, respondent says that the so-called separate causes of action, other than that calling for damages for breach of the entire contract, were in the nature of special damages for particular consequences, substantially growing out of the same breach of contract. This we believe to be a correct construction of the pleading.

[2] Concerning the questions raised by demurrer to the second count of the complaint, the only one which seems to require special attention relates to respondent's demand for a share of the money received by the Lerdo Land Company as interest on deferred payments made by purchasers of some of these tracts of land. It was provided in the contract:

> That (except as to the town site) the sales prices in the subdivision should be at least $150 per acre; that "the second party is to receive $50 of said purchase price of $150 per acre, in full compensation for all of his commission, labor, services, and expenditures made under or in connection with this agreement, and $100 per acre is to belong to and be retained by the first party. If any of said land is sold for a price in excess of $150 per acre, then as to such excess the same is to be equally divided between the parties of the first and second parts. Where the initial payment does not exceed 25 per cent. of the purchase price, all of such amount received shall be retained by the second party, and as to all amounts received for initial payments in excess of 25 per cent., or payments thereafter received, such amounts shall be divided between the first and second parties pro rata, in proportion to their interests as herein agreed, until said second party is fully paid. The party of the second part is to receive such payments of commissions at the date of the execution and delivery of such contract of purchase, and at the date of the making of the initial payment, and the several succeeding payments as provided to be made in said contract of purchase, until such time as the party of the second part has received all amounts due under this agreement."

According to the terms of the contract, it seems to have been intended that respondent should have a direct interest in those sums collected by appellant as part of the purchase price of the land sold and that such direct interest should be measured in the proportion stated in the contract. We think that the language used is sufficient to imply that respondent should share in the interest received on such deferred payments as well as in the principal thereof.

[3] Very soon after the contract of October 2, 1912, was made, the Lerdo tract was sub-

divided and maps of the subdivision were recorded. In addition to the principal subdivision, the contract included two smaller areas which were designated subdivision B and subdivision C. The transactions which touch the merits of the action were those having relation to subdivision A. Certain wells were on the land at the time when the contract was made. The work of putting these wells into good condition was commenced by appellant, who also entered upon the work of drilling other wells. Appellant employed engineers under whose supervision ditch lines were laid out and ditches were prepared to carry water from some of these wells both to tracts which were sold by respondent and to other tracts the sale of which was intended. In pursuance of the terms of his agreement, respondent promptly entered upon its performance, inaugurated a vigorous selling campaign, and to that end employed a number of subagents, printed and circulated literature concerning the land, and advertised it extensively, and devoted his own time exclusively to the sale of the Lerdo tract in good faith and as required by the terms of the contract. In connection with these activities, respondent expended large sums of money which were necessary and proper in the fulfillment of his obligation to appellant. The court found that respondent duly performed the obligations imposed upon him by the contract until prevented from the performance thereof by appellant, and that from and including December, 1912, to and including April, 1913, plaintiff sold to bona fide purchasers 1,198.91 acres of the said Lerdo lands. Many of the purchasers entered into possession of the land covered by their contracts and attempted to raise crops thereon. In the spring of the year 1913, and especially during the month of May, the crops planted on some of these lands were seriously injured for want of irrigation. This caused dissatisfaction among the purchasers and interfered with the success of the enterprise in the matter of selling more land. The court further found that appellant neglected and refused to develop and distribute water to the land in the Lerdo tract as it had covenanted and agreed to do. The findings contain a statement outlining the particulars in which it was determined by the court that there was a failure to supply and distribute water in the manner and in the quantities provided for in the contract of respondent and appellant, and that this failure was due to the fault of appellant. It is one of the principal contentions of appellant that there is no evidence to sustain the findings in this matter of alleged failure in the development and distribution of water. The evidence on this subject is reviewed extensively in appellant's brief. It occupies many hundreds of pages of the printed record. Under the well-understood rule that the findings will be sustained if there is in the record evidence substantially tending to support the same, even though there may be strong conflicting evidence, it has been our duty to examine this record, not for the purpose of weighing the probabilities, but for the sole purpose of determining whether there is evidence which taken alone is sufficient to prove the facts found. In the summary contained at the end of their review of the evidence, counsel for appellant state their position to be: A. That the evidence shows that wells were drilled and equipped as rapidly as reasonably possible, and that more water was developed than required at all times. B. That the evidence shows that ditches were constructed carrying water to all of the lands sold as rapidly as reasonably possible, and that all of the purchasers received the contract amount of water except those in that district where the land was withdrawn because of the impossibility of developing water at reasonable expense; as to certain purchasers who testified that they did not receive sufficient water, that their lands were not properly leveled, so that, although the contract amount was delivered, sufficient water to make a crop was not, which resulted in the loss of crops in 1913, and this further resulted in the extension of time of payments required from purchasers, and the extension of Miller's contract. C. That, if the ditch system was not sufficient, this insufficiency grew out of something over which appellant had no control, to wit: (a) Ditches were constructed out of fresh, loose earth; (b) character of the soil was such as to make it impossible to construct sufficient ditches; (c) this fact was admitted by respondent by the request which he made for a cement pipe system, and certain land was actually withdrawn to sell to obtain the money with which to put in such a system.

[4] Subdivision A extends in a northwesterly direction for a distance of several miles. The Southern Pacific Railroad runs in the same direction through the subdivision, so that about one-fourth thereof is on the northerly side of the railroad. The town site of Lerdo was laid out in section 15, one of the north line of sections of subdivision A. On October 2, 1912, there were eight wells on this subdivision, which are known in the record as wells 1 to 8, inclusive. The wells drilled by appellant subsequent to the date of this contract are numbered 9 to 15. Most of the lands sold and for which irrigation was required in the spring of 1913 were in the central part and northerly half of the subdivision. In May, 1913, well No. 9 had been finished and equipped, and was producing 972 gallons per minute, which, according to appellant's estimate of 9 gallons per minute as representing one miner's inch of water, amounted to 108 inches. No. 10, when first put on the pump on April 19th, had "sanded up." According to some of the testimony, this

had been unnecessarily permitted by neglect on the part of appellant. On May 16th pumping was resumed, and the well was then producing about 120 miner's inches of water. Of the old wells, the only substantial results then being obtained were through wells 2, 5, and 7, with a combined product of 3,900 gallons per minute, or about 433 miner's inches. These constituted the supply available at the wells to meet the demands for water to be used upon the lands sold by respondent. If this quantity of water, without excessive loss, had been delivered on those lands, it is improbable that there would have been any complaint of want of water for irrigation. Apparently the trouble consisted in the lack of sufficient means of distribution rather than in failure to develop an adequate amount of water for the then existing emergencies. The testimony shows that ditches were supplied from wells 9 and 10 leading to some of these sold lands. These ditches, however, were so constructed and in such condition that there was an excessive waste of water and that the water would often break through and run over land where it was not wanted. It had not been intended to supply water to the northerly part of the subdivision from wells 2, 5, and 7, but there was an old ditch extending from those wells toward this northern area, and an attempt was made to restore this ditch so as to carry more water to the area which was supposed to be under wells 9 and 10 and under other wells which were to be completed in that neighborhood. The last-mentioned ditch was likewise unfit to produce the desired result. In consequence of these conditions, the hemp, ramie, and grain of the purchasers who had attempted to raise those crops was burned up in the hot days of May and June, 1913. Appellant testified that in the early part of May, together with Mr. Wishon, the general manager of appellant company, and Mr. Balch, its president, he made a thorough survey and inspection of subdivision A to ascertain what would be the best method to settle with the purchasers who had been damaged on account of the water failure, and to ascertain what would be the best method of putting the Lerdo water in proper condition for future supply. According to this testimony, after a very full examination and discussion of the situation, Mr. Balch stated that he realized that they had not done on the subdivision the things which they ought to have done, and asked respondent to arrange for settlements with the purchasers. He said he would give them an extension of time, knock off their interest and water charges, and postpone their payments; "just tell them we are going to put concrete pipes on this land and put it in proper shape so the future will have nothing but success for these people." No cement ditches ever were constructed, and it is not claimed that the contract obligated appellant specifically to construct such ditches. If there was any such obligation, it could only be incidental to appellant's obligation to provide by some means a sufficient distribution of the agreed quantity of water for the tracts which it was proposed to sell. It was provided in the contract that "after the drilling and installation of the wells, and the construction of the ditches herein called for, and as herein agreed, and capable of producing the quantity of water required, the party of the first part shall be under no further liability or expense in connection with such wells or water system or the pumping or delivery of such water." This amounts to a direct agreement that the appellant would construct ditches capable of carrying to the several tracts of land the amount of water necessary for irrigation, not exceeding the defined quantity, as measured by the limit of 50 miner's inches for each 160 acres. The water was to be carried "to each 20-acre lot of said land." It was further provided in the contract that appellant would cause mutual water companies to be incorporated for the purposes of ownership and distribution of the water supply among the owners of the lands purchased from appellant, and would convey to the purchasers "said land when paid for, together with said water or shares of stock in the water company holding same, sufficient to give each buyer of land the supply of water above provided." The effect of the contract was that appellant's obligations concerning the development and distribution of water as defined in the contract were to continue until transferred to the mutual water companies. No such companies ever were organized.

The contract of October 2, 1912, provided for its continuance and termination as follows:

"If, within one year from the date hereof, the second party shall have sold 1,500 acres or over, or obtained agreements for the sale of same in accordance with the terms hereof, this agreement shall continue for two years from the date hereof; and if within two years from the date hereof the second party shall have sold or obtained agreements for the sale of 4,000 acres of said lands, in accordance with the terms hereof, then this agreement shall be extended and be in force for one year longer, during which third year the party of second part shall have the privilege of selling and disposing of all of the remainder of said lands upon the terms herein set forth. In the event sales are retarded or interfered with by failure of water developments, as herein agreed upon, then, if for that reason the sales made do not equal the acreage herein required, within the periods above specified, the time within which such acreage is to be sold shall be extended for a period equal to the time lost by reason of such failure of water developments."

It was also provided—

"That if it shall be ascertained and determined by the first party in the drilling of wells

upon any portion of said lands that water cannot be discovered, produced, and developed for the irrigation of the same in adequate quantities, and at reasonable cost, then and in that event the first party shall in writing notify the party of the second part to that effect, and shall describe the lands upon which it has been ascertained and determined that it is not practicable to develop and deliver water in adequate quantities and at such reasonable cost, and such lands so described in such notice shall thereupon be removed from the terms of this agreement, and shall cease to be affected hereby or included herein."

[5] Without attempting to more minutely set forth the evidence tending to prove failure of appellant to perform the obligation which it had assumed with relation to the development and distribution of water in the early part of the year 1913, we state it as our conclusion that the evidence supports the finding that such failure did occur. That this condition, which continued to exist throughout the year 1913, was recognized by the officers of appellant, is indicated by a letter dated November 24, 1913, addressed to respondent, in the name of appellant, by its president and secretary, purporting to extend respondent's time for making sales. The letter said:

"This is to advise you that, in view of the fact that Lerdo land sales have been interfered with on account of water conditions and will necessarily be slow on that account in future, we hereby cancel your obligation to have sold 4,000 acres by October 2, 1914, and hereby extend the time in which you shall have sold that many acres to October 2, 1915, and you shall have until October 2, 1916, to sell out the entire Lerdo acreage."

During the year 1913, and while the unsatisfactory conditions above mentioned existed with respect to water supply for sundry purchasers of land in the Lerdo tract, respondent co-operated with appellant in the efforts which they made to prevent those purchasers from abandoning their contracts, by granting to them concessions with respect to their interest and water charges, and by extending their time for making payments.

On the 18th day of March, 1914, appellant served upon respondent a notice that it thereby withdrew and removed from the terms of the contract certain described land, which embraced all of subdivision A lying north and east of the railroad. This was done upon the stated ground that the withdrawal was made under the provisions of the contract and because of the fact "that it has been ascertained and determined by the said Lerdo Land Company in the drilling of wells upon said lands, and also in the attempt to discover, produce, and develop water for the irrigation of the same, that water cannot be discovered, produced, and developed for the irrigation of said lands in adequate quantities and at a reasonable cost." Respondent was thereby notified not to make any sales whatsoever of said withdrawn lands or any portion thereof. On the same day, March 18, 1914, appellant caused to be served upon respondent a notice that the Lerdo Land Company had refused to approve the abovementioned letter of November 24, 1913, and "you are further notified that no extension of time within which you may sell any of the land belonging to the Lerdo Land Company, under the provisions of the contract between it and you dated October 2, 1912, had been granted, and said letter is of no force or effect, and is not the act of, and is not approved by, said Lerdo Land Company."

In finding XXIV, after setting out the notice of withdrawal of lands dated March 18, 1914, the court found that in fact it was practicable to develop and deliver water in adequate quantities and at reasonable cost upon all of the lands described in said notice, and it had not been ascertained, in the drilling of wells upon any portion of said lands described in said notice, that water could not have been and could not be discovered, produced, and developed for the irrigation of said land in adequate quantities and at reasonable cost; "that at the date of said notice water had already developed in that portion of subdivision A lying north and east of the right of way of the Southern Pacific Railroad Company at a reasonable cost, and in such quantities as to demonstrate that an adequate supply could have been secured if defendant had diligently prosecuted its development work, and the work of distributing the water already developed, to the land sold and that remaining unsold in said subdivisin A of said Lerdo tract." After further statement of the acts of appellant in carrying out the policy indicated by these notices, the findings (No. XXV) declare that by its conduct in refusing to develop and distribute water upon said tract of land as required by said sales contract, and by the circulation of the information that plaintiff's selling campaign had been terminated under his contract, and by the repudiation of said extension agreement, and by its refusal to execute any contracts to purchasers of land in the Lerdo tract, produced by plaintiff, after March 18, 1914, appellant rendered it impossible for respondent to complete the sale of the land described in his contract and remaining unsold at the commencement of this action and "by such conduct prevented plaintiff from fully performing the terms of the said sales contract by selling all of the unsold land therein described," less a certain 1,390.08 acres which had been withdrawn from sale by mutual consent.

The court made the further finding (XXVI):

"If the selling of said Lerdo tract of land had not been interfered with by the defendant, and complete performance of plaintiff's sales con-

tract had not been prevented, as hereinbefore found, and if said defendant had performed the terms and conditions of its said contract with plaintiff (Exhibit 1) for the development and distribution of water, the plaintiff would have been able to and would have sold the remainder of said tract of land, upon the terms and conditions mentioned in said sales contract, within the time prescribed in said contract and the extension thereof dated November 24, 1913, and by such performance he would have earned in excess of all expenses in making said sales the sum of $107,928.93, including the town site, and excluding the 1,390.8 acres withdrawn by mutual consent, and described in Exhibit 3 attached to the complaint. That plaintiff was thereby damaged by the defendant in the sum of $107,928.93, no part of which has been paid. And the court finds that 15 per cent. of the gross selling price of said land would have been the reasonable cost and expense to plaintiff of selling said unsold land."

The right of appellant to withdraw from the terms of the contract any land of the Lerdo tract, as such right was defined in the contract, was limited to one condition alone, which was that appellant must have ascertained and determined in the drilling of wells that water could not be discovered, produced, and developed on said land for their irrigation in adequate quantities and at reasonable cost. It was not provided that excessive cost of distribution of water produced and developed on any such land would alone authorize appellant to remove that land from the terms of the agreement. The purpose of the parties in making this reservation in the manner stated is plain when its subject-matter is considered. Whether wells thereafter to be driven would produce adequate quantities of water, or any water at all, or whether the cost of drilling wells would be excessive, was necessarily uncertain. On the other hand, the cost of labor and materials required for the construction of a distributing system was capable of ascertainment to a reasonable extent, and presumably was taken into consideration by appellant before deciding to go ahead with the enterprise and before entering into any contract with respondent. The evidence is sufficient to sustain the findings of fact stated in finding XXIV as hereinabove set forth. We are satisfied that by the conduct of appellant in endeavoring to withdraw the described land from the operation of the contract, and by its further conduct in refusing to proceed further under the contract, appellant was guilty of acts constituting breaches of its contract with respondent. The legal consequences of these acts will be discussed when we come to a review of the award of general damages and the exceptions thereto.

First Two Groups of Special Damages Claimed.—The first item of special damages allowed ($27,040.59) represents the unpaid commissions claimed to be due to respondent on certain sales made of parcels of land in the Lerdo tract, concerning which the court found:

"That solely because of the failure of defendant to perform its said contract with plaintiff and with each of the said purchasers, the contracts with the persons hereinafter named were canceled by the mutual consent of defendant and said purchasers, prior to the commencement of this action, but without the consent of plaintiff, and each of said purchasers was released by defendant from all further obligations of his said contract with defendant of every kind and description whatsoever."

The second item ($8,251.01) is identical with the first, except that the cancellations occurred after the commencement of this action.

[6-8] It is the general rule that, unless there is a provision in the contract to the contrary, a real estate agent employed to negotiate a sale of land earns his commission, and it is payable when he produces within the time allowed a purchaser who is ready, willing, and able to take the property on the terms prescribed or with whom the owner enters into a contract upon these or other terms satisfactory to him; and the agent cannot be deprived of the agreed compensation because deferred payments are not made by the purchaser, or because other terms of the contract are not carried out. Stewart v. Bowie, 185 Pac. 868. But the parties to an agency contract may make the payment of commission dependent upon any lawful condition. The contract may be so worded as to make it clear that the parties intended that the commissions, or some part thereof, were not to be paid except upon a completed sale, or (as in the case at bar) out of installments of the purchase money as the same shall be paid by the buyer. Shepherd-Teague Co. v. Hermann, 12 Cal. App. 394, 107 Pac. 622. It therefore follows that, to establish the liability of appellant for the payment of commissions to respondent (other than those paid at the time of making the initial payment) for any sale made by respondent, he must establish that the purchaser made some payment on the deferred purchase price, or that the purchaser did not make payment because of some fault of appellant. In other words, the right of respondent to recover the special damages claimed for nonpayment of commissions on the sales actually made cannot be sustained if the evidence is insufficient to prove that such nonpayment of installments by the purchaser resulted from the fault of appellant as set forth in the finding last above quoted. When the vendor does not comply with the terms of his contract, and as a result thereof the purchaser fails to complete his payments, the agent is, nevertheless, entitled to commissions which were to be paid out of the deferred purchase money of the land so bought. Realty Bonds, etc., Co. v. Point

Richmond, etc., Co., 171 Cal. 238, 152 Pac. 433. In Ratzlaff v. Trainor-Desmond Co., 41 Cal. App. 586, 183 Pac. 269 (Third District Court of Appeal), it was held that, if the contract of sale is canceled by mutual consent of the vendor and vendee, the vendor does thereby, in a legal sense, prevent the payment of the purchase price. It was pointed out that the commission contract necessarily implied that the vendor would act in good faith and do nothing to prevent, or even discourage or embarrass, the completed purchase of the property. It was the duty of the landowner, under his contract with the agent, to do everything possible to promote the fulfillment of the sales contract by the purchaser, "and thereby to aid in securing the purchase price, to the end that respondent might receive compensation for the services which he had performed."

Counsel for appellant contend that the evidence is insufficient to support the finding of the court that each of these purchasers would have complied with his contract if the conditions thereof with reference to the development and distribution of water had been performed; that, on the contrary, the evidence establishes without conflict that they forfeited their respective contracts without right, and not by reason of any fault of appellant. Pursuant to this contention, they insist that, according to the testimony of some of these purchasers, the reason they forfeited their respective contracts was that they were charged $8 per year for water, whereas, under the representations made to them, they should not have paid more than $4. Their contracts contained no agreement limiting the water rate, and there is no evidence that the charge made was excessive. Following the tabulation set out in the brief for appellant, we have examined this testimony.

The statements of some of these purchasers, but not of all, were clearly to the effect that on account of the high water rate alone they would have refused to make their payments, even if the water supply had been sufficient. By "sufficient" we think that it may fairly be inferred that they intend to refer to the agreed quantity, which was at the rate of 50 inches for each 160 acres of land. But under the contracts they were not entitled to refuse payment for that cause. The court, however, was not compelled to accept such testimony of purchasers as conclusive. Other evidence produced by respondent tends to show that, apart from the rates charged for water, the failure of appellant to produce and distribute the agreed supply of water for the use of these purchasers had caused them to be dissatisfied, and was sufficient to justify them in refusing to hold to their contracts, and, except for the concessions which they obtained as next hereinafter stated, probably would have caused them to refuse payment even if the water rate had not exceeded the expectations which they had derived from the representations made to them.

In the summer of 1913, after the failure to distribute water as provided by the contracts had occurred, and while the complaints on that score were under consideration by the parties, extension agreements were made whereby all of those purchasers except Irene Darnall and Mrs. M. C. Fritcher, remained in possession of their lands without charge for water, taxes, or interest until the end of the year. It was after these extensions had expired, and after notice and demand, and after failure by those parties to make further payments on the contracts, that their contracts were declared forfeited. Appellant contends, and the evidence appears to support that contention, that none of these cancellations, except under the Darnall and Fritcher contracts were made by mutual consent of the parties. After the contracts had been declared forfeited for nonperformance, then as to certain matters and as to certain claimed rights of possession, the defendant and some of the contract holders entered into special negotiations which resulted in the adjustment of those matters whereby, as a condition of such settlement, the purchasers surrendered their contracts. These being the facts, appellant contends that the evidence is insufficient to support the finding that these contracts were canceled by mutual consent of the parties because of the failure of the defendant to perform its obligations under those contracts. This contention is correct to the extent that by accepting the concessions thus granted the purchasers waived their right to abandon the contracts by reason of the then existing default of appellant in furnishing the water supply, but this waiver was conditioned upon the absence of any further failure of appellant to perform its contract obligations. It is not true, however, as to all of the purchasers, that the water supply continued to be insufficient. For example, J. S. Bird testified that in 1914 he had plenty of water, but for some reason, not defined, his crop was not satisfactory. There were others who testified that after 1913 they had "plenty of water." With respect to these parties, their waiver of their right to abandon the contracts remained in force, and the subsequent declaration of forfeiture of their contracts was an exercise by appellant of its rights in the premises. None of them thereafter asserted any claim for damages, or right of cancellation. It follows that the findings (XVI and XVII) now under consideration are not sustained as to all of those contracts. They are also excessive in allowing commissions for the sales to Mr. Weyand and to Mrs. Mitchell. Both of those purchasers gave testimony which, apparent-

ly without contradiction, proves that their failure to make their payments was based upon reasons which were outside of their contract rights against appellant. Mrs. Kelsey testified that she purchased the land through respondent, who promised to lease it for her. When she found that she could not lease the land, she did not choose to invest any further money in it. This appears to be the only reason why she did not go on with the contract.

[9] Appellant calls attention to a special list of commissions allowed, amounting to $13,507.30 (being a part of the above-mentioned sums of $27,040.59 and $8,251.01), concerning which counsel for appellant say that there is no testimony from the purchasers, or any other person, giving any reason why they failed to make their deferred payments. Respondent has not contradicted this statement. The index of the transcript shows only three persons, out of the 23 contracts covered by this list, who were witnesses at the trial. These were Cloud, Meudell, and J. P. Seaton. Seaton is the only one whose testimony indicates that his failure to pay resulted from failure to get sufficient water to irrigate his land. In all these instances, where there is no evidence tending to prove the reason for failure of the purchaser to make his deferred payments, the court was not justified by the evidence in finding that the contracts were canceled by mutual consent of appellant and the purchasers, or because of appellant's failure to perform its contract, Each one of the canceled contracts, about 58 in number, constitutes a separate item in the claim for commissions earned, and must be supported by evidence sufficient to entitle plaintiff to compensation under the rules hereinabove stated. When so examined, many items of the awards of $27,040.59 and $8,251.01 are not sustained by the evidence.

Third Group of Special Damage Claims.—Finding VIII reads as follows:

"Plaintiff sold to J. C. Apple, Alfred Curtis, W. E. James, and W. R. Godfrey 70 acres of said land at the contract price of $150 per acre, and the defendant executed to each of said purchasers a contract for the land for which he had made a written application, but each of said purchasers refused to accept the formal written contracts executed by defendant, and tendered to said purchasers for execution, solely because of defendant's failure and refusal to develop and distribute water necessary for the irrigation of said Lerdo tract and of said land so purchased, as it was required to do by the terms of its said contract with plaintiff. And if defendant had performed its said contract for the development and distribution of said water so that said land and other land in the Lerdo tract could have been irrigated, the said last-named purchasers would have executed said contracts tendered to them, and they were and each of them was ready, able, and willing to have paid for said land in accordance with the terms of said contracts so tendered to them, if the water had been developed and distributed by defendant as required by the terms of said contract with plaintiff. That commissions earned by plaintiff by the sale of the last-named 70 acres of land amounted to the sum of $3,500.00 no part of which sum has been paid to him or to any one for him."

It is conceded to be the law that in constructing such a contract as that of October 2, 1912, in order for an agent to earn his commission where the sale was not consummated, it is necessary to prove that he found a purchaser ready, willing, and able to buy the property on the terms fixed and either that he procured from that person a valid contract binding him to purchase the property upon those terms, or that he brought the vendor and the proposed purchaser together so that the vendor might have secured such contract if he desired.

Appellant contends that the evidence is insufficient to support the finding, especially in this, that the evidence is insufficient to prove that said four persons, or either of them, was ready, willing, and able to buy the property proposed to be sold to them. In 1913 Curtis visited the Lerdo tract with one of respondent's agents and made a deposit on two 10-acre lots. A few days later he visited the land again and observed that there were no ditches near completion near those lots. Being asked what caused him to refuse to go on with the purchase of that land, he said:

"Well, I could not see where to make myself —that they were going to get the water there; and, another thing, I could not see, to my estimate, that their price was to hold, anything to guarantee that the price was to hold the same price for water; that they could raise the price of the water any time they saw fit, that was my idea. * * * At the time I made the deposit on 23 and 24 I was ready, able, and willing to complete the purchase."

Apple visited the Lerdo tract and made a deposit of $100 on account of two lots. Subsequently he visited the land again. Seeing "that other people out there had not got their water, and so on and so forth," he declined to complete his first payment or to accept a contract.

"The fellow that sold me the land, he told me I was to get water from the well right adjoining the 20 acres, and then afterwards I heard that I was to get water from the other two wells a mile and a half below there, something like that. * * * I told him that I would get the water right there adjoining the land I had picked out, and I come to find out that I had to get it from way down below, and I seen the other crops out there wasn't doing well, and everybody else wasn't getting water, and I decided to let mine go."

James did not testify. According to a letter of January 20, 1914, from appellant's sec-

retary to respondent, and respondent's reply thereto, it appears that some kind of preliminary agreement to purchase had been made with James in March, 1913. Miller's letter states that he instructed his agent at Bakersfield to have the James contract—

"returned immediately to this office or to have the same executed and the first payment made. * * * Our agent at Bakersfield advises that Mr. James has been away from Bakersfield, has never occupied the land, and did not receive any rent from same."

Godfrey did not testify. The only evidence concerning him was that of respondent's witness Stancliff, who stated:

"I showed some land in the Lerdo subdivision to a man by the name of Godfrey, W. R. Godfrey. I don't think he became a purchaser of any of the land of the Lerdo subdivision. The reason why he didn't become a purchaser was that he didn't like the contract. There was a discussion as to the water. The lack of proper distribution of the water wasn't the reason so much as the price of it—the price and interest and everything would eat it up. He was just a wage worker. He didn't have any capital, and that's the reason he didn't buy."

[10] It is not claimed that there was any evidence concerning these four sales different from that to which we have referred. Full commissions, amounting in all to $3,500, were allowed for these so-called sales. As to each of them, the evidence is insufficient to sustain the finding that he refused to execute the proposed contract with him "solely because of defendant's failure and refusal to develop and distribute water necessary for the irrigation of * * * said land so purchased." Curtis would not take the contract without a guaranteed limit on the price of water. The evidence does not show why James did not sign the contract, and it affirmatively shows that Godfrey was neither willing nor able to buy. The only one of these four purported sales on which the evidence creates a shadow of right of the plaintiff to commissions is that relating to the sale to J. C. Apple.

[11] *Fourth Group of Special Damage Claims.*—On these claims commissioners were allowed in the total sum of $14,687.50, being for sales to Burke, Killian, Paul, and Reiss. The court found that between April 10, 1914, and August 1, 1914, respondent procured bona fide offers from the persons named for the purchase of certain lots in the Lerdo tract; that each of said persons was ready, able, and willing to buy said land and to execute a written contract for the purchase of the land selected, and was ready, willing, and able to pay for the land at certain prices and on certain terms, which were in conformity with the agreement between appellant and respondent concerning such contracts; that plaintiff requested the defendant to execute a contract to each of said persons for said lands, and the defendant failed and refused to execute and deliver any contract to either of them; that, if said contracts had been executed and delivered by defendant when requested or within any reasonable time, the said persons would have executed said contracts and would have paid the purchase price in accordance with the terms and conditions thereof.

In harmony with the disposition hereinbefore made of the questions relating to the interpretation of the contract of October 2, 1912, and the obligations of appellant thereunder, we hold that respondent was entitled to make these alleged sales. At this point it is only necessary to consider the contention of appellant which attacks the good faith of these alleged sales. Respondent testified that on April 10, 1914, he made the sale of certain described lots to James A. Burke, and sent to appellant a written application requesting that contract for that land be executed to Mr. Burke. The application described the lots, the price, the installment amounts, showed that no deposit had been made, and was unsigned. Similar transactions occurred respecting the sales to Killian, Paul, and Alma C. Reiss. None of these contracts ever was executed by appellant.

Killian, Burke, and Paul testified that they were ready, able, and willing to make their first payments, and would have done so if the contracts had been executed. S. N. Reiss, husband of Alma C. Reiss, conducted the negotiations for the Reiss contract, but directed that it be made in her name. He testified that he was making the purchase for his wife, and that he was ready, able, and willing to purchase the land and pay for it according to the terms indicated by the receipt. At about the end of July, 1914, which was after appellant had refused to execute contracts for these sales, these parties, at the request of respondent, signed the agent's receipt. In making this request by letter to Burke, respondent in that letter said:

"I wish you would sign the inclosed agent's receipt and return to me at the place provided for purchaser to sign, as an evidence that you were willing prior to April 20, 1914, to enter into an agreement to buy this land. By signing this agreement, you do not obligate yourself to purchase the land at all now, unless you see fit, as the agreement specifically provides that the Lerdo Land Company should have entered into an agreement with you ten days subsequent to April 10, 1914, which they refused to do."

While the act of respondent in asking for a signature to such a document three or four months after its date, and the fact that these receipts were made up and sent to appellant with a request that appellant execute contracts when in fact the proposed purchaser had not made the usual deposit and had not signed any preliminary memorandum of sale,

were circumstances to be considered by the court in determining whether or not the offers were made in good faith, they were not conclusive as against the other evidence tending to support the finding as made by the court.

General Damages.—Besides the special damages awarded, we have seen that respondent was allowed damages in a sum specified as the net amount of compensation which he would have earned upon sale of all that part of the Lerdo tract which remained unsold at the time when performance of the contract by respondent was prevented by appellant. Appellant contends that such damages are speculative and uncertain in their nature and are incapable of proof; that, in fact, the evidence offered to prove that the plaintiff would have been able to sell and would have sold all of the lands of the Lerdo tract upon the prescribed terms and within the time agreed upon between appellant and respondent, if such performance by respondent had not been prevented by appellant, is insufficient to establish those facts; and that the court erred in overruling appellant's objections to the evidence.

[12] For the purpose of showing that he could have sold all of the land in question, respondent introduced testimony showing that large amounts of land had been sold in other subdivisions made in other localities of the San Joaquin Valley, and tending to prove that the Lerdo land was more desirable for selling purposes than were these other tracts. Basing their statements upon acquaintance with the real estate market in the vicinity where some of these other lands had been sold, witnesses testified favorably to respondent's contention that he could have sold the land; such testimony being, in part, as follows: The witness Baldeschwieler testified, "We could have sold a good deal of that land," giving as the reason for this opinion that "there was a good deal of land sold up in that part of the country." Alexander, another subagent who had made some sales there, said that the failure of crops there in 1913, "caused by no water," had prevented him from selling about 80 acres to persons who stated that they would not buy "because there wasn't sufficient water"; also that, if there had been no water failure, he "might have probably sold 1,000 acres, or probably better." Respondent testified that the entire 745 lots in the town site of the town of Lerdo could have been sold at $150 per lot, which he said was their average value. We have taken these facts from the review of the evidence as contained in the brief for appellant. The evidence thus brought to view shows that the tract was favorable situated for selling purposes; that the land was shown to various prospective purchasers who did not buy; that some of these witnesses gave it as their opinion that they would have been able to sell some of the Lerdo land. There was also evidence indicating a serious decline in the condition of the real estate market from the year 1913 until and including the year 1915. Counsel for respondent, on the other hand, contend that the evidence is sufficient to support the finding in question, since the following additional probative facts exist: Between December 1, 1912, and May 1, 1913, respondent sold to bona fide purchasers Lerdo lands aggregating 1,198.91 acres, for which contracts were executed; that other sales were negotiated, but failed of completion because of the failure of appellant to install an irrigation system such as the contract required; that respondent made additional sales to bona fide purchasers between May 1, 1913, and March 17, 1914; that he had made sales amounting to a grand total of 1,881.71 acres before his sales contract was repudiated by appellant; that "this concrete fact of actual accomplishment, under the most unfavorable conditions, is the most potent evidence of the very reasonable probability that all the balance of the land could have been sold within the extended period agreed upon in the letter of November 24, 1913, if appellant had complied with its contract and its promises instead of repudiating its obligations as it did do in March, 1914."

Section 3300 of the Civil Code states the rule of damages for breach of contract as follows:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

In connection with appellant's contention that the evidence is insufficient to support the finding that all of the land would have been sold, counsel for appellant depend upon the rule (which has been applied under defined conditions which appellant claims are illustrative of the conditions proved here) that prospective profits are too speculative and remote to justify an award of damages; in other words, that their nature is such that it is incapable of being proved that in the ordinary course of things such damages would be likely to result from the breach of the contract. The contention is not that lost profits may not be included as a proper element of damages. But, admitting that such profits are a proper subject of recovery if capable of being ascertained, the contention is that, as applied to a contract like that here under consideration, the claimed profits are too speculative and remote to be capable of anything like reasonable ascertainment.

[13] The subject of damages by reason of loss of prospective profits, and evidence ad-

missible to prove such loses, was considered and discussed by the Supreme Court of California in Pac. Steam Whaling Co. v. Alaska Packers' Ass'n, 138 Cal. 632, 72 Pac. 161. During the fishing season of 1897 the defendant unlawfully and forcibly excluded plaintiff from fishing in the ocean along certain portions of the shore of Alaska. Overruling objections of the defendant, plaintiff was permitted to introduce evidence tending to show how many fish the plaintiff could, with reasonable probability, have taken from the fishing grounds in question if it had not been excluded therefrom by the unlawful acts of defendant, the value of such fish, and the profits which would reasonably have accrued to plaintiff from the fish when canned. Plaintiff was also, in this connection, allowed to introduce evidence tending to show how many fish defendant actually did take in those fisheries during said season. The court instructed the jury that, if it found that plaintiff suffered damage by reason of the alleged wrongful acts of the defendant, then, in assessing the amount of damages caused to plaintiff by the alleged wrongful acts, the jury might consider the loss, if any, to the plaintiff of probable profits in its business. Defendant claimed that the evidence pointed to damages too much in the nature of mere speculative profits to be admissible at all. In response to this contention the Supreme Court said:

"We do not think that in these rulings of the court as to evidence, or in giving the said instructions, there was any error. The profits sought to be proved were not so remote, uncertain, prospective, or conjectural as to be entirely beyond the range of legitimate damages. * * * With respect to this kind of damage, of course, there cannot be the absolute certainty possible in many plainer cases; but a wrongdoer cannot entirely escape the consequences of his unlawful acts merely on account of the difficulty of proving damages; he can do so only where there is no possibility of a reasonably proximate estimation of such damages, which is not the fact in the case at bar. The waters in question here constituted a special salmon fishery, where those fishes were to be found in great abundance, and the proposition that damages evidently suffered by plaintiff from the wrongful act of the defendant by which plaintiff was excluded from exercising the clearly valuable right of fishing in those waters are entirely beyond legal proof cannot be maintained. We think that on this point the case at bar is within the rule announced in Shoemaker v. Acker, 116 Cal. 239, and cases there cited."

Shoemaker v. Acker, supra, 116 Cal. 239, 48 Pac. 62, was an action to recover damages for breach of contract. The contract provided that defendant would purchase land and furnish capital for its improvement; that plaintiff should have charge of the improvement and cultivation of the land, and have an interest in the income and profits derived from the sale of the land or its products, and in the increase of value of the land. Plaintiff agreed to devote his whole time and attention to the management and improvement of the property and the sale of the land and the products thereof. After land had been purchased, and after plaintiff had devoted more than a year to its care and improvement, the defendant attempted to annul the contract, by acts which were held to constitute a breach thereof. Referring to the rule of damages stated in section 3300, Civil Code, and the subject of future profits, the court pointed out that the cases in which future profits had been rejected as speculative or too remote were cases where the asserted future profits were entirely collateral to the subject-matter of the contract, and not consequences flowing in a direct line from the breach of such contract. It was there held, and authorities were cited to that effect, that profits or advantages which are the direct and immediate fruits of the contract may be recovered, and that the damages claimed in the case at bar were of the kind which are recoverable under the principles stated.

In Western Union Tel. Co. v. Commercial Pac. Cable Co., 177 Cal. 577, 171 Pac. 317, the action was one for an injunction to prevent the imposing of a discriminatory regulation and the exaction of a discriminatory toll, and to recover damages for injuries sustained by the demand and exaction. In determining the question of damages for injuries sustained by the demand and exaction, the plaintiff was permitted to introduce evidence showing the injury which plaintiff would sustain through falling off of any business, with consequent loss of profits, as a direct result of such discrimination. This was held to be a proper subject for the admeasurement of damages where the evidence disclosed a reasonable probability of their approximate estimation. The court said:

"It admits with no dispute that the plaintiff would have some falling off in business with its consequent loss of profits as a direct result of the discrimination of which it complains. The injury which it would thus suffer through the loss of such probable profits has heretofore been held by this court to be the proper subject of admeasurement of damages in cases where the evidence disclosed a reasonable possibility of their approximate estimation"—citing Shoemaker v. Acker, supra; Pacific Steam Whaling Co. v. Alaska Packer's Ass'n, supra; and McQuilkin v. Postal Tel. Cable Co., 27 Cal. App. 698, 151 Pac. 21.

In Schumann v. Karrer, 192 Pac. 849, the defendant had leased to the plaintiff a butcher shop and slaughterhouse for the term of two years, and entered into an agreement that during the term of the lease he would not carry on the butcher business in the described vicinity. The action was for an injunction and for damages for plaintiff's

breach of this stipulation. The court permitted the plaintiff to give testimony tending to show the value of his business and the loss which would probably ensue from appellant's interference and rivalry; also the loss which he had sustained by reason of not being able to purchase and fatten hogs and dispose of them, because of appellant's interference with said business. The rule stated in Shoemaker v. Acker, supra, was repeated and approved, and applied; it being noted, however, that the damage here in question was in the form of loss of profits to an established business of a permanent character.

In McConnell v. Corona City Water Co., 149 Cal. 60, 85 Pac. 929, 8 L. R. A. (N. S.) 1171, the award to plaintiff of damages consisting of profits which he would have made on a contract for the construction of a tunnel was sustained. Referring to the numerous cases wherein damages for loss of prospective profits have been denied upon the ground that they were too speculative and remote, the court said:

"Such is the undoubted rule, but it is to be noted that this is not an objection to the inclusion of profits as a proper element of damages, but is a declaration merely that when they are too speculative and remote to be capable of anything like reasonable ascertainment, when they are collateral merely and do not arise directly or by natural consequence out of the tort complained of, they cease to become a proper element in the admeasurement of damages. No one may contest the soundness of this principle, but the converse of it is equally true, that where prospective profits are not too speculative and remote, where they do arise directly and as a natural consequence out of the injury, they are always allowed as an element of damage."

In the case at bar the contract gave to respondent the exclusive right to sell the described land. Respondent on his part agreed to conduct a campaign for and the business of selling the land to the end that the same should be sold in the shortest possible time, and agreed not to engage in the sale of other land subdivisions during the life of the agreement. The distinction between such a contract and a nonexclusive contract of agency was pointed out in Friedman v. McKay Leather Co., 179 Cal. 566, 178 Pac. 139. It was held that in seeking compensation for breach by the principal of a contract wherein the agency was not exclusive and the agent did not contract to devote his time to the selling of the principal's goods, and where the compensation of the agent was to be a commission on sales made by him, damages on the basis of the suppositive sales are not recoverable unless it is shown that the sales would in fact have been made by the agent. The court referred to Parke v. Frank, 75 Cal. 364, 17 Pac. 427, where the court, in determining the measure of damages in case of a breach of an agency contract, said:

"The plaintiffs very properly made no effort to establish the profits they might have made, during any definite period, had defendant complied with his contract. From the nature of the case such damages must have been purely speculative."

There is no doubt that the rule thus stated in Parke v. Frank was properly applied in that case since the agency there was not exclusive. Also plaintiff had not agreed to represent the defendant alone, but in fact held other agencies for manufacturers operating in compensation with the defendant.

[14, 15] The evidence to which we have referred, upon which finding XXVI must rest, falls into three classes: (a) Evidence of sales in other subdivisions; (b) opinions of witnesses that sales could have been made; (c) the quantities of land actually sold by respondent. All of this evidence was admitted over objections urged thereto by appellant. The rulings overruling those objections are duly specified as errors on account of which it is claimed that the judgment should be reversed. The evidence of sales made of land in other places in the San Joaquin Valley at the period of time in question should have been rejected. In itself, it was irrelevant to the issue to be determined, which was whether or not the plaintiff could have sold the Lerdo lands. Conditions with respect to water supply, and other conditions, were different in various particulars in those several tracts from the conditions existing in the Lerdo tract, or which would have existed in the Lerdo tract even if appellant had complied with all of its obligations relating to the development and distribution of water thereon. The evidence of what one set of agents accomplished in the sale of a given subdivision of land is too remote and uncertain in its bearing to be receivable as evidence that another agent could have sold the lands of another subdivision. This evidence could have had no possible relation to the question at issue unless it had been used by witnesses as a basis and reason for their opinion that this particular land could have been sold. Even then it would not be admissible unless such opinion evidence was admissible, nor unless brought in by cross-examination after the opinion had been stated. But the opinions of the witnesses themselves were improperly admitted. We think that the correct rule is stated in the note found in L. R. A. 1916B, at page 875:

"And opinion evidence as to the value of an exclusive agency contract and the profits which might have been made or the amount of business which might have been done under the agency if it had not been wrongfully terminated is not admissible, since such opinion would be purely speculative and conjectural."

In support of the rule thus stated, the note refers to Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676. In that case the right of the plaintiffs to recover prospective profits lost by them by reason of the conduct of the defendant in preventing them from carrying out the contract was sustained. It was further held that the plaintiffs were entitled to prove the things which they had accomplished under the contract, and the circumstances existing at the time of the breach whereby it appeared that they had suffered damages in some amount and whereby, from the extent of the business done, an estimate could have been made of the value of the contract to the plaintiffs. But on the question of opinion evidence the court said:

"We think the opinions of witnesses as to the value of the agreement, as to the profits which it or any agency established in pursuance of it could produce, as to the damages plaintiffs realized, and as to the number of machines they could have sold were properly excluded. This was not a case for expert or opinion evidence. There was no certain basis of facts proved or facts assumed upon which an opinion could be based. The conflicting opinions of interested witnesses, selected because of their favorable opinions, instead of aiding the jury, would probably add to their embarrassment. The safer rule in all such cases is to exclude opinions and receive the facts, and then leave the matter for the determination of the jury. They may not have any certain basis upon which to rest their judgment, but that cannot be helped. They are supposed to be disinterested and must apply their experience and common sense to the facts proved and reach the best results they can."

The evidence showing the quantities of land sold by respondent and the rate at which sales were progressing when further performance of the contract by respondent was prevented by appellant was properly received, and the court did not err in overruling the objections thereto. It was evidence, however meager, tending to prove that further sales could have been made except for the acts of interference by appellant. If the court had received that evidence alone, and had accepted it as proof of the fact that respondent could have sold all of the land within the time limited by the contract, it may be that on appeal the findings would have to be sustained as sufficiently supported by the evidence. But it is doubtful whether upon that evidence alone—and we cannot satisfactorily hold that upon that evidence alone—the court would have found it to be true that respondent would have been able to sell all of the unsold lands in the tract. The court having overruled objections to the other evidence to which we have referred, we must assume that weight was given to that evidence in determining the fact. There was evidence tending to prove that the real estate market was less active in the year 1914 than in the year 1913, and had diminished to a state of extreme dullness in 1916. It therefore is not at all clear that the finding in question would have been made if the evidence of sales of lands in other parts of the San Joaquin Valley and the opinion evidence of witnesses had been excluded. The erroneous rulings therefore must be considered so far prejudicial to the rights of appellant that they cannot be disregarded.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In the opinion of the District Court of Appeal herein it is said that, under the contract of October 2, 1912, no right was given to the Lerdo Land Company to withdraw any land from the terms of said contract upon its determination that water could not be conducted from the wells to the land, or any part thereof, in adequate quantities and at reasonable cost. The court says:

"It was not provided that excessive cost of distribution of water produced and developed on any such land would alone authorize appellant to remove that land from the terms of the agreement."

The provision of the contract on that subject refers to the reasonable cost of delivering the water, as well as the cost of producing or developing it, and it is a matter of grave doubt whether the agreement does not authorize a withdrawal of the land from the agreement by the company, upon ascertaining and determining that the delivery of the water by ordinary ditches could not be made in adequate quantities at reasonable cost. While we deny a rehearing on the petition of the respondent, we think it proper to qualify the opinion in his favor so far as to say that the opinion of the District Court on the above question should not be considered as a part of the law of the case upon the new trial to be had therein, but should be left open for consideration, upon such evidence of extrinsic circumstances, if any, as may be properly admitted to explain its meaning, and upon such further consideration as the court below may give to the question of the proper construction of the contract on its face alone upon this point.

The petition for rehearing is denied.

All concur, except WILBUR, J., absent.

53 Cal. App. 317

CORNELL v. WESTERN UNION TELEGRAPH CO. (Civ. 2315.)

(District Court of Appeal, Third District, California. June 25, 1921. Hearing Denied by Supreme Court Aug. 22, 1921.)

1. Telegraphs and telephones ⟸70(1)—Loss of profits on pasturing cattle held not recoverable as damages.

In an action for damages for delay in delivering a telegram, the measure of damages is not that established by Civ. Code, § 3308, for the breach of a seller's agreement to deliver personal property, though by the delay plaintiff was prevented from buying cattle, but is the amount which will compensate plaintiff for the detriment approximately caused thereby, under section 3300 or 3333, depending on whether the action is for breach of contract or for tort; and therefore plaintiff cannot recover the difference between the contract price of the cattle which he was prevented from buying and the price at which he could have resold them after pasturing them without proof he could not have purchased other cattle in the open market.

2. Telegraphs and telephones ⟸66(4)—Evidence held not to establish measure of damages for delay.

In an action for delay in delivering a telegram, whereby plaintiff was prevented from exercising an option to purchase cattle, evidence that at the time and place the cattle in question had a market value between $25 and $35 a head is too indefinite to support a finding as to damages, especially where the finding was greater than the damages, if the larger figure as to market value was taken.

3. Telegraphs and telephones ⟸53—Not liable for delay in delivering telegram offering loan to purchase cattle without proof cattle could not have been purchased after delivery.

A telegraph company is not liable for substantial damages for delay in the delivery of a telegram offering to loan plaintiff money with which to purchase cattle for pasturing, where the evidence showed that the cattle in question were not sold to another until long after the telegram was delivered, and did not show that plaintiff could not have purchased them upon receipt of the message.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by E. B. Cornell against the Western Union Telegraph Company to recover damages for delay in delivering a telegram. Judgment for plaintiff, and defendant appeals. Reversed.

C. L. Russell, Jr., and Russell & Heid, of Tulare, Lamberson & Lamberson, of Visalia, and Beverly L. Hodghead, of San Francisco, for appellant.

Middlecoff, Scott & Ham, of Visalia, for respondent.

BURNETT, J. The action was for damages caused by the failure of defendant to promptly deliver a telegram, and plaintiff had judgment for the sum of $534, from which the appeal is taken. The telegram was left at the office of L. N. Cornell, a brother of plaintiff, who was away at the time, and was not delivered to plaintiff until several days thereafter. The telegram was sent by one W. H. Coffinberry from South San Francisco, and related to a loan of $5,000 from the South San Francisco Cattle Loan Company, for which plaintiff had made application to enable him to purchase some cattle.

As to the damage suffered by plaintiff the court found:

"That on the 27th day of September, 1916, plaintiff held an option from D. H. McLemore to purchase from him 178 cattle, consisting of red heifers which were then located in the state of Oregon; that said McLemore had agreed with plaintiff to sell cattle to plaintiff within five days from said date for the price and sum of $5,000, and deliver said cattle to plaintiff at Porterville, Cal., freight paid; that said cattle were reasonably worth to plaintiff at said time the sum of $5,534; that plaintiff had abundant feed at said Porterville with which to feed said cattle; that said plaintiff would have made a profit on said cattle of $534; * * * that between the said 27th day of September and said 4th day of October, 1916 (the date when said telegram was delivered to plaintiff), said plaintiff's option and opportunity to purchase said cattle expired, and, by reason of the fact that defendant did not deliver said message to plaintiff, plaintiff did not know that said South San Francisco Cattle Loan Company had approved plaintiff's application for said loan, and plaintiff did not have the money otherwise to pay for said cattle, and thereby lost the option and opportunity to purchase said cattle, to plaintiff's damage in the sum of $534."

[1] The trial court apparently adopted an erroneous theory as to the detriment caused to plaintiff by the negligence of defendant. The court seems to have applied the rule found in section 3308 of the Civil Code, providing as follows:

"The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled."

Herein, however, there was no breach of the seller's agreement. Indeed, the action against defendant was based upon the theory that the seller was, at all times within the period of the option, ready and willing to carry out his agreement. Said section prescribes the measure of damages for a particular condition that is not found herein, but the rule applicable to the situation in this case is embodied in section 3300 or 3333

of said Code. If the action may be said to be founded on contract, the former will apply; if it be regarded as based upon a tort, then the latter. It is sufficient to quote section 3300, as follows:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment approximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

It is well also in this connection to bear in mind section 3301, as follows:

"No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

Manifestly these sections prescribe a very general measure of damages, and it is not always easy to determine what particular facts satisfy the requirement of the rule.

In applying the measure to a case like this, however, the natural and reasonable inquiry is: What was the market value of similar cattle at Porterville, and whether they could have been obtained by respondent after said telegram was delivered. If he could have then bought the same or similar cattle at the same price as he had promised to pay, it can hardly be said that in contemplation of law he suffered more than nominal damages in consequence of the negligence of defendant. In 37 Cyc. p. 1765, the rule is stated as follows:

"If by reason of the negligence of a telegraph company in regard to the transmission or delivery of a message a purchase is defeated resulting in a loss to plaintiff, the company will be liable. The general rule is that the measure of damages is the difference between the contract price and the market value of the goods at the time and place of delivery; and where, as the result of the telegraph company's negligence, the purchase is not lost but delayed, there may as a general rule be a recovery for the rise in market value of the subject-matter of the sale during the delay."

In the note to Western Union Tel. Co. v. Cooper, as reported in 10 Am. St. Rep. 772, many cases are collated in support of this general statement of the rule:

"Actual damages sustained by reason of failures, delays, or errors of a telegraph company in transmitting or delivering messages intrusted to it may be recovered by the sender when such damages are the natural and proximate result of the company's default, and may be fairly considered to have been in the contemplation of the parties when the contract was made."

We may refer to some of the cases cited therein as illustrating the application of the rule.

In Western Union Tel. Co. v. Du Bois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109, an Illinois case, M. sent through the telegraph company a message informing the plaintiff that he would sell him apples at $1.75 per barrel. The company delivered the message, stating $1.55 as the price per barrel. The plaintiff then ordered the apples, and had to pay the $1.75 to have them delivered to him. The difference was held to be the measure of his damages.

In Hadley v. Western Union Tel. Co., 115 Ind. 191, 15 N. E. 845, the plaintiff had sold cattle for future delivery at the option of the purchaser. The latter sent a dispatch informing him that he would take the cattle on the morning of the next day. It was the custom of stock dealers to take the weight of cattle at early daylight. Through the negligence of the telegraph company to promptly deliver the message the weighing of the cattle was delayed, whereby the weight decreased. It was held that the defendant was liable in damages for the loss of weight resulting from its negligence.

In Manville v. Western Union Tel. Co., 37 Iowa, 214, 18 Am. Rep. 8, plaintiff's correspondent sent him this message: "Ship your hogs at once." The delivery of the message was delayed four days by defendant's negligence. It was held by the court that—

"The difference between the market value of the hogs on the day plaintiff could have put them on the market if the defendant had been guilty of no negligence in the delivery of the dispatch, and the market price when plaintiff was afterward able to put his hogs into the market, * * * is the measure of damages which may fairly be supposed to have entered into the contemplation of the parties at the time the message was delivered to defendant's operator at Chicago."

In True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156, the plaintiff, in replying to an offer of a cargo of corn, sent this message: "Ship cargo named at ninety, if you can secure freight at ten." The message was not delivered. The price of corn and freight advanced immediately after, and the plaintiff was obliged to buy at the advanced rate. The court held that—

"The sum * * * which would be compensation for the direct loss and injury sustained by the nondelivery of this message is the difference (if at a higher rate) between the 90 cents named and the sum which the plaintiffs were or would have been compelled to pay at the same place, in order, by due and reasonable diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of the same species of merchandise."

In Leonard v. New York, etc., Tel. Co., 41 N. Y. 544, 1 Am. St. Rep. 446, the plaintiffs' agents at Chicago sent to the plaintiffs at Oswego this message: "Send five thousand sacks of salt immediately." The company delivered the message reading "casks" in-

stead "sacks." The plaintiffs shipped the casks, but there being no market for that kind of salt in Chicago at the time, it sold for less there than it was selling for at Oswego. It was held that the measure of damages was the difference between the market value at Oswego and at Chicago, together with the transportation from Oswego to Chicago.

In United States Tel. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751, in relation to the purchase of stocks, the difference between the agreed price and the market value was held to be the measure of the damage.

In Washington, etc., Tel. Co. v. Hobson, 15 Grat. (Va.) 122, the message was in relation to the purchase of 500 bales of cotton. The message as delivered read 2,500 bales. The damage was held to be the loss sustained on the resale of the excess above that ordered.

We have found no authority holding that, in a case like this, a recovery may be had for speculative profits that might have been enjoyed in the future if it had not been for the negligence of the telegraph company. The cases cited by respondent, as far as they relate to this point, do not support his contention.

In Union Const. Co. v. Western Tel. Co., 163 Cal. 298, 125 Pac. 242, we find a painstaking and exhaustive consideration of various questions relating to the negligence of the telegraph company, including the contention of the defendant that the plaintiff had sustained no damage by reason of its failure to deliver a certain message in reference to a contract for the doing of certain work at a stated price. The Supreme Court properly held that the plaintiff was entitled to recover the difference between what it would have had to pay under said contract and what it was compelled to pay under the best contract it could secure.

In Parks v. Alta California Telegraph Co., 13 Cal. 423, 73 Am. Dec. 589, by reason of the negligence of the telegraph company in transmitting a message, plaintiff was prevented from levying an attachment to secure his claim until other creditors obtained the first attachment and exhausted the assets of the debtor. The actual damage was manifestly the amount of the plaintiff's claim, and the court held that he was entitled to recover this amount.

In Kerns & Larton v. Western Union Telegraph Co., 170 Mo. App. 642, 157 S. W. 106, by reason of defendant's delay in delivering a telegram a carload of peaches did not reach their destination in time for the morning market and plaintiff was compelled to sell them at a discount. It was properly held that the measure of damage was the difference between the selling price and what they could have been sold for if they had arrived in time.

Kerns & Larton v. Western Union Telegraph Co., 174 Mo. App. 435, 160 S. W. 556, had to do with delay in delivering a telegram for the purchase of potatoes, and the rule of damages was declared to be "the difference between the price that the sender * * * agreed to pay therefor and the sum which he would have been compelled to pay at the same place, in order, by due diligence, to have purchased * * * like quantity and quality of * * * merchandise."

In Levy Bros. v. Western Union Telegraph Co., 39 Okl. 416, 135 Pac. 423, a mistake was made in transmitting a message from the owner of real estate to certain real estate agents, whereby they were misled as to the payment of a commission, and after selling the property it was justly held that they were entitled to recover from the company the value of their services up to the time they discovered the mistake.

In Thompson v. Western Union Tel. Co., 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644, plaintiff lost the sale of a horse by reason of delay in the transmission of a message, and it was held that he was entitled to recover his actual loss, the sum of $25.

The main question involved in the Cooper Case, supra, was whether "injury to feelings disconnected from all actual personal injury are exemplary damages," and it was held that they constituted an element of the actual damage and might properly be considered in determining the amount to be awarded, if the negligence of the telegraph company were the proximate cause of such injury.

It is due counsel to say that the foregoing cases are cited in support of the general scheme of plaintiff's complaint, and for that purpose they are not without value, but we have examined them to see if therein is anything inconsistent with indorsement of the measure of damages which we have declared as applicable to a case like this. Upon that point there seems to be no conflict, and we take it that the general rule as before indicated is well established.

If it can be said that, under peculiar circumstances, a plaintiff who has been prevented by the negligence of a telegraph company from purchasing stock may recover as damages the profit which he might reasonably expect to derive in the future by reason of increasing their value through his own efforts, manifestly there should be allegation and proof of such peculiar circumstances. Acheson v. Western Union Tel. Co., 96 Cal. 641, 31 Pac. 583. To contend with any plausibility that such theory is applicable here it would be necessary at least to show that plaintiff could not obtain said or similar cattle by the exercise of reasonable diligence. No negligence on the part of appel-

lant would absolve respondent from the duty to exercise ordinary care to avoid injury.

No such showing was made, and there is no room for the contention that he was entitled to the peculiar profits that he might have derived from pasturing and taking care of said stock.

[2] The only substantial evidence of the market value of similar stock at Porterville at the time of the proposed purchase is found in the testimony of McLemore, as follows:

"Q. What was the actual market value of this band of cattle spoken of by you which you agreed to sell to Mr. Cornell for $5,000? A. They were not beef cattle. There was really no sale for them at that time.

"Q. Well, they had a value, a market value? A. Yes.

"Q. At Porterville, did they? A. Yes; I should judge they were worth between $25 and $30 a head just then."

Such testimony is too indefinite upon which to base a finding. But upon the basis of the larger figure the profit would be only $2 a head, or $340 instead of $534 as found by the court.

It is true that plaintiff testified as to the value of the cattle, but it is apparent from the record that he had in view not the market but the peculiar value to him in view of prospective profits from pasturing the cattle. In fact he had never seen the cattle, and it does not appear that he was familiar with their market value. The question that he answered, over objection, was:

"Now if those cattle had been delivered and if they were of the kind which McLemore represented them to you to be, what would have been their value at that time at Porterville after delivery to you?"

His answer was between $8,000 and $9,000. It is also apparent from the findings that the trial court based the conclusion as to the amount of damages upon the probable profits to be derived from pasturing the stock.

[3] Moreover, plaintiff did not show that he could not have purchased the stock from McLemore after the telegram was delivered. It is true that he and McLemore contemplated that the sale should take place within four or five days after their conversation at Fresno. This would be before the telegram was delivered, but there seems to have been no definite agreement as to the time within which the option should continue. Indeed, the most reasonable view is that the purchase could have been made after the message was received. He testified:

"Mr. McLemore said if the San Francisco Cattle Loan Company approved my application that he would ship me the heifers immediately, that he was holding them without feed, and he wanted to get rid of them."

It appears that the cattle were not sold by McLemore until some 60 days thereafter, and there is no evidence that he was not willing to sell to plaintiff at the same price after the latter had the chance to secure the money. At any rate, before he could hold defendant for his loss in not taking advantage of the opportunity to purchase the cattle he must show that the opportunity was not still open.

Some other questions are discussed, but they will probably not arise again, and for that reason we forego specific consideration of them.

For the reason stated, we think the judgment must be reversed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

53 Cal. App. 229

Ex parte VOLPI. (Cr. 567.)

(District Court of Appeal, Third District, California. June 17, 1921.)

1. Intoxicating liquors ⟸17—Penal ordinance of city not void as violative of Eighteenth Amendment.

A penal ordinance of the city of Stockton, denouncing the offense of selling intoxicating liquors containing more than one-half of 1 per cent. alcohol by volume, is not void as violative of Fed. Const. Amend. 18.

2. Intoxicating liquors ⟸132 — Volstead Act not intended to nullify penal ordinance of city.

The Volstead Act, enforcing on the part of Congress the Eighteenth Amendment to the federal Constitution, prohibiting the manufacture or the sale of intoxicants, was not intended to nullify a penal ordinance of the city of Stockton, denouncing the offense of selling intoxicating liquors containing more than one-half of 1 per cent. alcohol by volume.

3. Intoxicating liquors ⟸132 — Fact local statute or city ordinance is more exacting than Volstead Act does not constitute conflict.

The fact that a state statute or city ordinance relative to intoxicating liquors is more exacting than the Volstead Enforcement Act, or that the penalty imposed is more or less severe, does not constitute a conflict between the Volstead Act and the local statute or ordinance.

4. Intoxicating liquors ⟸17 — Express purpose of city ordinance to enforce Eighteenth Amendment cannot affect validity.

The fact that an ordinance of the city of Stockton relative to intoxicating liquors expresses the purpose to exercise the power granted by the Eighteenth Amendment of the federal Constitution cannot affect the validity of the ordinance under the California Constitution (article 11, § 11), empowering the city to prohibit traffic in intoxicating liquors; the expression of purpose being treated as surplusage.

Application for writ of habeas corpus by Cæsari Volpi against the Chief of Police of the City of Stockton to secure petitioner's release from custody after conviction of violation of a prohibition ordinance. Writ discharged.

Tye & Edwards and Walter F. Lynch, all of Stockton, for petitioner.

J. W. Hannan and M. P. Shaughnessy, both of Stockton, for respondent.

FINCH, P. J. Petitioner was convicted under an ordinance of the city of Stockton of selling intoxicating liquor containing more than one-half of 1 per cent. by volume of alcohol, and sentenced to pay a fine of $150, with the alternative of imprisonment in the county jail. Failing to pay the fine, he was imprisoned, and now seeks release by habeas corpus on the following grounds: (1) That "no power is conferred upon municipalities to enact legislation for the enforcement of the Eighteenth Amendment, and any penal ordinance by municipalities upon the subject of prohibition or its enforcement is void and in violation of said section of the Constitution; (2) that the ordinance is void, in that it conflicts with the Volstead Act."

The text of the Eighteenth Amendment is as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes, is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

In Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946, the Supreme Court, having under consideration the Eighteenth Amendment and the Volstead Act (41 Stat. 305), among other conclusions, announced that—

The first section of the Eighteenth Amendment "of its own force invalidates every legislative act—whether by Congress, by a state Legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits"; that the second section of the amendment "does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means"; that "the words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them, nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs"; that "the power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, * * * and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

Since the adoption of the Eighteenth Amendment a number of state and federal courts have had occasion to pass upon questions similar to those here presented. In all of those cases convictions were upheld, whether prosecuted under state laws or municipal ordinances. In Commonwealth v. Nickerson, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568, the defendant was convicted under a state law enacted prior to the adoption of the Eighteenth Amendment. The court said that—

"Legislation by the states need not be identical with that of Congress. It cannot authorize that which is forbidden by Congress. But the states need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable also that a state may forbid under penalty acts not prohibited by the act of Congress. * * * State statutes, rationally adapted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverages contained in section 1 of the amendment by different definitions, regulations, and penalties from those contained in the Volstead Act, * * * but in harmony therewith, are valid. Existing laws of that character are not suspended or superseded by the act of Congress."

In State v. District Court (Mont.) 194 Pac. 310, it was held that the adoption of the Eighteenth Amendment did not render inoperative the state prohibition law enacted prior thereto. The court said:

"In adopting the amendment, the states did not deprive themselves of the power to make laws for their internal government upon the subject of intoxicating liquors. * * * So long as legislation of a state actually seeks to enforce, by appropriate legislation, under the second section of the amendment, what is prohibited by the first, no valid objection can be made, even though the state law may differ from that of Congress. The authority of the states is not to enforce the acts of Congress, but to enforce the amendment itself."

In State v. Turner (Wash.) 196 Pac. 638, it was held that the Eighteenth Amendment and the Volstead Act do not supersede the state law upon the same subject. To the same effect is the case of U. S. v. Holt (D. C.) 270 Fed. 639. In Jones v. Hicks (Ga.) 104 S. E. 771, 11 A. L. R. 1315, it was held that—

The Eighteenth Amendment and legislation thereunder by Congress "does not impair the integrity of any existing state statute to enforce prohibition, nor can it interfere with the enactment of any future legislation by the states for that purpose."

In the case of Gilmore (Tex. Cr. App.) 228 S. W. 199, it is said that—

"The impotence of the state, in view of the federal law, to render lawful the manufacture, sale, or transportation of a beverage containing more than one-half of 1 per cent. of alcohol does not imply that the state, in the exercise of its judgment, could not elect to punish persons who dealt in intoxicants containing 1 per cent. or more of alcohol. Its refusal to punish where the percentage of alcohol was less than 1 per cent. would not obstruct or impede the right of the federal government to do so under its own law. * * * The framers of the amendment, having selected language specifically conferring upon the states concurrent power to enforce the prohibition by 'appropriate legislation,' in our opinion did not intend that the state's legislation should be identical with that of Congress. * * * Should an irreconcilable conflict develop, no doubt the provisions of the federal Constitution, making that document and the laws of Congress paramount, would prevail. But neither Congress nor the state being able to thwart the prohibition, but being empowered to enforce it, the development of such a conflict would appear remote, if not impossible. The difference in the penalty prescribed by Congress and the state would not condemn the state law as unconstitutional."

Petitioner relies upon the case of U. S. v. Peterson (D. C.) 268 Fed. 864. In that case it was held that—

"The concurrent power given to the state does not, however, authorize the state to delegate that power to municipalities. It is a power which must be exercised by the state itself."

In a later decision by the same judge, Woods v. City of Seattle (D. C.) 270 Fed. 315, involving the validity of a city ordinance prohibiting sales of intoxicating liquors which the Volstead Act and the regulations made pursuant thereto permitted, it is said:

"The plaintiff asserts that article 18, supra, and the National Prohibition Act, grant him a right to do except that which is prohibited, and that this right overrides all police power of the state with relation to intoxicants. In this the plaintiff is in error. Instead of granting a right, the amendment and the Volstead Acts are limitations upon privilege. * * * The police power of the state, therefore, is paramount where it does not authorize what the National Act prohibits, and through its inherent reserve power it has the right to legislate in such manner. The state may prohibit, but it may not authorize. The state, having this power by article 11, § 11, of the state Constitution, has granted to the defendant city police power, with a limitation that ordinances shall not be enacted in contravention of state statute. * * *

"In United States v. Peterson, supra, it was said: 'The concurrent power given to the state does not, however, authorize the state to delegate that power to municipalities. It is a power which must be exercised by the state itself.'

"Concurrent power is not an issue here. The prohibiting by national legislation of traffic in liquor with more than one-half of one per centum of alcohol by volume does not prevent the state, or the city within the granted police power, to decide upon measures that are needful for the protection of its people by prohibiting possession or delivery of intoxicants fit for beverage purposes, under the guise of innocent preparations not within the National Prohibition Act."

In Ex parte Crookshank (D. C.) 269 Fed. 980, the validity of an ordinance of the city of Bakersfield was assailed on grounds similar to those urged here. It was there contended that a municipality is without power to enact or enforce legislation in restraint of the liquor traffic, under the Eighteenth Amendment or otherwise, until the state has, by appropriate enforcement legislation, enacted subsequently to the ratification of the amendment, actually authorized such municipality so to do. In upholding the ordinance the court said:

"It may not, I think, be maintained with success that in the adoption and ratification of the Eighteenth Amendment the several states were surrendering any of the powers theretofore possessed by them, respecting their own jurisdiction to prescribe effective prohibition of that traffic. In all that was done, they were simply conferring upon the federal government the like power to prohibit, which theretofore, in virtue of its organization and the character of the powers reserved to the states, it had not possessed. * * * The state of California, as a sovereign state of the Union, by its Constitution (section 11, art. 11) has heretofore conferred upon 'any county, city, town, or township' the authority to 'make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.' * * * If the state of California is in receipt of any 'new' power, in virtue of the terms of section 2 of the Eighteenth Amendment, such power, it would seem, has already been appropriately conferred upon the city of Bakersfield."

[1] It is seen that the contentions of the petitioner find no support in the decisions relative to the national amendment.

The police power is inherent in the state, and is one of the necessary attributes of its sovereignty. It is not a grant from the federal government, but is reserved exclusively to the states, except as expressly surrendered by them in the manner provided by the National Constitution. No one subject has required the more constant exercise of that power than the traffic in intoxicating liquors. In the adoption of the Eighteenth Amendment there is no apparent intent to surrender this important power to the general government. By that amendment the federal government is authorized to exercise police powers theretofore exclusively within the province of the states to the extent of enforcing the provisions of the amendment. No power is given Congress to authorize the sale of intoxicating liquors, but on the contrary such

authorization is expressly forbidden, both to Congress and the states. Some confusion apparently exists as to the source of the present power of the states to prohibit the traffic in intoxicants, one point of view being that it is derived solely from the second section of the Eighteenth Amendment, the other that it is an inherent power which the states have never surrendered. The latter view seems the more logical, with the qualification that the second section may confer upon the states authority relative to the importation and exportation of intoxicating liquors not theretofore possessed by them. Should the federal government and a state differently define the term "intoxicating liquors," it appears that both enactments would be equally binding upon the people of the state, the one enforceable exclusively through the federal courts, the other through the courts of the state.

[2, 3] If it be conceded that Congress is empowered to nullify a state law on the subject, still it does not appear that the Volstead Act was intended to have that effect.

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has often been reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two could not be reconciled or consistently stand together.' Sinnot v. Davenport, 22 How. 227, 243 [16 L. Ed. 243, 247]." Reid v. Colorado, 187 U. S. 148, 23 Sup. Ct. 96, 47 L. Ed. 114.

The fact that the statute or ordinance of the lesser jurisdiction is more exacting, or that the penalty imposed is more or less severe, than that of the greater, does not constitute a conflict. If prosecuted under the one, a defendant is entitled to the protection which that law affords him; if under the other, his rights are governed by its provisions. In re Hoffman, 155 Cal. 114, 99 Pac. 517, 132 Am. St. Rep. 75.

[4] Section 26 of the ordinance provides, among other things, that—

"The council of the city of Stockton hereby declares that this ordinance shall be deemed to be an exercise of the power granted by the Eighteenth Amendment to the Constitution of the United States, and of the police power of the city of Stockton," etc.

Section 2 of the Eighteenth Amendment authorized the states to enforce the amendment by appropriate legislation. As said in the Crookshank Case, supra, by the provisions of article 11, § 11, of the state Constitution, the state of California has already appropriately conferred upon municipalities the power to enforce the amendment. However, if the city of Stockton is not authorized to enforce the amendment, it is by the state Constitution empowered to prohibit traffic in intoxicating liquors in the exercise of its police power. Though the expressed purpose is to enforce the provisions of the Eighteenth Amendment, that expression is not a necessary part of the ordinance, and can in no wise affect its validity. No objection is made that the ordinance, independent of the purpose expressed, is not complete in itself. Under such circumstances, the expression of purpose may be treated as surplusage. State v. Brothers, 144 Minn. 337, 175 N. W. 685.

We are not here concerned with the question whether a conviction or an acquittal under the provisions of the municipal ordinance could be pleaded in bar of a prosecution under the Volstead Act in the federal courts for the same act. In U. S. v. Peterson (D. C.) 268 Fed. 864, cited by counsel for petitioner, it was held that such a conviction would not constitute a bar. It clearly appearing that the adoption of the ordinance was within the police power of the city, its validity is not dependent upon the possibility or impossibility of a second prosecution for an act in violation thereof.

The writ is discharged and the petitioner is remanded.

We concur: HART, J.; BURNETT, J.

53 Cal. App. 138

COLLEGE OF OSTEOPATHIC PHYSICIANS AND SURGEONS OF LOS ANGELES v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA. (Civ. 3523.)

(District Court of Appeal, Second District, Division 1, California. June 9, 1921. Hearing Denied by Supreme Court Aug. 8, 1921.)

1. Physicians and surgeons ⇐3—In an action to compel the Board of Medical Examiners to approve a medical school, evidence as to the course of instruction is admissible.

In an action by a school under Medical Practice Act, § 10½, to compel the Board of Medical Examiners to approve the school so that its students, who had pursued a course of instruction therein, might be examined, evidence as to the quality of the course of instruction is admissible as bearing on the question of whether the school had complied with the requirements of section 10, and the exclusion would be reversible error, for section 10½ allows the Board of Examiners to consider the quality of the course of instruction.

2. Appeal and error ⇐1122(2) — Appellate courts cannot make findings of fact.

Appellate courts cannot make findings of fact, but they can only be made by the trial

court; therefore, where the trial court, though it received material evidence, stated that it would not consider the same, but would only leave it in the record for the appellate court, such action was reversible error, for the defense could not be considered by the appellate court on the facts found with reference thereto.

3. Physicians and surgeons ⊜3—Trial court held to have received evidence as to quality of instruction.

In an action by a medical school to compel the Board of Examiners to approve it, *held*, in view of the circumstances at the trial, and notwithstanding a previous statement by the trial court that it would not consider the same, evidence as to the quality of the course of instruction must be considered as having been received and weighed by the trial court.

4. Appeal and error ⊜1011(1)—Finding on conflicting evidence is conclusive.

A finding by the trial court on conflicting evidence is conclusive on appeal.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the College of Osteopathic Physicians and Surgeons of Los Angeles, a corporation, against the Board of Medical Examiners of the State of California to compel the approval of plaintiff as a medical school. From a judgment for plaintiff, defendant appeals. Affirmed.

Harry A. Encell, of San Francisco, and Frank M. Smith and Charles D. Ballard, both of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondent.

CONREY, P. J. Section 10 of the State Medical Practice Act, as amended by Stats. 1917, p. 99, provides that applicants for a physician and surgeon certificate, as defined in that act, shall file satisfactory evidence of having pursued, in any legally chartered school or schools approved by the Board of Medical Examiners, a course of instruction covering and including certain prescribed minimum requirements. Section 10½ (Stats. 1919, p. 1299) provides:

"*Board Must Approve Schools Meeting Requirements.—Action in Event of Disapproval.*—The Board must approve every school which shall comply with the requirements of section ten of this act and must admit to the examination every applicant who shall comply with the requirements of sections nine and ten of this act. Nothing in this act shall prohibit the Board from considering the quality of the course of instruction outlined in section ten hereof. If any school should be disapproved by the Board or any applicant for examination rejected by it, then such school so disapproved or such applicant so rejected may commence an action in the superior court against said Board to compel the Board to approve such school or to admit such applicant to examination or for any other appropriate relief. In any such action the court shall have full power to investigate and decide all facts anew without regard to any previous determination of the board thereon. * * *"

This is an action brought in accordance with section 10½ to compel the Board of Medical Examiners to approve the plaintiff as a school whose graudates are entitled to examination before the Board for physician and surgeon certificates, and to admit the graduates thereof to examination for those certificates. Judgment was entered in favor of the plaintiff. Defendant appeals from that judgment.

For more than four years prior to October, 1919, the students graduated by the plaintiff were regularly admitted by the defendant to examinations for physician and surgeon certificates. On the 27th day of October, 1919, the Board of Medical Examiners disapproved the college of plaintiff as an institution qualifying applicants for examination for such certificates. A few days later this action was commenced in the superior court. At the trial evidence was introduced tending to prove, and it was found by the court, that said college at all times complied with the provisions of section 10 of the State Medical Practice Act.

[1] The principal claim of error asserted by appellant is based upon the contention that the court refused to consider the quality of the course of instruction given by the plaintiff to its students, and rejected the evidence offered by appellant for the purpose of showing defects in the equipment and methods of instruction of respondent's school. We agree that appellant was entitled to introduce that evidence as a part of the evidence by which the court would determine whether or not respondent was complying with the requirements of section 10. Section 10½ does not state the purpose for which evidence of the quality of the course of instruction shall be considered, but that purpose is plain enough without direct definition. It can be nothing less than that the facts relating to the quality of such course of instruction may be considered for the purpose of determining whether or not the college applying for recognition is actually and in good faith a college giving instruction upon the subjects defined in section 10, and complying with the minimum requirements thereof. Since it is provided by section 10½ that in any such action as the present "the court shall have full power to investigate and decide all facts anew without regard to any previous determination of the Board thereon," it follows that the court should receive and consider the evidence of such facts in like manner and for the same purpose as the Board of Medical Examiners is permitted to receive and consider evidence of the same

character. Therefore we are of the opinion that, if the court did reject the offered evidence, such rejection constituted error which would require a reversal of the judgment.

[2] But the evidence was not rejected. When appellant proposed to present the testimony of certain witnesses relating to the adequacy of the facilities of the college and the quality of the instruction it was able to give under existing conditions, the court suggested that for the purposes of a record on appeal—

"we might permit you to place in the record all your evidence that you have prepared, with the understanding that this court has disregarded it and considered it as rejected; but, if the higher appellate reviewing court should conclude that that rejection was error, you might have your case in a position to get a final decision from them, including the consideration of the rejected testimony. * * * For that purpose alone I will overrule the objection and permit you to put on the testimony which you have prepared; subsequently grant a motion to strike it out in such a way that it may be available to a reviewing court, in case they hold it is material. Counsel for Appellant: With that understanding, then, we will offer the testimony. The Court: With that understanding you may go ahead and take the evidence. Counsel for Appellant: At this point the objection is overruled, is it? The Court: Only in the manner I have indicated. I think that my statement makes it very clear what the ruling is."

If the court had subsequently adhered to its decision as above stated, we think the effect would have been that, although the evidence was introduced in form, it was rejected in fact. The court was in error in its assumption that this would have enabled a higher court to act upon the evidence if it found that the evidence had been erroneously rejected. Findings of fact are made only by the trial court. Under our practice the Courts of Appeal are not authorized to make or change findings of fact.

[3, 4] But the matter does not end there. After the defendant had rested, and after the plaintiff had introduced evidence in rebuttal, counsel for appellant inquired concerning the court's ruling "in respect to section 10½." The court replied:

"I am afraid, if it takes the course of a formal order of removing it by striking it out, it will preclude any reviewing court from considering it at all. The safer plan is to overrule the objection, and deny the motion to strike out and leave it in the record, together with the evidence, if there be by counsel considered any in rebuttal, and let the reviewing court consider whether or not there was error in the admission of it rather than error in the rejection. It amounts to very little one way or the other, having heard it now. The testimony has not taken the lines that I rather anticipated it would when the ruling was first made, and such evidence as has been introduced perhaps had better be allowed to remain, especially in view of the fact that the complaint and the answer will necessitate findings which will cover the points involved just as absolutely as any order made to strike out or to refuse to strike out that evidence would cover. What I want to accomplish, if possible, is to get your matter finally determined on one review rather than on some side issue such as striking out a bit of evidence."

It thus appears that the court, contrary to its first intention, refused to strike out the evidence in question; and the evidence, having been thus accepted, comes to us as a part of the evidence received and considered by the court in making its findings of fact. We hold that the evidence was properly received, since the rejection thereof would have been erroneous. Since the evidence is conflicting, and the court has made a finding that respondent at all times complied with the provisions of section 10 of the State Medical Practice Act, we are bound by that decision.

The judgment is affirmed.

We concur: SHAW, J; JAMES, J.

52 Cal. App. 737

WHITE v. GREENWOOD et al. (Civ. 3377.)

(District Court of Appeal, Second District, Division 2, California. May 24, 1921.)

1. Exchange of property ⟸8(4) — Evidence held insufficient to show mistake in contract as to property included therein.

A contract provided for the exchange of plaintiff's fruit land and enumerated personal property "situated upon" such land, including "all trays and boxes," for certain lands owned by defendant. At the execution of the contract a portion of the fruit trays belonging to plaintiff were not on his land, having been loaned to a neighbor. Plaintiff denied that it was his understanding that the loaned trays went with the property, though the evidence showed that defendant, as a part of the transaction, assumed payment of a chattel mortgage on all trays owned by plaintiff. *Held*, on the evidence, that the trays which were not on the land did not pass to defendant under Civ. Code, § 3399, providing for relief in case of a mutual mistake of the parties or a mistake of the one party which the other knew or suspected.

2. Evidence ⟸433(6)—Parties to exchange of lands and personalty may show negotiations on issue of mistake.

Where a contract for exchange of lands and personal property covered eight pages of typewritten matter and indicated that the negotiations leading to its culmination were very long, and a dispute arose as to the personal property intended to be included, the parties were entitled to go fully into the negotiations to aid

the court in determining whether there was a mistake in setting forth the terms, and whether it was intended to include personal property not situated on the land at the time of the exchange.

3. Appeal and error ⇐1011(1)—A conflict of evidence precluding disturbance of judgment must be a substantial conflict.

While a finding will not be disturbed on appeal if there is a substantial conflict in the evidence from which it springs, the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion.

4. Contracts ⇐147(1)—Enforcement according to intent held improper without reformation.

A contract which does not express the intention of the parties cannot be enforced according to the claimed intention without first reforming it to make it express such intention.

5. Set-off and counterclaim ⇐29(3)—In action for conversion, a claim for excessive interest paid held not proper counterclaim.

Where plaintiff and defendant exchanged lands and certain personal property thereon, and plaintiff sued defendant for the conversion of items of personal property which plaintiff claimed were not included in the contract of exchange, a counterclaim by defendant based on the fact that he was compelled to pay past-due interest on a mortgage assumed by him as a part of the exchange contract did not arise out of the transaction involved in the suit within Code Civ. Proc. § 438, providing that a counterclaim must arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action.

6. Set-off and counterclaim ⇐34(1)—In action for conversion counterclaim based on contract is bad.

Where plaintiff and defendant exchanged lands and certain personal property situated on such lands, and plaintiff sued defendant for conversion of items of personal property which plaintiff claimed was not included in the contract, a counterclaim by defendant to recover past-due interest on a loan assumed by him as a part of the transaction did not come within Code Civ. Proc. § 438, on the ground that it was a cause of action arising upon contract and existing at the time of filing the complaint, and that the complaint was also upon an action arising on contract, since the action was one based on tort, while the counterclaim was based on contract.

Appeal from Superior Court, Kings County; H. Z. Austin, Judge.

Action by S. J. White against B. S. Greenwood and another. Judgment for defendants both on complaint and counterclaim, and plaintiff appeals. Reversed and remanded.

W. R. McQuiddy, of Hanford, for appellant.

Harris & Hayhurst, of Fresno, and John G. Covert, of Hanford, for respondents.

WORKS, J. This is an action for the conversion of 2,000 fruit trays, in which the defendants presented a counterclaim for one hundred dollars. The defendants had judgment that plaintiff take nothing, and also judgment as prayed for under the counterclaim. The plaintiff appeals.

Appellant was the owner of real property in Kings county and respondents owned real property in Fresno county. They entered into a written agreement for the exchange of their respective holdings, as well as for the exchange of certain personal property. We set forth the portion of the instrument which is of present interest, our italics showing the particular language bearing upon the question we are to determine:

"The following described personal property *now situated upon said real property in Kings county is to go* with said property in this transfer and to be considered a part of the same, to wit: Four (4) mules and harness for the same; one spraying outfit and its truck; *all trays and boxes;* two (2) sows; one (1) cow; one section harrow; one rotary harrow; two 12-inch plows; one 10-inch plow; one small gang plow; one four-horse wagon; capitol wagon; one vineyard truck; all tree props and hooks; all hay in barns; all panels and woven wire fences now on the ranch; also one light buggy, yellow gear."

At the time of the exchange of properties between the parties appellant was the owner of 2,000 fruit trays which had been formerly used on the "said real property in Kings county," but they were then on a certain ranch which was the property of one Marlow, who had rented or borrowed them from appellant. After the exchange respondents took possession of these trays, claiming title to them under the agreement for exchange. Appellant then commenced this action for the conversion of the 2,000 trays.

In their amended answer respondents allege, "as a counterclaim," that at the time the agreement for exchange was executed the parties intended that all the trays which had been used in connection with the Kings county place, including the 2,000, were to be sold and delivered to respondents, but by mistake of the parties the trays were described as those then on the premises, and that appellant at the time well knew that respondents understood that the 2,000 trays were included in the exchange. In their briefs the parties treat this allegation as if it were interposed as a defense to the complaint, instead of being put forth merely as matter in support of the counterclaim, and we shall likewise so consider it. The trial court found with respondents on the issue of mistake, and appellant insists that the finding is not supported by the evidence.

[1] Appellant testified at the trial on cross-examination by respondents' counsel, that the

2,000 trays had not been sold to respondents, and that he (appellant) had not understood that they were included in the trade. The testimony of respondent B. S. Greenwood was that at the time the exchange was negotiated he asked appellant how many trays he had, and the answer was, "seventeen thousand." The witness then remarked:

"That was really all that was said regarding the trays until we drew the contract."

The examination then proceeded:

"Q. Well, how many trays did you actually find on the place, including these 2,000? A. Around 15,000."

And, after the witness had stated his "understanding" at the time the contract was made, ruled out as a conclusion, this transpired:

"Q. What do you mean by your understanding? Where did you get your understanding? A. All I got was from what Mr. White said in regard to the number. * * * Q. I will ask you * * * if Mr. White ever at any time mentioned the fact that he had rented these trays out to a neighbor and they were not right at that time on his ranch? A. No, sir. * * * Q. How many trays were actually on the ranch when you went on it? A. About 13,000. Q. These 2,000 would make 15,000. A. About 15,000; I never counted them exactly, but I would simply judge by what I had rented out and the counts that were made by the parties who hauled them away, after I went on the ranch."

A circumstance which respondent points to as aiding to support the finding that there was a mistake is this: At the time of the exchange of properties a certain third person held a mortgage on the trays, both those on appellant's Kings county ranch and the 2,000 on the Marlow place. Under the agreement for exchange respondents assumed and agreed to pay this obligation, and they afterward did pay it. Respondents also contend that the 2,000 trays were a necessary part of the equipment of appellant's ranch, and that they went with the land in the exchange for that reason; and appellant did testify that he "had to use them in connection with" the place.

We can see no evidence in the record supporting the finding of mistake. The testimony which we have quoted tends to show neither "a mutual mistake of the parties" nor "a mistake of one party, which the other at the time knew or suspected." Civ. Code, § 3399. In considering the fact that respondents agreed to pay the outstanding mortgage on the trays including the 2,000, we need only refer to the language of the court (White v. Greenwood, 40 Cal. App. 113, 180 Pac. 45) in disposing of the cause on a former appeal:

"It cannot be said that merely because one, as part of the consideration of a purchase, assumes and agrees to pay a mortgage on personal property, he is entitled to the property."

[2] The contention of respondents that the 2,000 trays were a part of the exchange because they were a necessary part of the equipment of appellant's property deserves a more particular mention. It may be that the parties intended that the entire equipment of the ranch should be included in the exchange, but the evidence does not show that fact. If it did, the situation might be different. The portions of the record referred to in the briefs as bearing upon the question of mistake are very meager. Considering that fact and considering that this is the second appeal of the cause, we have not been content with relying upon counsels' references to parts of the record, but have read it in full with great care. The references in the briefs to the testimony upon the question of mistake are meager, because the testimony on the subject is scant, is almost negligible. The exchange contracted for between the parties was an important one. The real properties involved were of considerable value. On both sides they were subject to various incumbrances. The agreement is long, comprising over eight pages in the typewritten record, and it was evidently prepared with care. In short, the nature of the transaction was such that, of necessity, the parties must have gone through an extended negotiation in order to bring it to a culmination. On the trial they were entitled to go fully into the negotiations in order to aid the trial court in determining whether there was a mistake in the matter of the trays. It is unfortunate that they did not do so, whatever the result may have been.

We have gone over the entire agreement for exchange in an endeavor to ascertain the true state of affairs, but, with the exception of a single clause which we shall mention below, the instrument throughout seems to evince an intent to carry into the exchange only the personal properties actually on the appellant's ranch, as well as on a ranch of respondents which figured in the exchange. The agreement first described the ranch owned by appellant. Following that, it described the properties of respondents, lying in two parcels. It then provides that the parties "agree to exchange their respective properties with each other upon the following terms and conditions." The reference to their "respective properties" plainly contemplates the realty, as personalty has not yet been mentioned; the consequence being that the exchange of the personal property was but an incident to the transfers of the real property. The instrument then recites that the "property together with the personal property thereon, as hereinafter enumer-

ated," and belonging to appellant was of a certain value. Then follows a listing of the various incumbrances on both sides and provisions for their disposition and for the giving of new mortgages. Next comes the paragraph set forth in the early part of this opinion, followed by several other paragraphs on various subjects. At the close of the agreement is a paragraph to the effect that "the following is a description of the personal property situated upon said forty acres in Fresno County, agreed to be conveyed by" respondents "and which goes with said property and is to be considered a part, to wit: One mower; one cultivator." This last provision is of considerable significance, for it is not to be supposed that these two implements were the entire personal property equipment of the 40 acres.

We have above mentioned a single clause in the agreement which is favorable to the contention of respondents. It is recited that the mortgage on the trays, which respondents assumed and agreed to pay, was "on the trays on said premises," meaning the Kings county ranch of appellant, although, as already noted, it actually covered the 2,000 trays on the Marlow place. This single recital cannot avail respondents. It is of no weight whatever when placed beside the plain and positive provisions of the agreement to the effect that the personalty exchanged was at the time of the execution of the instrument actually situated upon the ranch.

[3] While a finding will not be disturbed on appeal if there is a substantial conflict in the evidence from which it springs, "the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion." Field v. Shorb, 99 Cal. 661, 34 Pac. 504; Felsenthal v. Warring, 40 Cal. App. 119, 180 Pac. 67. The matter we are now discussing comes within this rule.

We are convinced, on the whole, that the record fails to show a mistake. The finding of the trial court on that issue is without support in the evidence.

[4] As the cause must be remanded, it is proper now to notice a state of the record which is not mentioned in the briefs and which will affect the conduct of the cause on a retrial, if a retrial is to be had. Laying aside the point that the allegation of mistake in the amended answer is apparently made in support of the counterclaim only, a circumstance which we have already pointed out, it is to be noted that the pleading contains no prayer for a reformation of the agreement for exchange because of the alleged mistake. If we overlook that circumstance and concede that relief which is not prayed for in a pleading may be granted if the facts alleged will warrant, we are to note that here there is no judgment for reformation. "A contract which does not express the intention of the parties cannot be enforced according to their intention without first reforming it to make it express such intention." De Witt v. Duncan, 46 Cal. 342; Third Street Imp. Co. v. McLelland, 23 Cal. App. 369, 137 Pac. 1089. This circumstance alone necessitates a reversal, but we have thought it best first to pass upon the sufficiency of the evidence upon the question of mistake, as much that we have said on that subject will be useful on a retrial, and further because the point we now present was not raised by counsel.

[5, 6] We now consider the judgment rendered in favor of respondents upon their counterclaim. The agreement for exchange of properties required respondents to pay a certain mortgage outstanding against appellant's property and interest falling due thereon after a particular date, appellant to pay interest due before that date. Respondents' counterclaim is based upon the alleged payment of $100 as and for interest accrued prior to the date mentioned and seeks from appellant a reimbursement in the amount named.

Under Code of Civil Procedure, § 438, a counterclaim may be filed only: First upon a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; second, on a cause of action arising upon the contract and existing at the time of filing the complaint, where the complaint is also upon an action arising on contract. The alleged counterclaim of respondents is not within either of these classes. It does not come within the first, because the transaction upon which the action is based is the conversion of the fruit trays, and either the trays themselves or the facts constituting appellant's cause of action for their recovery are the subject of the action. 34 Cyc. 688. The counterclaim does not arise out of that transaction, nor is it connected with that subject of action. It does not come within the second, because the action of conversion sounds in tort (26 R. C. L. p. 1098, par. 3; French v. Robbins, 172 Cal. 670, 158 Pac. 188), while the alleged counterclaim sounds in contract being based upon the implied promise of appellant to reimburse respondents for the payment they claim to have made.

The judgment is reversed and the cause is remanded for further proceedings in accordance with this opinion.

We concur: FINLAYSON, P. J.; CRAIG, J.

53 Cal. App. 312

KEMP v. VAN BEZEL et al. (two cases). (Civ. 3547, 3548.)

(District Court of Appeal, Second District, Division 2, California. June 24, 1921.)

1. Carriers ⟸318(7)—Evidence held sufficient to show negligence of motor bus driver at railroad crossing.

In actions against the owner of a motor bus for injuries to two passengers in a collision with a railroad engine at a crossing, evidence *held* to make a sufficient case of negligence on part of the bus driver.

2. Damages ⟸131(3)—$500 not excessive where husband expended over $400 for medical attendance for injured wife, and suffered minor bruises, lacerations, temporary unconsciousness and nervous shock himself.

Where a husband, who with his wife was a passenger in a motor bus struck by an engine at a railroad crossing, suffered minor bruises, two lacerations of the arm, one of which had to be sewed up by a surgeon, was rendered unconscious for a few minutes, suffered a nervous shock, from which he did not recover for a week, and expended more than $400 for medical attendance for his wife, who was more seriously injured, a judgment for $500, being less than $100 as general damages, disregarding the loss of the wife's society and service, was not excessive.

3. Damages ⟸132(14)—$2,500 not excessive for severe injuries to head, eye, nose, lip, and thigh, several weeks' confinement to bed, inability to walk without assistance thereafter, etc.

A verdict for $2,500 for personal injuries, consisting of a blow on the head, first thought to be a fracture, a contusion over an eye, which became bloodshot and sightless, a contusion on the back of the head, cuts on the nose and upper lip, the latter requiring stitching, a deep bruise in the thigh, a dazed condition the morning after the accident, confinement to bed or wheel chair for four weeks, inability to walk without assistance for eight or nine weeks, eye trouble necessitating a consultation with a specialist, and bad health for about two years, accompanied by nervousness and irritability and pain in the head and leg, was not excessive.

4. Trial ⟸260(1)—Refusal of instructions covered by others not error.

Refusal of requested instructions covered by instructions given is not error.

5. Damages ⟸216(1)—Instruction to consider pain and suffering sustained and likely to be sustained, impairment of health, strength, and activity and other injuries, and to award fair damages, not exceeding amount prayed for, held proper.

In an action against a motor bus owner for injuries to a passenger in a collision with an engine at a railroad crossing, an instruction to take into consideration in estimating the damage, the pain and suffering sustained by plaintiff, and that which it was reasonably certain she would sustain thereafter, the impairment of her health, strength, and activity, and any other injuries received, and to award such damages as the jury considered fair, not exceeding the amount prayed for in the complaint, was not error.

6. Appeal and error ⟸1033(5)—Omission in instruction favorable to complaining party harmless.

In an action against a motor bus owner for injuries to a passenger in a collision with an engine at a railroad crossing, an instruction that a common carrier owes to his passengers the duty of exercising the highest degree of care was not erroneous, though it omitted the words, "and must exercise to that end a reasonable degree of skill," the concluding clause of Civ. Code, § 2100, such clause imposing an additional burden on carriers, so that its omission from the instruction was more favorable to defendant than would have been its inclusion.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Charles A. Kemp and one by his wife, Helen M. Kemp, against Frank Van Bezel and another. Judgment for plaintiffs, and defendant Van Bezel appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

T. A. Williams, of Los Angeles, for respondents.

WORKS, J. These two actions were for the recovery of damages for personal injuries suffered in a collision between a motor bus owned and operated by defendant Van Bezel and a switch engine of defendant corporation. The plaintiffs, who were husband and wife, were passengers in the motor bus. Under stipulation the two actions were tried together by a jury. Plaintiffs had judgment against defendant Van Bezel, and he appeals.

[1] The first contention of appellant is that there was no sufficient evidence of negligence on his part. The accident occurred at the intersection of Seventh and Alameda streets, in a thickly built industrial district of Los Angeles. A brick building stood at the right of the motor bus as it approached the intersection, obscuring the view of the driver toward the direction from which the switch engine came. The driver of the bus and some others testified that the engine gave no signal or warning as it approached, and that it bore no lights, the accident having occurred between 12 and 1 o'clock at night; but there was much evidence to the contrary. The driver of an automobile, which was 75 feet behind the bus at the crossing having just been passed by it, testified that as the bus "came to the intersection it was going about 20 miles an hour." This witness did not see a headlight, but he did see the "body of the engine" as it came from behind the brick building, and heard its bells

ringing. The fireman on the switch engine testified:

"The engine was equipped with headlights on both ends. Just prior to the accident there was as good headlights as on any switch engine. They were not lighted with electric lights. They were carbide lights. Part of the fender of the bus came up through the cab window, and put the lights out of commission. It pushed the can loose and connection loose, so that the lights went out. The bell was ringing at the time of the accident."

The testimony of the engineer corroborated that of the fireman. This evidence made a sufficient case of negligence on the part of the driver of the bus.

[2] The husband had judgment for $500 and the wife for $2,500. Appellant insists that these awards were excessive. The complaint of the husband was in two counts, the one for general damages, the other for special damages in the expenditure of moneys for the hire of nurses and for the services of physicians and the like, and for the loss of the society and service of the wife. Under this claim for special damages the proof showed the actual payment by the husband of various bills aggregating more than $400. The jury therefore allowed him, if we disregard the item of loss of the wife's society and service, less than $100 as general damages. His injuries consisted of minor bruises and two lacerations of the arm, one of which was four inches in length and had to be sewed up by a surgeon. He was rendered unconscious for a few minutes by the accident, and suffered a nervous shock from which he did not recover for a week. The jury was amply justified in allowing him judgment for $500.

[3] The wife's injuries were severe, and for an account of them we look to portions of the evidence recited in appellant's brief. She received a blow on the head from which it was thought a fracture had resulted, but, as it transpired later, this was a mistake. There was a contusion over her right eye, the eye was bloodshot and a doctor testified he could get no vision from it; there was a contusion on the back of the head, a cut on the nose, a cut on the upper lip which required stitching to close the mouth, and there was a deep bruise in the middle of the right thigh. She was in a dazed condition the next morning after the accident, and was confined to her bed or to a wheel chair for about four weeks, did not walk without assistance for eight or nine weeks and not at all for seven weeks. She had trouble with her eye for several months, and had to consult a specialist about it. Her health was good before the accident, but was very bad from the date of the occurrence up to the time of the trial, a period of about two years; and during that time she was nervous and irritable. As late as the time of trial she complained of pain in her head and leg, and the leg required rubbing to alleviate the pain in that member. We are far from being able to say that a verdict of $2,500 under such circumstances was excessive.

[4] Appellant requested two certain instructions which were refused, and it is claimed that the refusal to give them was error. It is enough to say, upon this point, that the subject-matter of the requested instructions was covered by instructions which were given.

[5] The court gave an instruction in this language:

"In estimating the damage to Helen M. Kemp, you are to take into consideration the pain and suffering, if any, which she has sustained, and which it is reasonably certain that she may sustain hereafter, the impairment of her health, strength, and activity, and any other injuries she may have received, and award her damages as, in your judgment, shall be fair, not exceeding the sum of $10,000;" that being the amount prayed for in her complaint.

Appellant contends that the instruction was erroneous, and cites Melone v. Sierra Railway Co., 151 Cal. 113, 91 Pac. 522, in support of his view; but the Supreme Court in that case approved an instruction in the form given by the trial court. The difficulty there was that another instruction had also been given on the same subject; the two taken together being conflicting. The court reversed the judgment because it could not be determined which of the contradictory instructions had guided the jury. The instruction given by the trial court was proper.

[6] An instruction was given to the effect that, "A common carrier of passengers owes to his passengers the duty of exercising the highest degree of care in safely carrying his passengers throughout their journey," together with other matter not necessary to be noted. Section 2100 of the Civil Code contains language substantially like that given to the jury, but concludes with the clause, "and must exercise to that end a reasonable degree of skill." Appellant contends that the instruction was erroneous without the substance of these closing words of the Code section. The omission of these words, however, is not one of which appellant may complain, as it has been determined that the closing portion of section 2100 imposes an additional burden on carriers. Fisher v. Southern Pac. R. Co., 89 Cal. 399, 26 Pac. 894. The omission from the instruction of the language mentioned, granting that in a legal sense it may be called an omission, was more favorable to appellant than would have been its inclusion.

Judgment affirmed in each case.

We concur: FINLAYSON, P. J.; CRAIG, J.

53 Cal. App. 259

ACKERMAN v. CHANNEL COMMERCIAL CO. (Civ. 3313.)

(District Court of Appeal, Second District, Division 2, California. June 17, 1921. Rehearing Denied July 15, 1921. Hearing Denied by Supreme Court Aug. 15, 1921.)

1. Evidence ⟸400(3)—Complete written contract not superseded by former oral statements.

A complete written contract, consisting of a sale of goods, could not be superseded by former oral statements between the parties and could not be varied by them, under Civ. Code, § 1625

2. Principal and agent ⟸132(1)—Principal bound by contract signed by agent.

Purchaser named in order for goods was bound by the order, although it was signed, "Purchaser, J. A. S."; evidence showing that J. A. S. was acting within the scope of his authority when affixing his signature.

3. Sales ⟸365—Findings of fact held to sustain judgment for seller.

In an action by seller to recover price of goods, findings of execution of a written contract, delivery of goods thereunder, demand for payment, and refusal of the defendant to pay were sufficient, and a lack of other findings upon other and immaterial facts was not ground for reversal.

4. Sales ⟸187—Plaintiff seller held entitled to interest.

In an action to recover purchase price of goods, where defendant set up counterclaim, and there was no dispute concerning the amount found due the plaintiff, and the amount owing from the plaintiff to the defendant being only a matter of computation, plaintiff was entitled to interest for the difference between the amount of its claim and that of the defendant.

5. Principal and agent ⟸137(1) — Principal has right to dispute authority of agent.

In an action to recover purchase price of goods, where defendant asked for affirmative relief based upon an alleged oral contract entered into between him and the agent of the seller entirely separate from the one alleged in plaintiff's complaint, plaintiff had a right to dispute the authority of the agent to enter into the oral agreement.

6. Principal and agent ⟸150(2)—Verbal arrangements made by salesman not binding on principal.

Verbal arrangement made by a salesman outside the scope of his agency is not his principal's contract, and the principal is not bound thereby.

7. Principal and agent ⟸120(1)—Order blank held material in action to recover price of goods.

In action to recover price of goods, where defendant counterclaimed upon verbal agreement with plaintiff's agent, an order blank used by the plaintiff and exhibited to defendant's agent when the order was taken was material and relevant as tending to show that plaintiff's agent had no authority to enter into the oral agreement.

8. Evidence ⟸471(28)—Question as to making of contract held objectionable as calling for conclusion.

In an action to recover price of goods, court erred in not sustaining an objection as calling for a conclusion of the witness to the question, "I will ask you now what, if any agreement you ever made, or authorized your brother, J., to make with C. Company [the defendant] for the sale of these goods other than written contracts between the wholesalers and retailers."

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by J. H. Ackerman, doing business under the fictitious name of the Volrox Manufacturing Company, against the Channel Commercial Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward M. Selby, of Los Angeles, for appellant.

H. S. Laughlin and Muhleman & Crump, all of Los Angeles, for respondent.

CRAIG, J. The appeal in this case is based upon alleged error in ruling upon the admission of testimony, and the claim that the findings are not supported by the evidence. The court rendered judgment against the defendant on the complaint for $538.65, and for the defendant on the counterclaim for $70.63. The action is for goods, wares, and merchandise sold and delivered, and the counterclaim is for commissions earned under contract. Plaintiff was a manufacturer of a polish and did business under the name of "Volrox Manufacturing Company." Defendant was engaged in the wholesale grocery business. The court found that on or about October 10, 1918, plaintiff sold to defendant 70 cases of "Volrox" for $538.65, to be delivered to the defendant in Los Angeles; that plaintiff and defendant entered into an agreement by which defendant was to act as the sole distributor of "Volrox" in a certain territory, and that the defendant was to receive 5 per cent. of the selling price of any of the polish which the plaintiff might sell therein except to the defendant; that plaintiff sold $1,407.55 worth of the polish to others than defendant, which was the basis of the court's judgment for the defendant on the counterclaim.

We will first consider the appellant's arguments as applied to the record on appeal pertaining to the cause of action alleged in the complaint and the defendant's answer thereto. Later the question presented by the counterclaim will be passed upon. The plaintiff's case is based upon a written agreement, signed by the Channel Commercial Company through its buyer, Smith, concern-

ing the 70 cases of polish for which the court gave judgment. This agreement was as follows:

"Wholesale Order Book—Duplicate. Volrox Manufacturing Co., Manufacturers and Jobbers of Volrox Polish, Los Angeles, California. Chicago, Ill. Date 10—12, 1918. Sold to Channel Com'l. Co. Mail address, Channel Com'l. Co. Shipping point, Channel Com'l. Co. Shipped by warehouse stock when

Quantity.	Pkg.	Description.	Price.	Amount.
70	Cs.	Volrox	9:00	
7			free	

"Less 10% and 5%.
"F. o. b. warehouse.
"Purchaser, F. A. Smith.
"Salesman, J. W. Ackerman.

"Any agreement as to resale of this order, either verbal or written, not to effect terms of payment. We treat this order as a contract, no verbal statement recognized. Terms——2% cash 10 days from date of invoice. 30 days net. Sight draft when due.
"Read carefully before signing."

[1, 2] According to uncontradicted evidence, J. W. Ackerman held a conversation with Smith, the buyer of defendant, in which J. W. Ackerman made certain statements and promises. Subsequently the above instrument was executed. Smith testified that he did not read it before signing, and that he must have done so through carelessness. The oral representations were merged in the written agreement. It was a contract and was binding upon the parties even if J. W. Ackerman had been authorized to make verbal alterations in the written forms provided by his company and though he had done so previously. This writing, being a complete contract in itself, superseded any former oral statements, if any were made, and could not be varied by them. Civ. Code, § 1625; Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469. We are not unmindful of the fact that the contract was signed, "Purchaser, J. A. Smith." Appellant has not disclaimed Smith's authority or that it is bound by this signature, and it could not well do so, because the uncontradicted evidence appearing elsewhere in the record establishes that in executing the above contract he was acting within the scope of his authority, and that he was in fact exercising that authority in affixing his signature. Under such circumstances the principal is bound. Montgomery v. Dorn, 25 Cal. App. 666, 145 Pac. 148; Southern Pac. Co. v. Von Schmidt Dredge Co. et al., 118 Cal. 368, 50 Pac. 650.

It appears that subsequent to the delivery of the goods under the contract above set forth J. H. Ackerman attempted to secure payment for them. The negotiations in that regard finaly culminated in a meeting at which were present J. H. Ackerman, J. W. Ackerman, C. H. Ackerman, E. S. Wright, and F. A. Smith. As to what was said upon this occasion there is a conflict in the evidence, but the court apparently accepted J. H. Ackerman's testimony concerning it, which was that Smith and Wright said that they did not care to keep the 77 cases and suggested that plaintiff take them back, to which proposition he agreed. Thereupon Wright said he would deliver them in the next two or three days. It appears from the testimony of J. C. Williams, an employee of the defendant company, that after the conversation just related, when the truck of the plaintiff called for the 77 cases, the defendant did not have them on hand and did not deliver them. The trial court apparently treated the arrangement for the redelivery of the 77 cases as a modification of the written contract, but one which was not carried out by the defendant, and the evidence does not disclose that the defendant, upon any occasion, did anything toward returning these cases.

From the foregoing it follows that the testimony bearing upon the scope of the authority of J. W. Ackerman, as plaintiff's agent, was immaterial to any issue tendered in plaintiff's complaint and joined by defendant's answer.

[3] The proof was ample as to the execution of the written contract, the delivery of the goods thereunder, demand for payment, and that the defendant had failed and refused to pay. The findings that allegations of these facts were true are sufficient and a lack of other findings upon other and immaterial facts are not ground for a reversal.

[4] It is claimed that the judgment for plaintiff should not have included interest because there were items on both sides of the account. Section 1917, Civil Code, is cited to sustain this contention. The court gave judgment for 7 per cent, interest from the date of the execution of the contract. There was no dispute concerning the amount found due the plaintiff, as to the number of cases delivered to defendant, nor as to the price to be paid for them. The same was true with reference to the amount owing from the plaintiff to the defendant; that is, it was only a matter of computation. The total sum owing from the defendant to the plaintiff could readily be ascertained by subtracting the amount of $70.43 from $538.65. Under such circumstances the plaintiff should have judgment for the interest. Robinson v. American Fish, etc., Co., 17 Cal. App. 212, 119 Pac. 388.

We now proceed to the counterclaim and the findings and rulings that concern it.

The court found further:

"That all the allegations of plaintiff's complaint are true except as herein found, and that all of the allegations of defendant's answer and counterclaim are untrue except as herein expressly found to be true."

It thereby found the defendant's allegation "that J. W. Ackerman was the duly author-

ized agent of plaintiff" to be untrue. J. H. Ackerman, the plaintiff, testified that it was the duty of J. W. Ackerman "to make arrangements with wholesalers and jobbers for the handling of this product"; "that he was to attend to the selling end of this business." J. W. Ackerman testified that in the conversations he had with J. H. Ackerman, his brother, it was understood that he was to have charge of handling the jobbers and that J. H. Ackerman was to do the manufacturing. While other testimony given might be construed to limit the agent's authority, in view of the uncontradicted testimony of both J. H. and J. W. Ackerman that J. W. Ackerman represented the plaintiff, there seems to be no basis for the finding of the court that he did not.

[5, 6] It is alleged in the counterclaim, and the court found it to be a fact, that J. W. Ackerman, representing the plaintiff, entered into a contract with defendant by which defendant was to act as the sole and exclusive distributor of "Volrox" in the territory in which defendant had its business. The counterclaim also states that it was further agreed that, should any purchaser return "Volrox" distributed to him, the plaintiff would remove the same from defendant's warehouse and repay defendant the entire purchase price of the returned goods. This last allegation the court finds to be untrue. Without here quoting the testimony, it may be fairly said that it appears from the evidence that such promise was made by J. W. Ackerman, but the plaintiff claims that this agent had no authority to make this and certain other promises. The defendant, in this phase of the case, is asking for affirmative relief. He based his claim upon an alleged oral contract entirely separate from the one alleged in the plaintiff's complaint. The plaintiff, therefore, had a right to dispute the authority of J. W. Ackerman as his agent; to show, if he could, that the representations made, as alleged, were outside the scope of the agent's authority. J. H. Ackerman testified:

"What had been said between us as to the method of introducing and selling these goods to the trade was just he would sell to the trade on these order blanks."

And also:

"My brother did not tell me the terms of any agreement which he had entered into with Mr. Smith; no one else told me; I first discovered that my brother had made an arrangement with defendant other than a written agreement when we three brothers called on Mr. Smith and Mr. Wright in regard to payment of the 77 cases; I told them he had exceeded his authority."

When asked:

"What, if anything, did you say to your brother at the time he called on the Channel Commercial Company to sell these goods; did you have a conversation with reference to the sale of the goods to the Channel Commercial Company, with your brother?"

J. H. Ackerman replied:

"Nothing in particular, other than he was to go and sell them merchandise, receive an order."

This evidence is sufficient to support the court's finding that the allegations in the answer concerning the existence of a verbal agreement were untrue. Even if the conversation related by J. W. Ackerman and Wright took place, it could not bind the plaintiff. A verbal arrangement made by a salesman, outside the scope of his agency, is not his principal's contract. It was within the province of the trial court to accept J. H. Ackerman's version of the employment of J. W. Ackerman, and the limitations that had been placed upon his authority.

Appellant complains that the court's finding that the allegation of the counterclaim "that plaintiff has not paid for the goods returned" is not true is not supported by the evidence. This finding is immaterial because the court had first determined that J. W. Ackerman's agreement that returned goods should be paid by plaintiff was outside of the agent's authority, and that plaintiff had made no agreement to pay for such returned articles.

[7, 8] It is next alleged that several rulings of the court overruling and sustaining objections were erroneous. The objection to the offer of plaintiff's exhibit No. 1—the contract for 77 cases of "Volrox"—should have been sustained. At the time the ruling was made the foundation had not been fully laid. However, the foundation was subsequently supplied, and defendant's manager, Smith, admitted the execution of the contract. It is urged that the court erred in overruling defendant's objection to the introduction of plaintiff's Exhibit No. 2. This was one of the order blanks used by the "Volrox Manufacturing Company" and exhibited to Smith when the first order was taken by defendant, and which plaintiff's salesman, J. W. Ackerman, was required to use in making sales. It tended to contradict that part of the counterclaim based upon the supposed verbal agreement between J. W. Ackerman and the defendant. The objection was that the exhibit was irrelevant and immaterial. This objection was clearly untenable. The following question asked by counsel for the plaintiff was objected to on the ground, among others, that it called for a conclusion of the witness, etc.:

"I will ask you now what, if any, agreement you ever made, or authorized your brother, J. W. Ackerman, to make with Channel Commercial Company for the sale of these goods other than written contracts between the wholesalers and retailers."

The objection should have been sustained, but that part of answer which consisted of a conclusion may be disregarded and still the plaintiff's case be unaffected. Without discussing each ruling on the admission of evidence relied upon for reversal, it is sufficient to say that the substantial rights of the defendant were unaffected by them.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

53 Cal. App. 55

MINIUM v. MINIUM. (Civ. 3627.)

(District Court of Appeal, First District, Division 1, California. June 3, 1921. Hearing Denied by Supreme Court Aug. 1, 1921.)

1. Divorce ⟸322 — Decree not determining rights as to community property does not preclude subsequent action.

A divorce decree in which community property is not mentioned, no issue as to such property being made in the pleadings, does not preclude a subsequent action to determine rights as to property alleged to have belonged to the community.

2. Husband and wife ⟸252 — Government homestead held not community property; "gift."

Where the husband and wife had separated when the husband initiated an entry on a homestead, and remained separate until the wife procured a divorce, two years before the final proof and receipt of patent, the land is not community property, but the property of the husband, since a government homestead is property acquired by "gift" within Civ. Code, §§ 162–164.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift.]

3. Husband and wife ⟸252 — Government homestead procured by husband with money borrowed from wife held not community property.

The fact that a wife lends her husband money to use in making an entry on public land for a homestead does not make the homestead community property.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by Mary E. Loeber, revived in the name of La Rey C. Minium, administratrix of her estate, against Charles Minium. From an order sustaining a demurrer to the amended complaint, plaintiff appeals. Affirmed.

Frank C. Collier, John Schlegel, Louis F. Laberere, and W. H. Sprague, all of Los Angeles, for appellant.

F. E. Dunlap and Cedric E. Johnson, both of Los Angeles, for respondent.

KERRIGAN, J. This is an appeal from an order sustaining a general demurrer to the plaintiff's first amended complaint without leave to amend. Since the appeal was taken Mary E. Loeber, who commenced the action, has died, and the administratrix of her estate has been substituted as plaintiff and appellant.

The purpose of the action is to obtain a decree declaring a homestead acquired by the defendant from the government of the United States to be community property of the intestate and defendant, who were husband and wife at the time of the initiation of the proceeding for the grant of the homestead. From the complaint it appears that the deceased and defendant were married in the year 1888. In 1914 they separated and did not thereafter live together. About two months after said separation, to wit, in December, 1914, the defendant made a homestead entry upon the land in question. Subsequently an action for divorce was commenced by said wife, and in the month of October, 1916, she was granted a final decree of divorce from the defendant. About two years thereafter, the defendant having made his final proof upon the homestead application, and complied with the laws of the United States in that regard, a patent to the land was issued to him. It is disclosed by the amended complaint that in the meantime his divorced wife had remarried, and she commenced this action shortly after the defendant received said patent. The complaint also alleges that between December, 1910, and October, 1914, when the parties separated, the deceased had advanced to the defendant or on his account $600, $400 of which was for living expenses, and $200 for the purpose of securing the relinquishment by one Melvina A. Lot of a desert land entry on the property the subject of this controversy. The money so alleged to have been furnished by the deceased to the defendant was advanced prior to the entry and settlement on the land by the defendant. The complaint further alleges that no adjustment of the property rights of the parties was sought or made by agreement between them in the divorce action, or otherwise.

[1] No objection is urged by the defendant that this action may not be maintained on the ground that the property rights of the parties should have been settled in the divorce proceeding; nor could such objection very well be made in view of the position taken by the authorities in this state on the subject. Where the plaintiff in an action for divorce does not set forth that there is any property whatever belonging to the community, nor ask for any judgment or determination concerning it, a decree in such a case being for divorce simply, does not conclude either of the parties in respect to their claims

otherwise existing to the community property. Coats v. Coats, 160 Cal. 67, 679, 118 Pac. 441, 36 L. R. A. (N. S.) 844.

Coming now to the sole controverted question in the case, namely, was the homestead acquired by the defendant, under the circumstances related, his separate property or community property? It is contended by plaintiff that the right to the patent subsequently issued having been acquired during the existence of the marriage, although not perfected until after its dissolution, the perfected title when issued related back to its inception, and the property must be regarded as having been acquired during coverture, and therefore community property.

[2] This position is not maintainable in this state. The grant of said homestead by the United States to the defendant was a gift or donation, and therefore it became his separate property. All property acquired by either spouse before marriage, and that acquired after marriage by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is separate property. All other property acquired after marriage by either husband or wife or both is community property. Civ. Code, §§ 162–164. In the federal cases it seems to be assumed that the homestead is a gift from the government. In the case of Smith v. Townsend, 148 U. S. 490, at page 497, 13 Sup. Ct. 634, at page 636 (37 L. Ed. 533), Mr. Justice Brewer says: "The general homestead law gives right of homestead to persons possessing certain qualifications," etc. And in the same case the court holds that no one shall enjoy the bounty of Congress unless he can qualify as an entryman. In the case of Oscar O. Reeg, 40 L. D. page 206, the following language is used:

"The object of the homestead laws is the donation of public lands to persons, seeking to establish and maintain agricultural homes thereon," etc.

In the case of Anderson v. Carkins, 135 U. S. 483, at page 487, 10 Sup. Ct. 905, at page 906 (34 L. Ed. 272), the same learned justice, in passing upon the alienability of a homestead says:

"The theory of the homestead law is that the homestead shall be for the exclusive benefit of the homesteader. Section 2290 of the Revised Statutes provides that a person applying for the entry of a homestead claim shall make affidavit that, among other things, 'such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person.'"

And on page 488 of 135 U. S., on page 906 of 10 Sup. Ct. (34 L. Ed. 272), of the same case, it is said, in stating the argument pro and con in a similar case:

"On the other hand, it is contended, that the homestead is a gift from the government to the homesteader, conditioned upon his occupation for five years, and upon his making no disposition or alienation during such term."

In this last case it is not held, as stated in Adams v. Church, 193 U. S. 511, 24 Sup. Ct. 512, 48 L. Ed. 769, that the homestead is a gift from the government to the homesteader upon certain conditions subsequent. However, the question is settled in this state by the case of Noe v. Card, 14 Cal. 577. In that case Noe, under the Mexican government was granted a 50-vara lot in San Francisco subject to the conditions that within one year the lot should be fenced and have a house built thereon, and the payment of certain municipal fees established by law. The entryman at the time of filing his application for the grant was married. The wife died after the grant was completed, and the question arose as to whether the property so acquired was community property, which question resolved itself into the inquiry whether the grant in question was a donation or a sale. It was held to be the former, and consequently to be the separate property of the donee; for, although certain conditions were attached to the grant they were held not to be onerous since they consisted in the expenditure of money and labor upon the land itself and for the benefit of the grantee, and not for the benefit of the grantor or persons other than the grantee, only conditions of that character being classed as onerous in a grant. In that case Mr. Justice Field, speaking for the court, said:

"In the present case, the donee solicited the premises for the purpose of erecting a house. This purpose is expressed in his petition, and he and his wife and heirs are estopped from denying that he desired it for that purpose. * * * It must be taken, then, as true that such was the case. The premises were not, therefore, the less gratuitously given or the less valuable to him, because granted subject to the conditions of their appropriation to that end. The house and fence were to be built for the benefit of the donee, and not for the government. There was, therefore, no consideration in the performance of these acts, moving to the government, which can be regarded in the nature of a price, which is essential in all contracts of sale. The condition requiring the construction of a house within a year, was very generally annexed to grants made under the Mexican government in California. * * * The performance of the condition was exacted in furtherance of the general policy of the republic to induce settlements, and not as a price to the government upon any notion of a sale."

The court then addressed itself to a consideration of certain Texas cases, saying that they undoubtedly support the contrary position, that property thus acquired is community property, and, speaking of the case of Yates v. Houston, 3 Tex. 433, the court says:

The court holds the property to be "community property on two grounds. (1) That the commissioner's fees, office fees, stamp, paper, surveying fees, etc., were required by law before the title issued; and (2) that the condition of cultivation annexed to the grant was onerous. * * * The error, as we conceive, of this decision consists in regarding the fees paid to the officers, and the services rendered in settling upon the land, as constituting a valuable consideration in the nature of a price to the government. The fees incurred in making the survey and in issuing the title papers were altogether incidental to the grant and formed no part of its consideration, and the services rendered in the settlement were directly for the benefit of the grantee, and only collaterally and remotely for the benefit of the government."

The same principle is laid down in Fuller v. Ferguson, 26 Cal. 547, Wilson v. Castro, 31 Cal. 421, and Hood v. Hamilton, 33 Cal. 698. See, also, Estate of Lamb, 95 Cal. 397, 30 Pac. 568; Estate of Boody, 119 Cal. 402, 51 Pac. 634; Harris v. Harris, 71 Cal. 314, 12 Pac. 274; Morgan v. Lones, 80 Cal. 317, 22 Pac. 253; Wadkins v. Producers' Oil Co., 130 La. 308, 57 South. 937; Id., 227 U. S. 368, 33 Sup. Ct. 380, 57 L. Ed. 551; 21 Cyc. 1627, 1658.

In Washington a doctrine contrary to that followed in Noe v. Card is established, the cases in that state holding that when the entryman is a married man at the time of filing his application for a homestead, and he and his wife reside upon the property and do the work necessary to acquire title thereto, such homestead when patent is issued is community property. In such a case the land, for the purpose of fixing the relative rights of the entryman and his wife, is regarded as having been acquired by purchase, the consideration being the settlement upon and improvement of the land, in which the wife participates with the husband. Kromer v. Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; Ahern v. Ahern, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. Rep. 912; Buchser v. Morss, 202 Fed. 854, 121 C. C. A. 212. Under one of the latest cases in that state, however, it is clear that the homestead in the instant case would be held to be the separate property of the defendant, for it is there held that when the marital relation does not exist at the time of the original settlement and entry, and continue until final proof is made, the land should be held to be the separate property of the spouse who finally acquires the patent to the land. Teynor v. Heible, 74 Wash. 222, 133 Pac. 1, 46 L. R. A. (N. S.) 1033. We have seen that in the case at bar the defendant and his wife were already separated when the former initiated the entry, and his wife never lived on the land nor assisted in its cultivation and improvement, and the marriage was dissolved by final decree of divorce more than two years before the making of final proof and receipt of patent.

[3] Granting, as we must, that any portion or all of the $600, alleged to have been advanced by the deceased to the defendant, was for the purpose of assisting him in his undertaking with respect to the land in question, this would not affect the title to or character of the property. This money constituted a loan to the defendant, giving rise to a right of action if not repaid. Carlson v. Carlson, 10 Cal. App. 300, 101 Pac. 923. This point was also in effect decided in the case of Noe v. Card, supra, where it was said that whatever was expended by the community existing between Noe and his wife constituted a claim in its favor against the estate of Noe, but did not affect the title to the property, for that was fixed by the terms of the grant, which was to the husband alone. See also Fuller v. Ferguson, supra. It follows that if labor and expenditures incurred by the community for the improvement of the separate property of one of the parties cannot change its character, mere money advances by the wife to the husband, although made to enable him to acquire title to public lands, will not do so, but may be recovered as a claim against him.

The order is affirmed.

We concur: WASTE, P. J; RICHARDS, J.

53 Cal. App. 63

SMITH et al. v. BACH et al. (Civ. 3614.)

(District Court of Appeal, Second District, Division 1, California. June 4, 1921. Hearing Denied by Supreme Court Aug. 1, 1921.)

1. Vendor and purchaser ⇐334(1) — Buyers under illegal and void contract entitled to recover payments.

A contract for the purchase of land being illegal and void, the buyers received no consideration for their payments, and they were entitled immediately to sue for and recover such payments.

2. Limitation of actions ⇐65(1)—Time within which buyers of land under void contract could sue for payments could not be postponed through delay in repudiation.

Where the buyers of land under an illegal and void contract were entitled to recover back their payments for which the consideration had failed, in the absence of appearance of equitable considerations relieving them from the effect of the rule, the time within which they might bring action, specified by Code Civ. Proc. § 339, subd. 1, could not be postponed by them through delay in their repudiation of the purported contract.

3. Vendor and purchaser ⟸341(1½)—Sellers of land under void contract, who each received payments, not jointly liable.

Where sellers of land received sums of money from the buyers under a contract illegal and void, each seller receiving part of the sums paid, the facts did not create a joint liability, and the buyers, suing to recover their payments as money had and received, were not entitled to enforce a joint liability against both sellers.

4. Appeal and error ⟸918(1)—Application of leave to amend answers presumed to have been properly made, etc.

In the absence of the record of proceedings relative to the filing of amendments to defendants' answers, except a minute order reciting the amendments were offered, were objected to by counsel for plaintiffs, and by the court ordered filed, it will be presumed on appeal that the application for leave to amend was properly made, and for sufficient reasons was allowed.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Clara L. Smith and others against George J. Bach and John Borgh. From judgment against defendant Borgh only for less than amount claimed, plaintiffs appeal. Judgment affirmed.

F. G. Blood, of San Diego, for appellant.

Sweet, Stearns & Forward and Clifford C. Pease, all of San Diego, for respondents.

CONREY, P. J. This action is one in assumpsit for money had and received. The case was once tried and judgment entered in favor of the defendants. On appeal to the Supreme Court that judgment was reversed. Smith v. Bach (Sup.) 191 Pac. 14. By the terms of the present judgment plaintiffs have failed to recover anything against the defendant Bach, and their recovery against the defendant Borgh has been limited to an amount less than their claim. Plaintiffs appeal from this judgment.

[1, 2] As determined on the former appeal, the contract which the parties attempted to make, providing for a sale of land by the defendants to the plaintiffs, was void because made in violation of a law so framed that its effect is to impose that penalty. September 5, 1911, was the date of the contract. This action was commenced on March 4, 1916. Payments were made by the plaintiffs first to the defendant Bach, and thereafter to the defendant Borgh. All of the payments to Bach, and some of those made to Borgh, were made more than two years prior to the commencement of this action. On these facts the trial court determined that as to all payments made more than two years before the commencement of the action the right of action is barred by the provisions of subdivision 1, section 339, of the Code of Civil Procedure. The judgment against Borgh covers only payments made within said period of two years. We think that the statute of limitations was correctly applied by the lower court to the facts found. The contract being illegal and void, the vendees received no consideration for the payments made by them, and they were entitled immediately to sue for and recover those payments. Richter v. Union Land, etc., Co., 129 Cal. 367, 373, 62 Pac. 39. Being so entitled, and there appearing no equitable consideration relieving them from the effect of the rule, the time within which they might bring this action could not be postponed by them through delay in their repudiation of the purported contract. Thomas v. Pacific Beach Co., 115 Cal. 136, 142, 46 Pac. 899; Vickrey v. Maier, 164 Cal. 384, 389, 129 Pac. 273. In this the case differs from the instance of a valid contract, performance of which is prevented by fault of the vendor occurring at some time after the payments were made.

[3] Appellants contend that they were entitled to a joint judgment against both defendants. To support their position, they refer to decisions which are to the effect that where two or more make a joint promise, each is liable for the whole debt or liability. Therefore they say that neither of those parties can be released from the joint liability which he assumed when he signed the contract. This argument implies the erroneous assumption that the action of plaintiffs is upon the contract. But the action is upon an implied obligation, arising from the fact that there was no contract. The complaint charges that the defendants received certain sums of money to and for the use of the plaintiffs. The court found that certain sums were paid by plaintiffs to the defendant Bach, and certain other sums to the defendant Borgh. These facts did not create a joint liability.

[4] Appellants further insist that the amendments to answers of the defendants, which by order of court were permitted to be filed on the day of the trial, were improperly allowed to be filed; that this is so because "no claim was made or order entered, stating that the amendment was in the furtherance of justice; no notice of intention to ask leave of court to file same was given, and no service of copy made upon plaintiff." There is no record of the proceedings relating to the filing of those amendments, except a minute order which recites that the amendments were offered, were objected to by counsel for plaintiffs, and by the court ordered filed. What those objections were is not made to appear. It will be presumed that the application for leave to amend was properly made, and for sufficient reasons was allowed.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

53 Cal. App. 61

SMITH et al. v. BORGH et al. (Civ. 3645.)

(District Court of Appeal, Second District, Division 1, California. June 3, 1921.)

Appeal and error ⟸801(4) — Motion to dismiss appeal denied where questions raised could be decided on the merits.

A motion to dismiss an appeal on grounds which involved questions which could be decided on the merits will be denied.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Clara L. Smith and others against George J. Bach and John Borgh. From the judgment against the latter, only, he appeals, and plaintiffs move to dismiss. Motion to dismiss appeal denied.

C. C. Pease, of San Diego, for appellant Borgh.

F. G. Blood, of San Diego, for respondents Smith and others.

Sweet, Stearns & Forward, of San Diego, for respondent Bach.

CONREY, P. J. This is a motion by the plaintiffs to dismiss the appeal of defendant Borgh. The notice of appeal was directed to appellant's codefendant as well as to the plaintiffs. An appeal by the plaintiffs from the same judgment is pending in this court. By stipulation between the attorney for plaintiffs and the attorney for appellant Borgh, it was agreed that the record or transcript of the judgment roll and of the records of this cause, served and filed by the plaintiffs in their appeal, shall constitute the transcript or records of same for the purposes of the appeal of Borgh. That transcript is on file in the other appeal (No. 3614, 199 Pac. 1106.) Appellant Borgh, desiring to present a further record by a bill of exceptions, obtained from the attorney for plaintiffs, but not from defendant Bach or his attorneys, a stipulation extending the time for presenting the bill of exceptions, and thereafter the bill of exceptions was allowed and settled by the judge in accordance with the consent thereto of the attorneys for plaintiffs.

The plaintiffs now contend that the appeal should be dismissed because only two questions are raised by the exceptions, and because an examination of the transcript and bill of exceptions discloses the fact that this court cannot consider either of the questions raised by those exceptions. One of those exceptions is stated to be "refusal of the court to hold that this action is barred by the judgment entered in action No. 24257." It is a sufficient answer to this motion that the answer of appellant Borgh, as shown in the judgment roll, pleaded the judgment entered in said former action as a bar to the present action, and that the findings of fact do not refer to that defense. The bill of exceptions contains matters pertinent to that issue, which will require consideration when we consider the appeal on its merits.

Counsel for plaintiffs argue that the interest of the defendant Bach being adverse to the interest of defendant Borgh in this action, the bill of exceptions must be disregarded because Bach was not a party to the stipulation purporting to extend beyond the statutory period the time for serving and filing such bill of exceptions. But the question as to whether or not Borgh and Bach were joint obligors to the plaintiffs, and the question whether or not for that reason the interest of Bach is adverse to the interest of Borgh in this appeal, are matters which likewise should be considered when we come to the merits of the appeal.

The record is properly certified, and is at least sufficient to show an appeal made in good faith, upon grounds relied upon by appellant. Therefore the motion to dismiss is denied.

We concur: SHAW, J.; JAMES, J.

53 Cal. App. 188

POSTAL TELEGRAPH-CABLE CO. v. CITY AND COUNTY OF SAN FRANCISCO. (Civ. 3759.)

(District Court of Appeal, First District, Division 1, California. June 14, 1921. Hearing Denied by Supreme Court Aug. 13, 1921.)

Eminent domain ⟸2(1)—Municipal street railroad extension proprietary function constituting taking property.

Action of a municipality operating a street railroad in extending the system and so locating its tracks as to necessitate that a telegraph cable company relocate manholes giving access to its conduits *held* within the exercise of the municipality's proprietary and not its governmental functions, so that the telegraph company could recover for the cost of relocating the manholes; the telegraph cable company in its occupancy of the street having been acting under the Post Roads Act Cong. July 24, 1866 (U. S. Comp. St. §§ 10072–10077), and Civ. Code, § 536.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Postal Telegraph-Cable Company, a corporation, against the City and County of San Francisco, a municipal corporation. From judgment for plaintiff, defendant appeals. Affirmed.

George Lull, City Atty., and D. S. O'Brien and Chas. S. Peery, Asst. City Attys., all of San Francisco, for appellant.

Willard P. Smith, of San Francisco, for respondent.

RICHARDS, J. The plaintiff and respondent herein is a telegraph corporation operating under the provisions of an act of Congress enacted on July 24, 1866, commonly known as the "Post Roads Act" (U. S. Comp. St. §§ 10072–10077), and is a public utility within the meaning and effect of the Public Utilities Act of the state of California (St. 1915, p. 115), and as such it had established, maintained, and operated, as a part of its interstate and foreign telegraph system, wires inclosed in conduits along and beneath the surface of Market street in the city of San Francisco prior to and since the years 1916 and 1917; the means of access to such conduits being certain "manholes" extending thereto from the surface of said street. At some time prior to the year 1916 the said city and county of San Francisco, the defendant and appellant herein, had constructed and was engaged in maintaining and operating a municipal street railway system upon and along certain of its streets, including a portion of Market street east of its junction with Geary street, and in the latter year concluded to extend its said municipal street railway system out Market street from its said junction with Geary street to Van Ness avenue, and accordingly notified the plaintiff herein that it was about to construct such extension, and that in so doing its tracks were to be so located that the means of access to the plaintiff's conduits through said manholes would be destroyed, and it therefore demanded that the plaintiff proceed to move its said manholes so that the same would not interfere with the construction of the defendant's street railway tracks along the line of said proposed extension. The plaintiff at first refused to move said manholes unless the defendant would pay the cost of such removal, but the defendant refused to do this, at the same time threatening to proceed with the construction of its tracks with the resultant destruction of the plaintiff's said property. In order to prevent this result the plaintiff, under protest removed and rearranged its manholes and approaches to its said conduits at a cost of $1,288.72, and thereafter brought this action for the recovery of said sum. Judgment was rendered in its favor therefor, and from such judgment this appeal has been taken.

It may be stated at the outset that it is conceded by the appellant that the city and county of San Francisco, while engaged in the operation of its municipal street railway system, is acting in a proprietary and not in a governmental capacity. It has, in fact, been so decided in the case of Vale v. Boyle, 179 Cal. 180, 175 Pac. 787. It is, however, contended by the appellant that while the municipality may be acting in a proprietary capacity in the operation of its municipal street railway system, it was acting in a governmental capacity in determining that it would engage in the operation of the same and in the selection of the route or right of way over which it would operate the same; and since the interference with and threatened destruction of the plaintiff's manholes arose out of and was incidental to the selection by the municipality of this particular route for the proposed extension of its already established municipal railway system, the plaintiff is without a remedy for the outlay to which it was thereby compelled.

We are unable to follow this refinement on the part of the appellant in its attempted application to the facts of the instant case. The municipality had for some considerable time prior to the date when this controversy arose been actually engaged in the operation of its municipal railway system along Market street to its junction with Geary street and thence out Geary street to and along Van Ness avenue. It proposed the further extension of its said system out Market street to its junction with Van Ness avenue, and was actually threatening to proceed with such extension with the imminent consequence of the destruction of the plaintiff's manholes when, in order to avoid such destruction, the plaintiff under protest removed and replaced the same at the cost for which this judgment was obtained. To our minds the action of the municipality thus taken and threatened was strictly within the exercise of its proprietary and not its governmental functions. We are unable to distinguish this case from the case of Los Angeles v. Los Angeles Gas & Electric Co., 251 U. S. 32, 40 Sup. Ct. 76, 64 L. Ed. 121. In that case it appeared that the city of Los Angeles, which for some time had been engaged in the erection, construction, and operation of a distributing system for the distribution and sale of electric energy to be used for the lighting of its streets and public places of said city and for supplying its inhabitants with electricity for illumination and other purposes for remuneration, enacted an ordinance requiring various persons, firms, and corporations then maintaining in the streets and public places of said city certain appliances for the distribution and sale of electric energy, to remove or relocate the same at the expense of the owners thereof. The Los Angeles Gas & Electric Company, being one of the private corporations affected by said ordinance, commenced an action to enjoin the enforcement thereof upon the ground that its enforcement entailed the taking and destruction of the plaintiff's property without compensation. Upon the trial of the cause the court held the ordinance to be void for that reason and enjoined its enforcement. In so doing the court held that in the enactment of the ordinance in question the city of Los Angeles was acting in the exercise of proprietary rather than of police or governmental powers; and that while so acting it could not compel the removal or destruction

of the plaintiff's property without compensation. The appellant herein seeks to distinguish the case above cited from the case at bar upon the ground that in that case the city of Los Angeles was attempting to order the removal of the appliances of its competitors in the business of distributing and supplying electrical energy, while in the case at bar the city of San Francisco in the construction of its municipal railway system along the street in question is devoting said street to one of the primary purposes for which public streets are created and maintained, and in so doing is merely interfering with a secondary use of said street by plaintiff which must yield to its aforesaid primary use.

We fail to appreciate the force of this distinction. The plaintiff's acceptance and use of the portion of said street wherein its conduits and manholes were placed was something more than a mere privilege, revocable by the municipality at will. The plaintiff in its occupancy of these portions of said street was acting under the authority of the act of Congress commonly known as the Post Roads Act, which entitled it to use the streets of cities for its wires and conduits, which were a necessary part of its interstate and foreign telegraph system and service. It was also entitled to such use under the provisions of section 536 of the Civil Code of California. The occupation and use of said street under the authority thus conferred did not, of course, give to the plaintiff the right to lay its conduits or establish and maintain their approaches in such a manner as would interfere with the normal and ordinary uses of the street for purposes of travel and traffic; but it was, nevertheless, a valuable and vested right, and the property used therein a valuable property, which the city, in the exercise of the purely proprietary activity of constructing and maintaining a municipal railway system upon and along said street, could not interfere with or destroy without being subjected to the same rightful demand for compensation which a private corporation engaging in a like enterprise would be required to respond to under the law of eminent domain.

The case of In re Board of Rapid Transit Commissioners of the City of New York, 197 N. Y. 81, 90 N. E. 456, is directly in point upon this phase of the case; the question involved in that case being the right of the city of New York, in the course of the construction and operation of an underground railway along certain of its streets, to take or damage the property right or fee of abutting landowners in such streets without compensation. The court held that the use of a public street for railway purposes was not such a street or highway use for the usual and ordinary purposes for which public streets and highways are created as would justify the taking, damaging, or destruction of the property or rights of other persons in, along, or under such streets without compensation, and that the city of New York in entering upon the use of its said streets for the purposes of an underground railway was engaged in a proprietary enterprise, and was not acting in or exercising a governmental function.

We can discover no real distinction in principle between the above case and the case at bar. It is not contended that the plaintiff's conduits and established manholes and approaches thereto in any way interfered with or obstructed the ordinary uses of said street for the purposes of public travel, or that the city, in the exercise of its police power, had any such cause to order their removal or change in form or place. It was only when the municipality entered upon the proprietary enterprise of constructing, operating, and extending a municipal railway system that the properties of the plaintiff, in place under its several franchises entitling it to the use of said street, were so threatened with destruction as to render their removal and replacement imperative. Under such conditions we think the municipality was bound to pay the reasonable cost to plaintiff of the compulsory removal and replacement of its said properties, and that the judgment of the trial court awarding such compensation was correct, and should therefore be affirmed.

It is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

53 Cal. App. 309

RUTHERFORD v. PEPPA. (Civ. 3726.)

(District Court of Appeal, First District, Division 2, California. June 24, 1921.)

1. Dismissal and nonsuit ⟸8—Plaintiff not entitled to dismiss after submission of case and statement by court of its ruling.

Where, after the court granted defendant's motion for nonsuit, defendant withdrew such motion and submitted the case, and the court had stated what its ruling would be on the evidence, it was too late for plaintiff to dismiss the action, notwithstanding Code Civ. Proc. § 581, providing that plaintiff may dismiss at any time before trial.

2. Frauds, statute of ⟸138(4)—Reasonable value of services rendered under unenforceable agreement may be recovered.

Where services were not intended to be gratuitous, but were rendered with the understanding that they should be compensated for by will, which cannot be enforced under the statute, the reasonable value of the services may be recovered.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by G. B. H. Rutherford against Nina Peppa sometimes known as Nina F. Peppa, as administratrix of Elizabeth Taylor, deceased. Judgment for defendant, and plaintiff appeals. Reversed.

Geo. Ingraham, of Oakland, for appellant.

Robert Gillogley, of San Francisco, for respondent.

LANGDON, P. J. This action was commenced against the defendant as administratrix of the estate of Elizabeth Taylor, deceased, to recover for care, medical services, and board and lodging furnished to the deceased by the plaintiff and his wife. The defendant, as administratrix, had refused to allow the claims filed by the plaintiff, amounting to about $1,600, and had filed an answer denying the indebtedness. The plaintiff offered testimony that deceased had been in the habit of spending week-ends at the home of the plaintiff and his wife for about 29 years. During the last few years of her life she had not been in good health, and upon her visits to the plaintiff would frequently receive medicines from the plaintiff, who was a licensed physician. During the last eight weeks of her life, she remained with the plaintiff and his wife and died at their home. During this period she was furnished with food and care by the plaintiff and his family. Claim was made for board for the week-end visits during the period not barred by the statute of limitations, and for board and care and medical services during the last illness, as well as for the value of linen and bedding used by deceased in her lifetime, which plaintiff claimed he was obliged to destroy because of the infectious character of deceased's illness.

The defendant offered no testimony, but made a motion for a nonsuit on the ground that there was no evidence that the services were rendered under circumstances showing that compensation therefor was contemplated by the parties, and that the evidence showed that the services were rendered under a promise by the deceased that she would remember the wife of the plaintiff in her will. The court granted the motion for a nonsuit. Thereupon the attorney for the defendant stated that he wished to withdraw the motion and submit the case. Attorney for plaintiff then stated that he wished to dismiss the action, and on November 20, 1919, filed with the clerk a dismissal of the action. This motion to dismiss was opposed by the defendant. The court took the matter under consideration and on December 19, 1919, filed findings of fact and conclusions of law in favor of defendant and gave judgment accordingly.

[1] We shall dispose first of the contention of appellant that the court had no power to render a judgment in favor of the defendant in view of the fact that the plaintiff had filed a dismissal of the action before judgment. Section 581, Code of Civil Procedure, relied upon by appellant, provides that the plaintiff may dismiss his action at any time before trial. But in the present case the dismissal was not filed until the plaintiff's evidence was in and defendant had submitted the case, and the court had stated what its ruling would be on the evidence. At that time it was too late for the plaintiff to dismiss his action. Floody v. Great Northern R. Co., 104 Minn. 517, 116 N. W. 107, 932; Judge of Probate v. Abbot, 13 N. H. 21; Cohn v. Rumely, 74 Ind. 120; Walker v. Heller, 56 Ind. 298; note, Ann. Cas. 1913D, 525. The trial court had clearly stated its intention to find for the defendant and had granted the motion for a nonsuit when the plaintiff attempted to dismiss his action. The rule contended for by plaintiff would work a hardship on a defendant and subject him to endless litigation in cases where the trial court had decided that there was no merit in the action. We are therefore of the opinion that the trial court had the power to render a judgment despite the attempted dismissal by the plaintiff, which came too late.

[2] The appellant also challenges the correctness of the judgment rendered. The evidence showed that at least a portion of the services involved in plaintiff's claim were rendered with the understanding that they should be compensated for by will. The court has not found upon this question, and

we shall not discuss the evidence, which may vary somewhat upon a retrial. The trial court evidently proceeded upon the theory that, if any of the services were rendered upon the understanding of the parties that they were to be compensated for in the will of deceased, such an agreement was insufficient to warrant a recovery for the reasonable value of such services where compensation by will had not been made. The recent case of Zellner v. Wassman, 193 Pac. 84, was an action in which the plaintiff attempted to recover for the breach of an agreement to make provision by will for payment for services. It was held that, although recovery could not be had upon that theory, the nonsuit was, nevertheless, improper, as plaintiff was not without his remedy. It was held that plaintiff was entitled to the reasonable value of his services upon the theory that where a party has conferred upon another, with the assent of the latter, a benefit which was not intended as a gratuity, and the recipient cannot be held upon his original promise to compensate by virtue of the statute of frauds, the law implies a promise on the part of the party receiving the benefit to pay the reasonable value of whatever has been received under the contract.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

53 Cal. App. 223

DAROUX v. DAROUX. (Civ. 3779.)

(District Court of Appeal, First District, Division 1, California. June 16, 1921. Hearing Denied by Supreme Court Aug. 15, 1921.)

1. Appeal and error ⊜162(1)—Appeal of wife not dismissed by reason of her retaining property under judgment.

An appeal by defendant wife in a divorce action was not dismissed, though wife received and retained certain portion of property in dispute under the judgment appealed from.

2. Divorce ⊜184(10)—Finding against condonation on conflicting evidence sustained.

On an appeal in divorce case a finding based on conflicting evidence that acts of wife were not condoned will not be disturbed.

3. Divorce ⊜184(12) — Error in declaring property to be community harmless.

In a divorce case, where plaintiff husband obtained divorce from wife on ground of cruelty, any error of the court in declaring property claimed by the defendant to be her separate property was a part of the community was not prejudicial, where the court awarded all the community property to the defendant.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Frank A. Daroux against Theresa Daroux. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank J. Murphy and Ed. A. Cunha, both of San Francisco, for appellant.

Leon Samuels and Jos. L. Taaffe, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal on the part of the defendant from a judgment in the plaintiff's favor in an action for divorce instituted by him on the ground of cruelty and in which it was also sought to have the property rights of the parties determined.

[1] There is a preliminary motion to dismiss the appeal upon the ground that the defendant, having received and retained certain portions of the property in dispute between the parties and dealt with in the interlocutory decree, has thereby lost her right of appeal. In view of the fact, however, that the settlement of the property rights of the parties to an action for divorce is a mere incident of the main purpose of the action, and also in view of the disposition of the courts to hear and determine actions for divorce upon both trial and appeal upon their merits, we have concluded to deny the motion to dismiss this appeal, and to deal with the main issue presented to us.

[2] It is conceded by the appellant that upon the main issue of cruelty the evidence offered on behalf of the respective parties is "in hopeless conflict," and for that reason the appellant does not ask this court to review the findings and conclusions of the trial court in the plaintiff's favor upon that ground of divorce; but the appellant insists that the evidence in the case is undisputed in support of her plea of condonation, and that, this being so, the trial court should have denied the plaintiff's prayer for divorce. We have examined the record upon this branch of the case, and we find it so reeking with vileness of thought, expression, and conduct as to render any review of the evidence it contains as unprintable as it is distasteful, and we shall therefore refrain from polluting the published pages of the decisions of this court with its recital. It will suffice to say that we find the evidence upon the matter of condonation as substantially in conflict as is the other evidence in the case, and hence will not disturb the finding of the trial court in that regard.

[3] The next series of errors alleged to have been committed by the trial court are those relating to the determination of the rights of the respective parties in various items of real and personal property involved incidentally in the proceedings for divorce. As to the so-called San Mateo property and the leasehold interest in certain San Francisco real estate, the evidence as to whether the same was separate property of the de-

fendant, or the community property of both spouses, is substantially conflicting; but aside from this, the trial court, while finding these holdings to be community property, awarded all the community property to the defendant and appellant herein; and, having awarded the plaintiff a divorce on the ground of the defendant's cruelty, it is difficult to see how she could have been injuriously affected by the decree of the court in her favor as to these properties.

As to the appellant's contention in relation to the alleged error of the trial court in refusing to credit the defendant with certain sums of money claimed to have been paid by her to the plaintiff, the evidence is conflicting, the plaintiff testifying that upon a general accounting of money transactions between the parties the balance would be in his favor. We will not, therefore, interfere with the conclusions arrived at by the trial court in this regard.

Finding no error in this record, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

53 Cal. App. 79

GARCIA & MAGGINI CO. v. COLVIN et al.
(Civ. 3818.)

(District Court of Appeal, First District, Division 2, California. June 7, 1921. Rehearing Denied June 30, 1921. Hearing Denied by Supreme Court Aug. 4, 1921.)

1. Principal and agent ⟸145(4)—Both the agent and undisclosed principal are liable.

Where a contract is made by an agent within the scope of his employment, but without disclosing his principal, both the agent and the undisclosed principal, when discovered, are liable on the contract, and may be joined as defendants in an action thereon.

2. Frauds, statute of ⟸116(3, 4, 10)—To recover from undisclosed principal on contract required to be in writing, precedent authorization or subsequent ratification in writing must be established.

Before plaintiff can recover from a defendant as the undisclosed principal of the one by whom the contract, which was required to be in writing by Civ. Code, § 1624, subd. 4, was made, he must introduce evidence sufficient to establish either precedent authorization or subsequent ratification by the principal under Civ. Code, § 2307, and either authorization or ratification must be in writing under sections 2309, 2310.

3. Sales ⟸58—Whether party to contract was principal or agent is controversy under contract within arbitration clause.

Whether a contract for the sale of a crop of prunes was made by the seller as a principal or was made by him as agent for his wife who owned the land, is a controversy arising under the contract withi a clause requiring arbitration of such controversies, so that an action before arbitration cannot be maintained.

On Petition for Rehearing.

4. Husband and wife ⟸138(8)—Wife not estopped to deny agency of husband, who contracted as principal.

Where a buyer of a prune crop dealt with the seller as principal and as owner of the land on which the crop was to be raised, he cannot claim that the wife, who really owned the land and the crop, was estopped under Code Civ. Proc. § 1962, subd. 3, or Civ. Code, § 2334, to deny her husband's authority to act for her, since he dealt with the husband as principal and not as an agent having ostensible authority

Appeal from Superior Court of Sonoma County; Thomas C. Denny, Judge.

Action by the Garcia & Maggini Company against Jennie Colvin and her husband. Judgment of nonsuit in favor of both the defendants, and plaintiff appeals. Affirmed, and petition for rehearing denied.

R. P. Tyler, of San Francisco, and Carl Barnard, of Santa Rosa, for appellant.

Geary & Geary, of Santa Rosa, for respondents.

NOURSE, J. Plaintiff appeals from a judgment of nonsuit in an action to recover damages for defendants' failure to deliver prunes under a written contract of sale between plaintiff corporation, by its agent Charles H. McDermott, and defendant Peter Colvin. By said contract, which was made March 22, 1919, about the beginning of the blossoming season, the former agreed to purchase and the latter agreed to sell 40 tons of dried prunes, at 10 cents per pound base, constituting the 1919 prune crop raised on the Colvin ranch in Sonoma county, which the contract recites is the sole and absolute property of defendant Peter Colvin. This property was in fact owned by his wife, defendant Jennie Colvin, as her separate property, Peter Colvin having no interest in either the land or the prune crop. Jennie Colvin and Peter Colvin were joined as defendants in this action on the theory that Jennie Colvin was in reality the principal because Peter Colvin acted as her agent in making the contract with plaintiff, or that his act in so doing was subsequently ratified. Defendant Jennie Colvin's answer denies that she at any time or place sold to plaintiff or that it bought of her 40 tons or any quantity of prunes. Defendant Peter Colvin in his answer denies that he owned either the land or the prunes specified in said contract, and alleges that Jennie Colvin owned the land as her separate property, and that he entered into the contract of sale with plaintiff solely as the agent of his wife, believing that he would be able to secure her ratification of his act. The contract provided that—

"Any controversy arising under this contract shall be settled by arbitration, and the submission of such controversy to arbitration in accordance herewith by each party shall be a condition precedent to the right of such party to enforce this agreement."

The motion for nonsuit was made on the ground that the submission to arbitration of the matters involved in this action was a condition precedent which had not been performed, and, on behalf of defendant Jennie Colvin on the further ground that the evidence failed to establish liability on her part under the contract as principal or otherwise—that it failed to show that Peter Colvin was acting as her agent at the time, that he had authority to do so, or that his act was ever thereafter ratified. The trial court granted the motion for nonsuit as to both defendants.

Appellant contends: (1) That both defendants had repudiated the contract, and that, the dispute being confined to the question of the legal existence of the contract, the provision therein relating to arbitration was not applicable, their repudiation amounting to a waiver of any rights under the arbitration clause; that the purpose of the provision was for the settlement by arbitration of controversies arising upon the contract as such regarding matters embraced therein, such as to quantity, quality, and condition of the prunes to be delivered; (2) that the evidence establishes the agency of Peter Colvin to act for defendant Jennie Colvin.

[1] The general rule is that where a contract is made by an agent within the scope of his employment, both the agent and the undisclosed principal, when discovered, are liable on the contract, and may be joined as defendants in an action thereon. Montgomery v. Dorn, 25 Cal. App. 666, 670, 145 Pac. 148. Plaintiff sued on the theory that Peter Colvin and his wife were both principals. Defendant Jennie Colvin denied execution of the contract in any manner. Defendant Peter Colvin alleged that he entered into the contract as agent for his wife, believing that he could subsequently procure her ratification of his act. Contrary to the recital in the contract, Jennie Colvin was the owner of both the real property and the fruit which was the subject of the contract at the time the contract was made and until its sale by her to other parties. She could not be held liable unless it was shown that she had either authorized her husband to execute the contract or had ratified his act.

[2] Her rights and obligations are determined by the Civil Code. The contract, being one for the sale of personal property at a price over $200 was required to be in writing. Section 1624, subd. 4, Civ. Code. An agency may be created by a precedent authorization or a subsequent ratification. Section 2307, Civ. Code. Oral precedent authorization is sufficient, except that authority to enter into a contract required by law to be in writing can be given only by an instrument in writing. Section 2309, Civ. Code. Subsequent ratification can be made only in the manner that would have been necessary to confer original authority. Section 2310, Civ. Code. Plaintiff made no pretense of meeting the proof necessary to hold defendant Jennie Colvin under these Code sections. The nonsuit as to her was properly granted.

As to the defendant Peter Colvin, he could have been held as a principal even though he did not own the prunes he agreed to sell. As to him, therefore, the nonsuit can be sustained only upon the first ground assigned, the failure of plaintiff to comply with the arbitration clause of the agreement.

[3] Obviously the controversies contemplated as coming within the provisions of this arbitration clause were such as might arise with relation to the subject-matter of the contract, being recognized as such by the parties thereto. The clause reads:

"Any controversy arising under this contract shall be settled by arbitration."

There were many provisions relating to quantity, quality, condition, preparation, etc., of the fruit which might have given rise to disputes. In such cases, to entitle either party to bring suit, it would have first been necessary to comply with the provisions of the arbitration clause. Besides these there was in dispute the question of Mrs. Colvin's connection with the contract, whether she had authorized its execution or subsequently ratified it. There was the question whether Peter Colvin was acting as a principal or as an agent, and the question of the market price of the prunes at the time fixed for delivery. All these questions came within the general clause of "any controversy arising under this contract."

Though Mrs. Colvin repudiated the contract and thus waived the right to insist upon the arbitration clause, the defendant Peter Colvin did not, prior to the commencement of the action, repudiate the contract either as principal or agent. As arbitration or an attempt to effect arbitration was a condition precedent to the commencement of the action, the failure to allege and prove that such course had been followed, or that plaintiff was excused from doing so, was fatal to its cause of action, and the nonsuit on that ground was properly granted as to Peter Colvin.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

On Petition for Rehearing.

PER CURIAM. The petition for a rehearing of the above-entitled cause is de-

nied. When framing its complaint plaintiff claimed that Jennie Colvin was an undisclosed principal, and sued both husband and wife as principals. When it came to prove its case plaintiff claimed that Peter Colvin was an ostensible agent. In its petition for rehearing plaintiff relies upon the doctrine of estoppel to prove the agency of the husband. All the evidence is to the effect that plaintiff dealt with the husband alone as a principal and not as agent for the wife. The husband had a perfect right to enter into the contract as a principal. It was not necessary that he should be the owner of the land or of the prunes in order that he might make a valid contract of sale. Plaintiff made no effort to investigate the ownership, but relied solely on Peter Colvin's representations. It does not appear that these representations were made in the presence of Mrs. Colvin, or that she had any knowledge that they had been made.

[4] The briefs upon which appellant submitted its case contain a mere suggestion that the defendant Jennie Colvin might be estopped from denying the agency. This point is now presented as the main ground for a rehearing. It is claimed that because the wife sat silent when her husband executed the contract with plaintiff she is estopped from denying that her husband was acting as her agent. But she did not intentionally and deliberately lead plaintiff to believe that her husband was acting as her agent (section 1962, Code Civ. Proc., subd. 3), and plaintiff did not act on such belief. On the contrary, he acted upon the belief that the husband was the owner, and was signing as principal. There was no evidence that plaintiff knew that Colvin had acted as agent for his wife in other matters. If such knowledge was had before the trial, it is apparent that plaintiff did not act upon it when executing the contract. Furthermore, if it had that knowledge, it was plainly negligent in dealing with the husband as a principal.

To bind the defendant Jennie Colvin as an undisclosed principal it was necessary to prove that Peter Colvin was in fact her agent, and that he had authority to execute the contract for her, or that his act was ratified by her. This plaintiff failed to do. To escape the measure of proof thus demanded plaintiff now insists that Jennie Colvin is estopped from denying the agency. But the only acts relied on as constituting an estoppel were her silence at the time the contract was executed by which plaintiff was led to believe, not that Peter Colvin was her agent, but that he was the owner of the property and the principal.

As to the claim that the husband had ostensible authority to act for his wife, plaintiff did not make out a case. There was no evidence that the plaintiff, acting upon such ostensible authority, had "in good faith, and without want of ordinary care, incurred a liability or parted with value." Section 2334, Civ. Code; Herington v. Alta Planing Mill Co., 25 Cal. App. 620, 622, 144 Pac. 973; Armstrong v. Barceloux, 34 Cal. App. 433, 436, 167 Pac. 895; Post v. City and County Bank, 181 Cal. 238, 245, 183 Pac. 802; Wellman v. Conroy, 194 Pac. 728. And then ostensible authority cannot be asserted when the party did not know the facts relied on as showing such authority. Harris v. San Diego Flume Co., 87 Cal. 526, 25 Pac. 758.

Rehearing denied.

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